

# **The EU imperative to a free public domain:**

## **The case of Italian cultural heritage**

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## Executive Summary

For more than seven decades, international law has consistently led countries to embrace culture as a global and cross-border value for humanity. The human right to cultural participation has become a pillar of protecting and empowering individuals and communities. At the EU level, the competence to legislate on cultural matters is mostly left to the Member States. However, the protection, enjoyment, and enhancement of Europe's cultural heritage is far from being merely national business. The Charter of Fundamental Rights of the EU and the entire EU cultural policy agenda stand on the obligations to safeguard artistic freedom and promote cultural diversity and inclusivity.

In this context of international and EU legal obligations to protect cultural rights, the EU has set a legal imperative to protect the public domain. Introducing Article 14 of the [Copyright in Digital Single Market Directive \(CDSMD\)](#), the EU legislator made it mandatory across the 27 Member States to ensure that faithful reproductions of visual artworks belonging to the public domain remain free to circulate and be used across the Union.

The rationale of Article 14 CDSM Directive is the **prohibition of a 're-fencing off' of a category of free cultural heritage**, namely works of visual art, by granting new exclusive rights to guarantee the necessary space for cultural flourishing in Europe.

Member States can depart from the wording of EU Directives. However, they are bound by an obligation of result, meaning that the national way of transposing a provision must fully enable achieving its specific objectives.

In this vein, Italy signals a highly problematic legal scenario. Even though in its Constitution the commitment to cultural promotion and enjoyment, the Italian legal system exhibits ever more conservative proprietary tendencies regarding the State's control over the uses of its national cultural heritage.

Italy transposed Article 14 CDSM Directive explicitly indicating that the norm applies with no prejudice to the Italian Code of Cultural Heritage and Landscape (ItCCHL). The Code, besides providing an open-ended definition of what qualifies as cultural heritage, sets up a legal mechanism that obliges anyone willing to copy and use cultural heritage - also when belonging to the public domain - to seek authorisation from the Italian government or responsible cultural institutions, in charge of assessing the compatibility of such uses with the cultural value of the heritage at stake and establishing a fee for each authorised use.

Italian Courts followed suit putting forward creative judicial engineering of **new forms of exclusivity on Italian cultural heritage artworks in the public domain**. In recent first-instance rulings, copies of David by Michelangelo and Vitruvian Man by Leonardo Da Vinci were prevented from being freely used on a board game, a magazine cover page, and an advertising commercial. The judicial reasonings ignored copyright legal

provisions, applying cultural heritage law and taking a long-arm approach to cherry-picked legal norms (such as personality rights) to give significant leeway to the Italian government and cultural institutions to decide whether and to what extent reproductions of cultural heritage can be used freely.

The Italian transposition of Article 14 CDSM Directive and the Italian Courts' rulings reveal an attempt to impose new forms of exclusivity on cultural heritage that may go even further than copyright restrictions, thus becoming what scholars describe as 'pseudo' or 'surrogate' copyright.

This results in **violating the principle of the numerus clausus of intellectual property** rights and a significant distortion in the implementation of EU law in the country. More specifically, the incompatibility of the Italian legal system with EU law in this regard is grounded on three main arguments.

First, the Italian legal system fails to meet the obligation of result imposed by Article 14 CDSM Directive by hollowing out the subject matter of the provision. Article 14 mainly addresses the collections of cultural institutions, such as museums, galleries, libraries, and archives. **It does not allow Member States to exclude certain types of visual artworks** from its objective scope of application. Exempting Italian cultural heritage (broadly defined by the ItCCHL as including all public and private cultural collections on national soil) from the scope of the provision fully distorts its pursued intent. Otherwise said: if not cultural institutions collections, which works of visual art would Article 14, in Italy, incentivise EU citizens and institutions to digitise and enjoy?

Second, the Italian legal system fails again to meet the obligation of result as it imposes a manifest **obstacle to the cross-border application** and harmonisation intent of Article 14 CDSM Directive. Building and enhancing the EU Digital Single Market is a quintessential component and the *raison d'être* of the EU law provision. By tacitly making the ItCCHL prevail over copyright rules, the Italian legal system creates a significant burden for EU citizens from other Member States to comply with national rules and differentiate their behavior in online settings.

Third, the Italian legal system **fails to safeguard the human and fundamental rights of cultural participation and artistic freedom**. By establishing a disproportionate, unnecessary, and hardly accountable mechanism of centralised control over the use of public domain cultural heritage, Italy fails to take a holistic account of all relevant rights and interests at stake, ignoring the rights to access, use, enjoy, and participate in cultural heritage.

The Italian case is not expected to be peculiar nor isolated in the EU. Several Member States feature specific rules on cultural heritage in their national legal system and their interplay with the transpositions of Article 14 CDSM Directive remains, to date, unclear.

**Clear-cut regulatory clarifications and balanced and systematic legal interpretations are utterly needed** to address and prevent all potential legal

inconsistencies in the interplay between copyright and cultural heritage. This would be significantly more effective if performed at the EU level through legal reform (not excluding interventions on competence rules), specific clarifications by the EU legislator, or autonomous interpretation by the Court of Justice of the EU.

# 1. Introduction

## 1.1 The vexed question: to free or to limit the use of cultural heritage

The regulation of cultural heritage is a persistently difficult matter. Since the second half of the 19th century, with the enshrinement of the notion of cultural heritage in international law,<sup>1</sup> debates have centred on how to define, protect, and enhance culture across societies. In the policy and legislative domains as well as in doctrinal and broader public debates, what has consistently emerged is the coexistence of the needs for both preservation and enhancement of cultural heritage.

Although both these objectives aim at safeguarding and enhancing the enjoyment and public appreciation of culture, tension has marked the relationship between the notions of protecting and freely making available the subject matter of cultural heritage. This juxtaposition has been often summarily referred to as the debate on the propertization of culture.<sup>2</sup>

Worldwide, policy and regulatory frameworks have struggled to reconcile the opposing ideas of protecting and making cultural heritage freely available for use. The most recent developments have increasingly allowed for culture to be considered in various ways, from its recognized role as a driver of economic development<sup>3</sup> to its role in social change.<sup>4</sup> In this context, the digitization of cultural heritage and, more

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<sup>1</sup> For a compact overview of the rise and evolution of this legal notion, see Francesco Francioni, 'Cultural Heritage', *Max Planck Encyclopedia of Public International Law*, 2020.

<sup>2</sup> See Hannes Siegrist, 'Intellectual Property Rights and the Dynamics of Propertization, Nationalization and Globalization in Modern Cultures and Economies' in Dimou/Siegrist, *Expanding Intellectual Property* (CEU Press 2017) 19. On the issue as applying to copyright, see Caterina Sganga, 'Propertizing European Copyright: History, Challenges and Opportunities' (2018); Id, Caterina Sganga, 'The Role of Copyright History in Casting out the Demons of Copyright Propertization'. *Annuario di Diritto Comparato e di Studi Legislativi* 11 (2020): 567–610, and others contributions therein cited.

<sup>3</sup> Explicit on this regard, among others, Giuseppe Piperata, *Cultura, sviluppo economico e... di come addomesticare gli scoiattoli*, Aedon, 2018, n 3, 1127–1345, <https://aedon.mulino.it/archivio/2018/3/piperata.htm>); Salvemini, Severino. "Quando" carmina dant panem": la cultura come risorsa economica del mondo simbolico." *Economia & Management* 3 (2005): 5–10; Wiśniewska, Aleksandra, Wiktor Budziński, and Mikołaj Czajkowski. 'An Economic Valuation of Access to Cultural Institutions: Museums, Theaters, and Cinemas' *Journal of Cultural Economics* 44 (2020): 563–587.

<sup>4</sup> Borowiecki, Karol Jan, Neil Forbes, and Antonella Fresa. *Cultural Heritage in a Changing World*. Springer Nature, 2016; Aureli, S, Del Baldo, M, Demartini, P, & Piber, M (2023). *Cultural Heritage as a Trigger for Civic Wealth Creation and Sustainable Urban Development*. Roma TrE-Press, 2023, 25.

broadly, digital transformation have been recognized as having considerable potential to facilitate this trend, promoting, *inter alia*, education and research, creativity, entrepreneurship, and tourism.<sup>5</sup>

The regulatory directions for realizing the economic and social potential of culture are far from unified, as is the relationship between cultural heritage regulations and other areas of the law, such as intellectual property, which is typically characterized by the privilege of private interests to limit the use and transformation of creative, and possibly cultural, works and other subject matter.

Copyright law is paradigmatic in this respect. Artistic, literary, scientific, and any other type of original creation falling within its scope are not free to be used, unless a specific, clear, and restrictively interpreted exception applies. European Union (EU) law, in its attempt to harmonize and modernize copyright rules across Member States, is a telling example, as it provides the possibility for national legal systems to permit *ex lege* only some uses, such as the noncommercial reproduction of protected works by cultural institutions,<sup>6</sup> the use of protected works during religious or official celebrations if organized by a public authority,<sup>7</sup> and the use of works of architecture or sculpture permanently located in public spaces.<sup>8</sup> As highlighted by many, this approach may clash with safeguarding the right to access and fully enjoy culture.<sup>9</sup>

Recently, the EU addressed the issue of copyright and cultural heritage by introducing a new mandatory rule that is having a meaningful impact on guiding the uses of cultural heritage. As explained in detail in this study, this new provision, namely

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<sup>5</sup> See Spina, Tiziana Russo, and Francesco Bifulco, eds. *Digital Transformation in the Cultural Heritage Sector: Challenges to Marketing in the New Digital Era*. Springer Nature, 2021; Manacorda, Daniele. 'L'immagine del bene culturale pubblico tra lucro e decoro: una questione di libertà' *Aedon* 1 (2021): 24–29; Modolo, Mirco. 'La riproduzione del bene culturale pubblico tra norme di tutela, diritto d'autore e diritto al patrimonio' *Aedon* 1 (2021): 30–36. Cultural heritage is also increasingly seen as a driver of new initiatives signalling the emergence of a distinct market-service orientation. Exploring the managerial implications of this assumption, see Roussos, Konstantinos, and Irimi Stamatoudi. 'Management Issues for Cultural Heritage Institutions'. *Research Handbook on Intellectual Property and Cultural Heritage*. Edward Elgar Publishing, 2022. 413–438. See also Zan et al, *Managing Cultural Heritage an International Research Perspective*, 2015. See also the most recent policy plan initiative promoted by the Italian Ministry of Culture, 'National Plan for the Digitization of the Cultural Heritage, Version 1.0', June 2022 <https://docs.italia.it/italia/icdp/icdp-pnd-docs/it/v1.0-giugno-2022/index.html>.

<sup>6</sup> Art 5(2)(b) InfoSoc Directive.

<sup>7</sup> *Ibid* Art 5(3)(g).

<sup>8</sup> *Ibid* Art 5(3)(h).

<sup>9</sup> Among others, Macmillan, Fiona. *Intellectual and Cultural Property: Between Market and Community*. Routledge, 2020; Yu, Peter K. 'Intellectual Property, Cultural Heritage and Human Rights' *Cultural Heritage and Human Rights* (October 26, 2021). *Research Handbook on Intellectual Property and Cultural Heritage*, Irimi Stamatoudi, ed, Edward Elgar Publishing (2022): 294–310.



Article 14 of the latest EU Directive on Copyright in the Digital Single Market (CDSMD), is meant to ensure that artworks belonging to the public domain remain free to be reproduced and used, with the aim that this contributes to the cultural flourishing of EU society. This EU approach, however, conflicts with the laws and practices in Italy. This study thus examines this tension.

## 1.2 Scope and methodology

This study focuses on cultural heritage, although this term's meaning has not been clearly pinned down in the relevant laws and regulations.<sup>10</sup> For the purpose of this study's analysis, however, the term 'cultural heritage' is preferred over other legal terminology, such as cultural property, cultural assets or goods, or cultural works, because it seems to be the most inclusive term and to fully embrace the subject matter of this study. For present purposes, cultural heritage is meant to refer to any resource, in tangible or intangible form, featuring a degree of cultural significance.

The aim of the study is to assess the compatibility of Italian and EU laws and practices in regard to the regulation of such resources, with this study motivated by the implementation of Article 14 CDSM and recent controversies concerning the reproduction of cultural heritage. The paper's argument is built upon desk-research efforts that focused on EU and Italian legislation, case law, explanatory and supporting documentation, and doctrinal interpretations thereof, which were selected on the basis on their relevance to the topic. The following traditional approaches to legal reasoning<sup>11</sup> were adopted:

- Literal analysis: focusing on the choices of and justifications for legal wording;
- Teleological analysis: investigating the rationales and underlying objectives of laws;
- Apagogic analysis: considering possible *a contrario* legal interpretations;
- Systematic analysis: focusing on the structure of and relationships between legal rules; and
- Consequentialist analysis: investigating the role of applied legal norms in society.

The main limitations of the study are its territorial and material scope and its theoretical nature. Regarding the former, the study is strictly limited to EU and Italian law, although an initial international law contextualization is provided. This does not suggest that, within the EU, the need to assess the compatibility of national and EU provisions on the matter of cultural heritage is not needed outside of the Italian

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<sup>10</sup> See Barbara T Hoffman, *Art and Cultural Heritage: Law, Policy and Practices* (CUP 2006) 16 highlighting the legal uncertainty on the status and definition of cultural heritage in international and across national laws.

<sup>11</sup> See Giovanni Tarello, *L'interpretazione della legge*, Milano, Giuffrè, 1980; id, "Argomenti interpretativi" in *Digesto*, 4th edition (UTET: 1987) 3–11.

context. As highlighted in some passages in the text, the methodological structure of the study is well-suited to serve as a blueprint for, potentially, all the other 26 Member States of the EU.<sup>12</sup> Furthermore, while acknowledging the multiple layers of the legal framework applying to cultural heritage, this study solely focuses on the intersection of cultural heritage law with copyright law.<sup>13</sup> Regarding the second limitation, the study is theoretical, and it does not rely on empirical data or statistical representativeness. However, it establishes the basis for sound legal interpretations while prompting the need for relevant and long-overdue evidence-based legal research in the cultural sector.

## 2. Cultural heritage and copyright: A multi-layered legal framework

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### 2.1 The international legal context

Cultural heritage is regulated by an assortment of international, supranational, and national legal norms. International covenants and declarations contribute in crucial ways to defining the scope and rationale of this legal area.<sup>14</sup> To provide for the collective safeguarding of heritage as the common and irreplaceable property of mankind, such conventions have traditionally featured a custodial approach by which they have aimed to protect cultural heritage from harm and diminishment; the aforementioned considerations have directly influenced the enactment of national laws and policies.

Cultural heritage is defined in international law, with a definition that refers to cultural objects and assets, movable or immovable, such as artworks, manuscripts, religious

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<sup>12</sup> For instance, see M Markellou (2023) 'Cultural Heritage Accessibility in the Digital Era and the Greek Legal Framework' *Int J Semiot Law*. <https://doi.org/10.1007/s11196-023-10027-w>.

<sup>13</sup> For instance, it does not get into the issue of contracts and private ordering, and it does not address the potential links with trademark law, nor does it explore the issue from the perspective of private international law.

<sup>14</sup> In particular, the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954); UNESCO (1970). Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

simulacra, sculptures, archaeological sites, and buildings<sup>15</sup>; moreover, the definition encompasses other tangible or intangibles works<sup>16</sup> as long as they are 'of outstanding universal value from the point of view of history, art or science'.<sup>17</sup> Consistently across the covenants, the most important requisite is, indeed, the cultural relevance of the resource in question for communities and the whole of humankind. It is common to find it explicitly stated that such *global value* is to be safeguarded, irrespective of the ownership of the cultural property.<sup>18</sup> Such value transcends national boundaries,<sup>19</sup> and the mission of cultural heritage institutions extends to supporting to the broadest possible extent the human enjoyment of cultural heritage by all.

International law imposes a legal obligation to ensure and foster inclusive access to and participatory enjoyment of cultural heritage. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) oblige signatory States to ensure the right of everyone to freely

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<sup>15</sup> UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (UNESCO Hague Convention), Art 1; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 (UNESCO Convention 1970), Art 1; UNIDROIT Convention on Stolen or Illegally Transported Cultural Objects of 1995, Art 2. For a comprehensive overview, see Irini Stamatoudi 'Cultural Property Law and Restitution A Commentary to International Conventions and European Union Law' (2022) 36–74.

<sup>16</sup> Cristiana Sappa, 'Actions and Reactions in Commodifying Cultural Heritage Hosted in Museums' (2023) JIPITEC 14, 161–179, 161.

<sup>17</sup> UNESCO Convention 1970, Art 1; see analogue reference to the requisite of 'great importance to the cultural heritage of every people' in UNESCO Hague Convention, Art 1(a); Council of Europe, Convention on the Value of Cultural Heritage for Society of 2005 (Faro Convention), Art 2.

<sup>18</sup> UNESCO Hague Convention, Art 1 ('For the purposes of the present Convention, the term "cultural property" shall cover, *irrespective of origin or ownership* [...]'); Council of Europe, Convention on the Value of Cultural Heritage for Society of 2005 (Faro Convention), Art 2 ('a group of resources inherited from the past which people identify, *independently of ownership*, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time') (emphasis added).

<sup>19</sup> On this, see Fiona McLean, 'Introduction: Heritage and identity' (2006) 12 *International Journal of Heritage Studies* 3-7; David C Harvey 'The history of Heritage', *The Routledge Research Companion to Heritage and Identity*. Routledge, 2016. 19–36.

participate in the cultural life of the community and enjoy the arts.<sup>20</sup> The latter further obliges them to take necessary steps for the ‘conservation, the development and the diffusion of science and culture’; to safeguard artistic freedom; and to promote international cooperation in the cultural field.<sup>21</sup> Consistent with international law concerning global outreach and specifically referring to European cultural heritage,<sup>22</sup> the Council of Europe’s Faro Convention of 2005,<sup>23</sup> also known as the Framework Convention on the Value of Cultural Heritage for Society, builds on the idea of a collective responsibility that justifies the need to impose limitations on exclusive proprietary rights for the sake of the public interest and recognizes the importance of truly engaging with cultural heritage for the benefit of society.<sup>24</sup>

## 2.2 The EU road towards cultural heritage protection, enjoyment, and enhancement

At the EU level, policies and regulations confirm the importance of cultural heritage preservation as well as, increasingly, its use and transformation, emphasizing its participatory governance, which supports human development, social cohesion, and

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<sup>20</sup> Universal Declaration of Human Rights (UDHR) of 1948, Art 27(1) (‘Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’); International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, Art 15(1)(a) (‘The States Parties to the present Covenant recognize the right of everyone to take part in cultural life’). There is a vast repertoire of literature on the matter. See, for instance, Irini Stamatoudi, ‘Introduction to the Research Handbook on Intellectual Property and Cultural Heritage: Overview of the Issues’, *Research Handbook on Intellectual Property and Cultural Heritage* (2022): 1–5.; Cristiana Sappa, ‘Museums as Education Facilitators: How Copyright Affects Access and Dissemination of Cultural Heritage’ *The Subjects of Literary and Artistic Copyright*. Edward Elgar Publishing, 2022. 233–256; Helle Porsdam, ‘Science as a Cultural Right’, *Humanistic Futures of Learning* (2020): 157; Yvonne Donders, ‘Cultural Heritage and Human Rights’ published in: *Oxford Handbook on International Cultural Heritage Law*, Amsterdam Law School Research Paper 2020-37 (2020), pp 379–398; Janet Blake, *International Cultural Heritage Law* (OUP Oxford 2015) 299.

<sup>21</sup> Respectively, ICESCR, Arts 15(2), (3), and (4).

<sup>22</sup> Faro Convention 2005, Art 3; see also Explanatory Report to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, CETS No. 199, 4–8; Lauso Zagato, ‘The Notion of “Heritage Community” in the Council of Europe’s Faro Convention. Its Impact on the European Legal Framework’ Markus Tauschek (ed) *Between Imagined Communities and Communities of Practice* 141 (2015), 141–168.

<sup>23</sup> Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro 2005).

<sup>24</sup> Explanatory Report to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, 6; Lauso Zagato, ‘The notion of “Heritage Community” in the Council of Europe’s Faro Convention. Its Impact on the European Legal Framework’ Markus Tauschek (ed) *Between Imagined Communities and Communities of Practice* 141 (2015).

quality of life.<sup>25</sup> This dynamic approach towards cultural heritage regulation, promoting access, enjoyment, and proactive engagement with it and especially tapping the potential of the digital environment,<sup>26</sup> has paved the way for specific strategies and initiatives aimed at a more cohesive EU policy for culture, despite the limited scope of the EU to harmonize national rules in this area.<sup>27</sup>

The EU has not been active in regulating cultural heritage other than by assisting and complementing Member States' actions, but this should not be an excuse for the governing body to refrain from taking a more proactive approach. Ensuring that Europe's cultural heritage is safeguarded and enhanced is a clear objective of the Union under Article 3(3) of the Treaty on European Union<sup>28</sup>; complying with this provision can of course already be pursued by means of soft law instruments, but the possibility of giving the EU new competences by modifying the treaties should not be entirely ruled out.<sup>29</sup>

The legal understanding of cultural heritage as a tool for social inclusion, active participation, and enhancement of the quality of life of EU citizens finds its first expression in the Charter of Fundamental Rights of the EU (CFREU), principally in Articles 13 and 25, which, respectively, safeguard the freedom of the arts and the inclusivity of cultural participation in the EU.<sup>30</sup> The scope and relevance of cultural

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<sup>25</sup> European Convention for the Protection of the Architectural Heritage of Europe (Granada 1985); European Convention on the Protection of the Archaeological Heritage (Valletta 1992); Christian Iaione, Elena De Nicolis, and Maria Elena Santagati, 'Participatory Governance of Culture and Cultural Heritage: Policy, Legal, Economic Insights From Italy' *Frontiers in Sustainable Cities* 4 (2022): 777708.

<sup>26</sup> See EU Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2006) 2006/585/EC; EU Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2011) 2011/711/EU; EU Commission Staff Working Document, 'Evaluation on digitisation and online accessibility of cultural material and digital preservation' (2021) SWD(2021) 15 final, pp 7 and 13 ('Member States are recommended to improve the access to and use of digitised cultural material in the public domain') (emphasis added) and ('The national reports pointed to a positive trend among Member States to ensure that public domain status is maintained after digitisation; most of them reported supporting actions ensuring wider access or use of the digitised cultural heritage material in the public domain').

<sup>27</sup> TFEU, Art 167 defining the role of the EU in supporting, coordinating, or supplementing national legislative initiatives by the Member States in the area of culture.

<sup>28</sup> Contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

<sup>29</sup> Such possibility is explicitly considered in Giulia Dore, Roberto Caso, Paolo Guarda, & Marta Arisi (2023) D5.7 Final Policy Recommendations for EU Lawmakers. Zenodo. <https://doi.org/10.5281/zenodo.7544364>.

<sup>30</sup> In particular, the inclusion of cultural minorities and elderly individuals in the living cultural substratum of EU society and the diversity of cultural representation and valorisation across EU peoples. See CFREU, Arts 13 and 25 and Preamble ('The Union contributes to the

rights in the Charter are further expressed in Articles 7, 10, 11, 12, and 14, with particular emphasis on their role in freedom of expression and education.<sup>31</sup>

Developments in EU cultural policy- and law-making<sup>32</sup> consistently exhibit an evolution from the original set of rules on the import, export, and repatriation of cultural objects<sup>33</sup> to an increasingly solid commitment to enhance cultural promotion and the sustainable use of cultural heritage.<sup>34</sup> This is also reflected in the EU's framework for copyright law. Since the first version of the Rental Directive in 1992 and its revision in 2006, the EU legislative body has been urging the Member States to strike a balance between exclusive copyright rights and cultural promotion objectives.<sup>35</sup> The InfoSoc Directive, the cornerstone of the horizontal harmonization of copyright rules across the Union, expansively refers to cultural aspects and openly declares its intention to support cultural dissemination and 'promote learning and culture by protecting works [...] while permitting exceptions and limitations in the public interest'.<sup>36</sup> Across the opinions collected by the Committee on Legal Affairs during the Directive's negotiations, this idea emerges solidly and consistently:

Rights holders deserve protection, and legal sanctions to enforce it, but that cannot be at the expense of these other elements in

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preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels'). Cf the New European Agenda for Culture (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).

<sup>31</sup> Evangelia Psychogiopoulou, 'The European Union and Cultural Rights' in Ana Vrdoljak (ed), *The Cultural Dimension of Human Rights* (OUP 2013), pp 165–166.

<sup>32</sup> Joint Communication to the European Parliament and the Council towards an EU strategy for international cultural relations, 2016; European Commission, Directorate-General for Education, Youth, Sport and Culture, European framework for action on cultural heritage, Publications Office, 2019, <https://data.europa.eu/doi/10.2766/949707>. See also the multiannual Work Plans, for example, Council Resolution on the EU Work Plan for Culture 2023–2026 2022/C 466/01ST/15381/2022/INIT, OJ C 466, 7.12.2022, pp 1–18.

<sup>33</sup> Respectively, EU Regulations 2019/880, 1081/2012, and 116/2009; EU Directive 2014/60.

<sup>34</sup> Council of the EU, 2022.

<sup>35</sup> Rental Directive 1992, Art 5(1) and Rental Directive 2006, Art 6(1) ('Member States shall be free to determine this remuneration taking account of their cultural promotion objectives'). See also the explanatory documentation on this sentence: European Commission, Report on the Public Lending Right in the European Union (2002) COM(2002)502 final, p 5 ('This sentence was inserted following a proposal by a Member State, which intended to create a new library system as a means of cultural promotion').

<sup>36</sup> InfoSoc Directive, Recitals 22 and 14, respectively.

the social fabric, where information will always mean empowerment.<sup>37</sup>

The provisions introduced in the InfoSoc Directive of 2001 merely permitted Member States to carve out exceptions for museums and archives to freely reproduce copyright-protected works for noncommercial purposes<sup>38</sup> and for everyone to freely use works of architecture or sculptures located in public places (so-called ‘freedom of panorama’).<sup>39</sup> Further, albeit implicitly, the InfoSoc Directive safeguards the free use of public domain works, as the exclusive rights as well as exceptions and limitations it harmonizes apply only to works or other subject matter protected by copyright.

In the Orphan Work Directive (OWD) of 2011 and, more recently, in the Copyright in the Digital Single Market Directive of 2019 (CDSMD), the EU *acquis communautaire* more explicitly exhibited a commitment to more effectively balancing the exclusivity of copyright vis-à-vis the freedom to access, enjoy, and engage with cultural heritage. The OWD was adopted as a response to the mass digitization and growing demand for cultural works online and the impossibility to clear rights to works and engage in royalty negotiations.<sup>40</sup> The response of the EU legislator has been to strongly commit to the preservation and dissemination of Europe’s cultural heritage, with this based on its understanding of the need for its protection to serve as a strong driver of the broad enjoyment of culture by citizens.<sup>41</sup> Libraries, museums, and archives as well as audio and video heritage institutions, are to serve crucial roles, and new provisions were introduced for such cultural institutions, permitting and encouraging them to reproduce and share cultural works whose rightsholders cannot be located.<sup>42</sup>

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<sup>37</sup> EU Committee on Legal Affairs and Citizens’ Rights, ‘Report on the proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society’ (1999) PE 225.907/fin, p 67.

<sup>38</sup> InfoSoc Directive, Art 5(2)(c).

<sup>39</sup> Ibid, Art 5(3)(h).

<sup>40</sup> European Commission, Green Paper on Copyright in the Knowledge Economy (2008) COM(2008)466/3, p 10 (‘There is a significant demand for the dissemination of works or sound recordings of an educational, historical or cultural value at a relatively low cost to a wide audience online. It is often claimed that such projects are held up due to the lack of a satisfactory solution to the orphan works issue. Protected works can become orphaned if data on the author and/or other relevant rightsholder(s) (such as publishers or film producers) is missing or outdated. This is often the case with works which are no longer exploited commercially. Apart from books, thousands of orphan works such as photographs and audio-visual works are currently held in libraries, museums or archives’). See also European Commission, Recommendation on the digitization and online accessibility of cultural content and digital preservation (2006) 2006/585/EC, L 236/28.

<sup>41</sup> OWD, Recital 5 (‘Mass digitisation and dissemination of works is therefore a means of protecting Europe’s cultural heritage’). See also EU Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, OJ L 283, 29.10.2011, pp 39–45.

<sup>42</sup> OWD, Art 6.

However, the OWD continues to be the subject of extensive criticism within the EU due to its overly complex implementation, and few States have adopted it.<sup>43</sup>

The CDSMD represents the most mature expression of the EU legislator's commitment to promote culture. The aim of the relevant provisions introduced by the Directive is twofold: first, to support the preservation of cultural heritage by introducing a new mandatory exception for cultural institutions to freely make copies of the works in their collections,<sup>44</sup> and, second, to facilitate uses, with special attention to the use of out-of-commerce and public domain works of visual art.<sup>45</sup>

In regard to the second point, the key provision is Article 14 CDSMD, which, read in conjunction with Recital 53, finds its justification in the need to align copyright law with the EU cultural policies and ensure that cultural heritage is widely accessible and strongly promoted across EU society by leveraging the potential of digital technologies.<sup>46</sup> Implicitly, a fundamental function of Article 14 CDSMD is to avoid legal fragmentation across the Union and to foster cross-border uses of European cultural heritage.<sup>47</sup> Article 14 CDSMD thus establishes that faithful reproductions of works of visual art that belong to the public domain<sup>48</sup> shall remain free from copyright

<sup>43</sup> On this, see Simone Schroff, Marcella Favale, and Aura Bertoni, 'The Impossible Quest—Problems With Diligent Search for Orphan Works' (2017) 48 IIC-International Review of Intellectual Property and Competition Law 286–304.

<sup>44</sup> CDSMD, Art 6 and Recitals 25 to 29.

<sup>45</sup> Respectively, *ibid* Arts 8–11, Recitals 30 to 43; and *ibid* Art 14, Recital 53.

<sup>46</sup> Recital 53 ('(...) In the field of visual arts, the circulation of faithful reproductions of works in the public domain *contributes to the access to and promotion of culture*, and the access to *cultural heritage*. In the digital environment, the protection of such reproductions through copyright or related rights is inconsistent with the expiry of the copyright protection of works. (...)' (emphasis added).

<sup>47</sup> CDSMD, Recital 53 ('[...] In addition, differences between the national copyright laws governing the protection of such reproductions give rise to legal uncertainty and affect the cross-border dissemination of works of visual art in the public domain'). See also European Commission Communication, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' (2016) COM(2016)592 final ('[...] the Commission announced a gradual approach to removing the obstacles to cross-border access to content and to the broader circulation of works across the EU, notably in light of increasingly widespread Internet connections and digital technologies. The objective is to increase the availability of works for citizens across Europe, provide new distribution channels for creators, promote the cultures of the Member States, and bring the EU's common cultural heritage to the fore').

<sup>48</sup> The category of visual artworks does not find a statutory definition in international nor in EU law. However, there seems to be consensus in the legal doctrine around the interpretation of this category as any figurative work that can be perceptible from the human eye, excluding, for instance, music works. See Cristiana Sappa and Bohdan Widta, 'Framing Texts and Images: Critical and Posthumous Editions in the Digital Single Market' (2023) IIC 54, 1359–1380, accessed at <https://doi.org/10.1007/s40319-023-01394-9>; Eleonora Rosati, 'Article 14 – Works of Visual Art in the Public Domain' in *Copyright in the Digital Single Market. Eleonora Rosati: Article-by-Article Commentary to the Provisions of Directive 2019/790*, Oxford



and any other related rights protection. This rule applies only to copies that do not meet the originality requirement to be considered new copyright-protected works.<sup>49</sup> Article 14 sets a minimum standard, and Member States can expand its scope. Article 14 CDSMD focuses on public domain works and does not<sup>50</sup> include any further requirements, meaning that although public domain works shall not necessarily be part of the permanent collections of cultural heritage institutions, they can be temporarily exhibited by such an institution or exist outside of, but perhaps adjacent to, such institutions, as in the case of cultural architectural goods or historical monuments in public sites. The article addresses works of visual art, but Member States can include other types of works or subject matter, and it applies to faithful reproductions of public domain artworks, excluding only those works that exhibit some degree of creative effort in the act of copying. Article 14 CDSMD therefore ensures the free use of those faithful reproductions.

The provision entered into force in 2019 in the form of an amendment to the new copyright exception for cultural preservation activities, expanding the scope thereof and excluding the possibility of contractual overridability.<sup>51</sup> It then became a separate article, losing the status of a copyright exception, entering Title III dedicated to 'ensure wider access to content', and losing also the proposed requirement of the faithful reproductions being done for preservation purposes, thus allowing for any lawful copies of public domain artworks to be the entry point for free use, without the possibility of restricting them contractually.

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University Press (2021) 239–249, interpreting as 'any figurative work that is perceptible to the eye, irrespective of both its mode or form of expression and of the intention of its author'; Andrea Wallace and Ellen Euler, 'Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments' (2020) IIC 51 823–855, 838, accessed at <https://doi.org/10.1007/s40319-020-00961-8>.

The explanatory documentation of the Orphan Works Directive corroborates this understanding, as it mentions 'visual works' as including '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'. Directive 2012/28/EU on certain permitted uses of orphan works, Annex 3.

<sup>49</sup> See Andrea Wallace and Ellen Euler, 'Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments', 838, clarifying the only sufficiently original works stemming from the reproduction of public domain ones may be protected.

<sup>50</sup> Recital 29 CDSMD might mislead defining what 'works permanently in the collection of a cultural heritage' means, but this is not the wording adopted in Art 14 CDSMD.

<sup>51</sup> Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 –2016/0280), 23/12/2019, C 433/36, Amendment 67 ('[...] 1a. Member States shall ensure that any material resulting from an act of reproduction of material in the public domain shall not be subject to copyright or related rights, provided that such reproduction is a faithful reproduction for purposes of preservation of the original material. 1b. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable').

The rationale of Article 14 CDSMD is the prohibition of a ‘re-fencing off’ of a category of cultural heritage, namely works of visual art belonging to the public domain, through the grant of new exclusive rights. Concretely, across the 27 Member States, the act of taking an unoriginal picture of a painting whose copyright expired cannot generate any new copyright or related rights protection over the photograph or the painting itself. This has a twofold legal effect. First, it allows for such a copy of the painting to be available for everyone to access and enjoy, online as well as offline. Second, it sets the follow-on uses of such a copy free from the need for authorizations by any rightsholder. This means that, as long as the copy of the artwork was done lawfully, that photograph is free to be used for any purpose.

### **2.3. An overview of relevant Italian legal provisions**

Following the adoption of the CDSMD, the Italian legal system showed reluctance towards an expansive transposition of Article 14.<sup>52</sup> This can be considered both surprising and unsurprising.

On the one hand, consider Article 9 of the Italian Constitution, which, as a Fundamental Principle, establishes the national commitment to cultural promotion, along with the promotion of technical and scientific research.<sup>53</sup> The same constitutional provision, in its second sentence, sets forth that the Italian Republic ‘protects the landscape and the historical and cultural heritage of the Nation’.<sup>54</sup> The terms standing out from the constitutional wording are the references to the ‘development’ of culture along with the ‘protection’ of cultural heritage. Doctrinal interpreters have studied in depth both these terms, concluding that the essence of Article 9 of the Italian Constitution lies in the public dimension of culture and in the

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<sup>52</sup> Marta Arisi, ‘Digital Single Market Copyright Directive: Making (Digital) Room for Works of Visual Art in the Public Domain’, in (2020) 1 *Opinio Juris in Comparatione* p 120. <https://www.opiniojurisincomparatione.org/articles/digital-single-market-copyright-directive-making-digital-room-for-works-of-visual-art-in-the-public-domain/>

<sup>53</sup> Ramon Romano, ‘Copyright Law and Cultural Heritage in Italy: Work in Progress’ (2018) 13 *JiPLP* 694–699.

<sup>54</sup> Constitution of the Italian Republic, 1948, Art 9 (translation by authors).

need for specific policy strategies dedicated to safeguarding Italian art, history, and landscape.<sup>55</sup>

On the other hand, the Italian legal system exhibits a peculiarly conservative attitude towards the duty to preserve cultural heritage. Such an approach is evident across many legislative and administrative acts, and the Code of Cultural Heritage Law (ItCCHL) is primary in this regard.<sup>56</sup> To date, the Code represents the cornerstone regulatory framework for Italian cultural heritage, and it still maintains the spirit of its historical origins, traced back in the early 1900s, as the first post-Unification law aimed at responding to the cross-border dispersion of national cultural assets—through the ItCCHL, the Italian state endeavoured to maintain control over them.<sup>57</sup>

The ItCCHL regulates cultural heritage and is applicable to public and private cultural property.<sup>58</sup> The law defines cultural heritage to include ‘artistic, historical, archaeological, and ethno-anthropological interest[s]’,<sup>59</sup> expanding this definition to an open-ended list of goods, works, buildings, public and private collections and disregarding the public or private nature of their ownership and custody.<sup>60</sup>

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<sup>55</sup> See, among others, Lombardi, Stefano, and Sara Carboni. *Diritto dei beni culturali*. Wolters Kluwer-CEDAM, 2021; Catani, Enzo, Gianluca Contaldi, and Fabrizio Marongiu Buonaiuti. *La tutela dei beni culturali nell’ordinamento internazionale e nell’Unione europea*. EUM-Edizioni Università di Macerata, 2020; Montella, Massimo. ‘La tutela dei beni culturali nella proposta delle Regioni/The protection of cultural heritage in the Regions’ proposal’. *Il Capitale Culturale. Studies on the Value of Cultural Heritage* (2020): 427–435. Boldon Zanetti, Giovanni. ‘Il nuovo diritto dei beni culturali’. Cafoscarina, Venezia (2016). Historically, the essence of Article 9 of the Italian Constitution relates to the understanding of the State’s public dimension over regional and private interests, and to the understanding of protection as the need to conserve the heritage that survived destruction, looting and misappropriations in times of war. For a full historical exegesis of the provision, see Tomaso Montanari, “Art.9 Costituzione Italiana” (Carocci Editore, 2018), in particular pp 5–30.

<sup>56</sup> Legislative Decree No 42 of 22 January 2004 (Italian Code of Cultural Heritage Law, ItCCHL).

<sup>57</sup> For a detailed historical account, see E Fusar Poli, ‘La causa della conservazione del bello’. *Modelli teorici e statuti giuridici per il patrimonio storico-artistico italiano nel secondo Ottocento*, Milano, Giuffrè, 2006; id, *Dalle cose d’arte all’intangible cultural heritage. Percorsi di ‘dematerializzazione’ (anche) giuridica*, in A. Bellini, A. Robbiati Bianchi, *Individuazione e tutela dei beni culturali Problemi di etica, diritto ed economia*, Milano 2018, 84 ss.

<sup>58</sup> Their connotation as cultural heritage will determine the limitations on the exercise of property rights, eg, their alienability. On this, Letizia Casertano, ‘The Law Governing Cultural Heritage in Italy: Universal Values Versus National Cultural Identity’ (2017) 17 *Global Jurist* 20160019.

<sup>59</sup> Art 10 ff ItCCHL.

<sup>60</sup> Art 10 ItCCHL defines the legal category of cultural heritage (‘beni culturali’) including, among others, immovable and movable assets belonging to the State or other national public entity or private nonprofit entity (para 1), collections of museums, archives, libraries and any other public institutions (paras 2(a) to 2(c)), any good belonging to anyone (para 3(d), 3(d-bis),

Along similar lines as both Articles 9 and 117 of the Italian Constitution (the latter distributing legislative competences), the Code contains rules and principles to protect and enhance cultural heritage. The Italian government and— to different extents—regional and municipal entities are obliged to ensure the protection and enhancement of cultural heritage for purposes of public enjoyment.<sup>61</sup>

Specifically regarding the uses of cultural heritage, the core provisions of the ItCCHL are found in Articles 106 to 108, set under Title II and dedicated to the ‘enjoyment and enhancement of cultural heritage’. Article 106 ItCCHL allows for the use of cultural heritage for purposes that are compatible with the original cultural designation, and Article 107 permits reproduction and instrumental and temporary uses; with a different focus, Article 108 sets a framework for determining concession fees and payments connected with the reproduction. Stemming from these provisions, the Italian Ministry of Culture issued Ministerial Decree No. 161 of 11 April 2023,<sup>62</sup>

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3(e)) to which the Italian State has attributed the so-called Certificate of Cultural Interest (Art 13 ItCCHL).

<sup>61</sup> It is worth noting that enhancement of cultural heritage is increasingly interpreted in economic terms. This is for instance confirmed by two provisions of the recent law on *Made in Italy* (Legge 27 December 2023, n 206. *Disposizioni organiche per la valorizzazione, la promozione e la tutela del made in Italy*. GU n 300): Articles 21 and 22.

Article 21 specifies the Ministry of Culture has the power to promote enhancement and protection of immaterial cultural heritage, as the set of intangible assets expression of the country’s collective cultural identity. Accordingly it modifies Articles 52 and 53 of D.lgs. 30 luglio 1999, n 300, Riforma dell’organizzazione del Governo, to clarify the powers that the Ministry can exercise on ‘management and enhancement, including economic enhancement, of tangible and intangible cultural heritage, institutes and places of culture’.

Article 22, consistent with the goal of enhancing and protecting the cultural heritage of the country, to increase the knowledge of cultural heritage and the ability to self-finance, allows institutes and places of culture to register their trademark and licence it to third parties for a fee, but without new or increased burdens on public finance.

<sup>62</sup> DM 161 11/04/2023, Linee guida per la determinazione degli importi minimi dei canoni e dei corrispettivi per la concessione d’uso dei beni in consegna agli istituti e luoghi della cultura statali, <https://www.beniculturali.it/comunicato/dm-161-11042023>, further amended by D.M. 187 1/5/ 2023. The most recent amendments by D.M. 108 21/03/ 2024, <https://www.beniculturali.it/comunicato/26075>, have in part fine-tuned the guidelines therein provided but not solved its main deficiencies. On this, see G Volpe, *Se l’uso delle immagini è l’immagine dell’Italia*, (2024) 223 *Archeologia Viva* 80.

causing a heated debate within<sup>63</sup> and beyond the Italian territory<sup>64</sup> because the Decree imposes specific guidelines for determining the minimum concession fees for the use of cultural heritage held by cultural institutions.<sup>65</sup> It also requires prior verification of the compatibility of the intended use of any copies of cultural heritage with its own historical and artistic character, questionably referring to Article 20 ItCCHL.<sup>66</sup>

The ItCCHL explicitly states that the enhancement of cultural heritage, which must be compatible with safeguarding it, consists of activities that promote the knowledge of cultural heritage and ensure the best conditions for public use.<sup>67</sup> In this respect, the proactive participation of private individuals and associations is highly encouraged.<sup>68</sup> However, the Italian legal system still shows reluctance towards the idea of a more dynamic regulatory approach to cultural heritage that features a higher degree of flexibility towards access, enjoyment, and the use of such resources. The legal system is struggling to move away from the historical rationale of the ItCCHL, which focused on maintaining physical resources of cultural significance under the care and control of

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<sup>63</sup> See especially Andrea Brugnoli, *Il dm 11 April 2023, n 161 e il suo impatto sulla ricerca e sull'editoria: brevi note a margine di un caso studio di pubblicazione in Open Access (2023) 2 Aedon* 208–213, DOI: 10.7390/108957; Daniele Manacorda, *Un decreto inopportuno: appunti di un archeologo (2023) 2 Aedon* 225–232, DOI: 10.7390/108960; Francesca Rossi, *Una riflessione sull'impatto del dm 161 del 2023 sui musei italiani non statali (2023) 2 Aedon* 241–243, DOI: 10.7390/108962.

The Italian Court of Audit showed explicit reservations in its Decision of 20 October 2023, n. 76/2023/G, 156-157, [https://trasparenza.mit.gov.it/moduli/downloadFile.php?file=oggetto\\_allegati/23317130313335918200\\_Ocorte\\_dei\\_conti\\_deliberazione\\_20\\_ottobre\\_2023\\_n\\_762023g.pdf](https://trasparenza.mit.gov.it/moduli/downloadFile.php?file=oggetto_allegati/23317130313335918200_Ocorte_dei_conti_deliberazione_20_ottobre_2023_n_762023g.pdf). See also the Court's previous arguments in support of Open Access to digital collections in its Decision of 12 October 2022, n 50/2022/G, 164, <https://www.corteconti.it/Download?id=a842440e-5d21-4c1e-82f9-96d10512d500>.

<sup>64</sup> Among the worried reactions, see D De Angelis and L Sinigallia, 'Is the Public Domain Under Threat in Italy?' *Europeana* (12 July 2023), <https://pro.europeana.eu/post/is-the-public-domain-under-threat-in-italy>. More recently, a formal parliamentary question (E-000406/2024) on the compatibility of the Ministerial Decree with Directive (EU) 2019/790 and Directive (EU) 2019/1024 was submitted by some members of the European Parliament and is currently pending before the EU Commission, see [https://www.europarl.europa.eu/doceo/document/E-9-2024-000406\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2024-000406_EN.html)

<sup>65</sup> Indisputably, the Decree prompted a rigid application of the ItCCHL and paved the way for the Italian case law that will be soon discussed.

<sup>66</sup> Art 20 co 1 ItCCHL forbids destruction, damage or assign to uses that are not compatible with their historic or artistic character or of such kind as to prejudice their conservation. The provisions however relate to physical or material resources. This point is clearly argued by Daniele Manacorda, 'L'immagine del bene culturale pubblico tra lucro e decoro: una questione di libertà' in (2021) 1 *Aedon*, *Rivista di arti e diritto* on line 25, who also highlights how the cultural designation as per Art 106 ItCCHL pertains to the physical or material dimension.

<sup>67</sup> A reading that would appear aligned with the open access philosophy, but is often disregarded, as we shall see.

<sup>68</sup> ItCCHL, Art 6.

the state; this rationale has mechanically been extended to any dimension of culture heritage. This is evident by looking at Italian copyright law.<sup>69</sup>

To begin, in 1996, Italy abrogated the system of ‘diritto demaniale’—referring to a legal mechanism similar to schemes of paying public domain (or *domaine public payant*) in other countries<sup>70</sup>—which established the obligation to pay a remuneration to the state upon the use and dissemination of works in the public domain, including cultural heritage.<sup>71</sup> From this specific angle of resources qualifying as cultural heritage, the disappearance of such mechanism for public domain works could be seen as a move towards the unleashing of public domain, but also—more counterintuitively—it aligns with the ItCCHL intention to maintain the state as a fulcrum of control over their uses, not being possible anymore to always disseminate and exploit them in return for a fixed remuneration.

Two additional aspects of the Italian Copyright Act (ItCA) clash with the exhortation to provide for broad access and enjoyment of Italian cultural heritage. The first is the readily apparent absence in the articles of the Act dedicated to copyright exceptions and limitations<sup>72</sup> of a freedom of panorama exception; this absence stems from the Italian legislature opting not to incorporate a legal mechanism to make free the uses of works of architecture and sculptures permanently located in public places.<sup>73</sup> The second copyright provision demonstrating the current Italian reluctance to embrace the open and transformative use of cultural heritage is the transposition of Article 14 CDSMD into Article 32-quater ItCA. Interestingly, located under the title dedicated to the national regulation on the ‘Duration of copyright economic rights over works’, Article 32-quater ItCA sets forth the following:

Upon the expiration of the term of protection of a work of the visual arts, also as defined by Article 2, the material resulting from an act of reproduction of such work shall not be subject to copyright or related rights, unless it constitutes an original work. The provisions on the reproduction of cultural heritage set forth in Legislative Decree No. 42 of 22 January 2004 [ItCCHL] remain unaffected.<sup>74</sup>

The provision transposes Article 14 CDSMD without expanding its objective scope beyond works of visual art and taking the wording for its first declamatory sentence

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<sup>69</sup> Law n 633 of 22 April 1941 (Italian Copyright Act, ItCA).

<sup>70</sup> For an overview of national experiences in this regard, see Adolf Dietz, ‘A Modern Concept for the Right of the Community of Authors (*Domaine Public Payant*)’ UNESCO Copyright Bulletin XXIV n 4 (1990) pp 13–24.

<sup>71</sup> Law no 633 of 22 April 1941 (Italian Copyright Act, ItCA), Arts 175–179, all repealed by Legislative Decree No 669 of 31 December 1996.

<sup>72</sup> In particular, *ibid*, Art 70.

<sup>73</sup> InfoSoc Directive, Art 5(3)(h).

<sup>74</sup> ItCA, Art 32-quater (translation by the authors).

verbatim from the Directive. The main peculiarity of this national transposition of Article 14 CDSMD lies in its second sentence, which adds an indication that the provisions on the reproduction of cultural heritage contained in the ItCCHL remain unaffected. By referencing the national regulation on cultural heritage, the Italian legislature excludes cultural heritage—including Italian historical landmarks and permanent collections in Italian museums and galleries—from the scope of Article 14 CDSMD. Despite being a sentence added at the last minute during the process of national negotiations for the transposition,<sup>75</sup> it casts major doubt on the compatibility of the Italian transposition with EU law—hence the need to identify the boundaries of the possible limitations of Article 14 CDSMD.

## 3. Recent Italian case law on cultural heritage in the public domain

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### 3.1. The disillusionment with a presumed harmony of copyright and cultural heritage

In the years following the transposition of the CDSMD, it became clear that the long-held assumption that Italian copyright law and cultural heritage law could peacefully coexist as autonomous pieces of regulation that would never interfere with each other's aims and scopes was erroneous.<sup>76</sup> Their friction has been undeniably exposed by the most recent Italian case law suggesting that conflicts between copyright and cultural heritage laws exist and urgently deserve closer attention. What the Italian legal controversies reveal is the inadequacy of the established regulatory system to avoid the restrictions suggested by cultural heritage regulation, or by any other exclusive rights or arrangements, trumping copyright rules and principles.

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<sup>75</sup> In the first draft proposal of the transposition decree, the Italian Government did not include the second sentence to Art 32-quater, as confirmed also by the related opinion issued by the Italian Permanent Advisory Committee on Copyright. Both the draft proposal and the opinion are on file with the authors, but no longer available on institutional websites. However, reporting a detailed account of them is Giulia Priora, 'Towards the Italian Implementation of the CDSM Directive' (27 May 2021) *Kluwer Copyright Blog*, <https://copyrightblog.kluweriplaw.com/2021/05/27/towards-the-italian-implementation-of-the-cdsm-directive/>

<sup>76</sup> Enlightening in this sense, I Stamatoudi 'The notions of Intellectual Property and Cultural Heritage: Overlaps and Clashes' in I Stamatoudi (ed), *Research Handbook on Intellectual Property and Cultural Heritage* (Edward Elgar 2022) 8–37.

All the cases herein discussed, which were decided on the merits and in a court of first instance, confronted the issue of the supposed or needed limitations to the qualification of the reproduction of cultural heritage goods as works in the public domain. In none of the cases in question did the judiciary explicitly address the possibility that copyright law could be relevant to cultural heritage. In assessing the applicability of the provisions of the ItCCHL<sup>77</sup> and of the personality rights of name and image under the Italian Civil Code (ItCC),<sup>78</sup> the courts acted as if copyright law and principles did not exist or at least did not matter in the cases in question. Nevertheless, either in the arguments of the defendants or through a systematic interpretation of the relevant norms, what is clear is that not only does copyright matters but it is a crucial piece of the puzzle comprising the pieces of cultural heritage, copyright, data, and much more—and all of this exists in the context of a complex constitutional, supranational, and international setting.

### **3.2. A perilous supplement: The upswing of ‘pseudo-copyright’**

Among other considerations, the recent rulings here under consideration reveal several weak points of the Italian transposition of Article 14 CDSMD and the attempt of the judiciary to impose new forms of exclusivity on cultural heritage that may go even further than copyright restrictions, thus becoming what scholars are describing as ‘pseudo-intellectual property [IP]’<sup>79</sup> or surrogate IP rights.<sup>80</sup> As discussed above, Article 32-quater ItCA, by safeguarding the application of national laws for cultural heritage protection, narrowed the scope of Article 14 CDSMD. As it has been construed, it maintains the application of Italian laws restricting the access, reproduction, and dissemination of cultural heritage images, thus not only conceptually but also explicitly conflicting with the letter and purpose of EU law, which encourages and clearly prescribes the free and unlimited faithful reproduction of works of visual art in the public domain. All the decisions analysed below originated from the contentious use of images reproducing cultural heritage works and are blatant examples of this problematic overriding of EU law, also resulting in

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<sup>77</sup> D.lgs. 22 January 2004, n 42. *Codice dei beni culturali e del paesaggio*, GU 24.02.2004, No. 45. <https://www.normattiva.it/eli/id/2004/02/24/004G0066/CONSOLIDATED>.

<sup>78</sup> L 22 April 1941, n 633. *Protezione del diritto d'autore e di altri diritti connessi al suo esercizio*, GU 16.07.1941, No. 166. <https://www.normattiva.it/eli/id/1941/07/16/041U0633/CONSOLIDATED>.

<sup>79</sup> S Aliprandi, Lo ‘pseudo-copyright’ sui beni culturali: ecco perché è un problema tutto italiano, *Agenda digitale*, 13.07.2022; R Caso, ‘Michelangelo’s *David* and Cultural Heritage Images. The Italian Pseudo-Intellectual Property and the End of Public Domain’, *Kluwer Copyright Blog* (15 June 2023).

<sup>80</sup> A Wallace, ‘Surrogate Intellectual Property Rights in the Cultural Sector’ (2023) *U Ill JL Tech & Pol’y*, who precisely addresses the issue of surrogate rights claimed in heritage in the public domain.



the violation of the principle of the numerous clauses concerning IP rights.<sup>81</sup> As this study endeavours to show, what the Court decisions below have in common is an underlying conservative approach to cultural heritage regulations and a neglect of copyright law implications, as if there were none. Yet, reading of the cases reveals exactly the opposite.

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### 3.2.1. *Gallerie dell'Accademia di Venezia v. Ravensburger (2022)*

We begin with the Court of Venice precautionary order of 24 October 2022. Despite not expressly referring to copyright, the ruling clearly shows that the public domain is incontrovertibly at risk, for at least two key reasons. First, the public domain in Italy is clearly at risk of contraction by a purist judicial application of the ItCCHL, which is becoming a legal basis for justifying specific restrictions on the use of cultural heritage works, including those that will eventually be in the public domain. Second, public domain confronts a new and more ominous hazard arising from the unwarranted expansion of personality rights claimed by institutions holding cultural assets.<sup>82</sup>

The order of the Venice Court concerned the restriction of the use of the image of one of the most renowned and replicated artworks by Leonardo da Vinci, namely the Study of the Proportions of the Human Body in the Manner of Vitruvius [Figure 1], commonly referred to as the Vitruvian Man, which is held on the premises of the public museum Gallerie dell'Accademia in Venice.<sup>83</sup> As the outcome of an anticipatory proceeding initiated by the Gallerie and the Museum of Culture against the German company Ravensburger and its Italian subsidiaries, the case centred on the production and sale of a puzzle with a reproduction of da Vinci's masterpiece on it [Figure 2], which the claimants alleged violated Italian cultural heritage regulations and their

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<sup>81</sup> G Resta, L'immagine dei beni culturali pubblici: una nuova forma di proprietà?, in *Le immagini del patrimonio culturale: un'eredità condivisa?*, (a cura di) D Manacorda, M Modolo, Atti del Convegno, Firenze, 12 giugno 2022), pagg. 73–86; id, *Le immagini dei beni culturali pubblici: una critica al modello proprietario*, in *Dir Informazione e informatica*, 2023.

<sup>82</sup> Tribunale di Venezia, ord, 17 November 2022, Min. cultura e Gallerie dell'Accademia di Venezia c. Ravensburger AG e altri, *Foro it.*, 2023, I, 2257, n R Caso, *Il David, l'Uomo Vitruviano e il diritto all'immagine del bene culturale: verso un'evaporazione del pubblico dominio?* <https://doi.org/10.5281/zenodo.8075077>.

<sup>83</sup> Among the first to comment the disputed order, D De Angelis, B Vezina, 'The Vitruvian Man: A Puzzling Case for the Public Domain' *Communia Association* (2023). <https://communia-association.org/2023/03/01/the-vitruvian-man-a-puzzling-case-for-the-public-domain/>; D De Angelis, 'L'ordinanza cautelare del Tribunale di Venezia del 24.10.2022 in materia di riproduzione digitale di opere pubbliche in pubblico dominio. Il caso "puzzle dell'Uomo Vitruviano – Ravensburger" tra codice dei beni culturali e direttiva europea sul copyright nel mercato unico digitale. *Personaemercato.it*, 2023, fasc. 1.

rights to the name and images of the work, causing severe and irreparable harm to the clamants.<sup>84</sup>

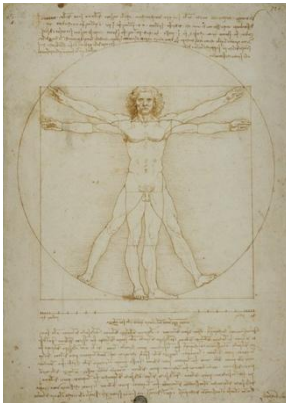


Figure 1

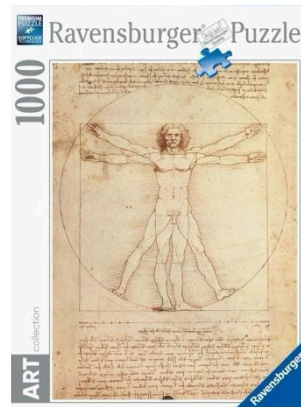


Figure 2

According to the Court, Ravensburger did not obtain permission to use the image of the Vitruvian Man for commercial purposes. Therefore, it violated Articles 107–109 ItCCHL, which grant cultural heritage institutions the authority to consent (or not) to the use of the work by others and impose concession fees and a percentage of the royalties while also overseeing the compatibility of the use with the historical-artistic character of the cultural heritage (i.e. the compatibility of the use with the cultural identity and value of, in this case, the artwork).<sup>85</sup>

Further and rather surprisingly, the Court also concluded that Ravensburger infringed Articles 6, 7, and 10 ItCC concerning the personal rights to a name and image due to the debasement of the image and the designation of the Italian cultural heritage,<sup>86</sup> with this attributed to the prolonged and unsupervised use of the work's reproduction for merchandising. As custodians of the artwork, the Court concluded that the Gallerie is best situated to assess the suitability of the use of the name and image of the

<sup>84</sup> The striking overturning of the ideal balance that the masterpiece embodies in a ruling that is everything but balanced is also concisely discussed in G Dore, 'The puzzled Tie of Copyright, Cultural Heritage and Public Domain in Italian Law: Is the Vitruvian Man Taking on Unbalanced Proportions?' *Kluwer Copyright Blog* (2023) <https://copyrightblog.kluweriplaw.com/2023/04/06/the-puzzled-tie-of-copyright-cultural-heritage-and-public-domain-in-italian-law-is-the-vitruvian-man-taking-on-unbalanced-proportion-s/>.

<sup>85</sup> As explicitly demanded by the Venetian court in the *Vitruvian Man* case, by mechanically applying Art 20 co 1 ItCCHL, which states that 'Cultural property may not be destroyed, damaged or used for purposes not compatible with their historical or artistic character or such as to be detrimental to their preservation'.

<sup>86</sup> However, the court did not seem to have a clear understanding of the application of these personality rights, ie on who or what they are vested in. This problematic aspect of the ruling is, among others, highlighted by A Bartolini, *Quale tutela per il diritto all'immagine dei beni culturali? (riflessioni sui casi dell'Uomo Vitruviano di Leonardo da Vinci e del David di Michelangelo)* (2023) 2 *Aedon* <https://aedon.mulino.it/archivio/2023/2/bartolini.htm#nota21>.

artwork. Accordingly, the Court barred Ravensburger from further utilizing the image of the Vitruvian Man for commercial purposes, in any form or through any medium.

The case is also notable for extending Italian law beyond its borders,<sup>87</sup> thus affirming the competence of the Court of Venice (which a prior order denied) to adjudicate the infringing set of behaviours by the different divisions of the Ravensburger group, which were connected to Italian jurisdiction by the forum damni criterion (i.e. where the museum holding the artwork and claiming damages is located). The case includes an additional peculiarity: In addition to the considerable publicity of the ruling, the court ordered Ravensburger to pay 1,500 euros for each day of delay in complying with the judicial order. Some would argue that this was an excessive and possibly punitive move by the court.

The strident stance of the Venice judicial order unreasonably strengthens national control over Italian Renaissance art. The Court acted as if the Italian state were the one and only authority in charge of the artwork, the sole custodian of the value that it embodies, and thus, the necessary source of authorization for anyone to use images of the artwork. In taking this stance, the court bound itself to a stringent interpretation of the national legal system, denying the global value of cultural heritage and departing from the assumption that the enjoyment and enhancement of cultural heritage is of crucial importance for society. Nothing could be more paternalistic and in conflict with the idea of a human and fundamental right to culture, as enshrined in both international and EU legal frameworks,<sup>88</sup> than the court granting such considerable authority to the cultural institution and the state.

Finally, the alleged irreparable damage caused by Ravensburger's haphazard and unauthorized reproduction of da Vinci's painting could have been avoided by merely paying for the reproduction,<sup>89</sup> which would have prevented the debasement of the artwork's image. What remains unclear is the correlation between such due payment and the contingency of determining the appropriate nature of the use of the image in relation to the cultural value of the artwork.

In Italy, conditioning the commercial use of reproductions of artworks upon both the museum's authorization and the payment of a fee is a frequent practice. The Galleria degli Uffizi in Florence has authorized, only in 2023, hundreds of instances of the use of images and collected a fee for said authorization. Among others, it authorized the

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<sup>87</sup> This cross-border application was recently denied by the Stuttgart court, according to which the itCCHL applies only in Italy. The German court did not take an explicit position on the issue of copyright but stated that it remains open. See Regional Court of Stuttgart, 17th Civil Chamber, 18 March 2024, 17 O 247/22.

<sup>88</sup> See sections above illustrating the binding legal context drawn by, jointly, UDHR, Art 27; ICESCR, Art 15; CFREU Arts 13 and 25.

<sup>89</sup> It is worth emphasizing that the alleged unlawfulness refers to the reproduction itself, alongside also its commercial use, for it was the reproduction in first place that was not authorized, regardless of the way or means it was made.

use of the images for publication in books or other editorial works including art catalogues; for display in webinars; for display in physical, virtual, and immersive exhibitions (and their promotion) at museums and other venues in Italy and overseas; for performances and scenography; and for audio-visual works and apps.<sup>90</sup>

All these uses that were authorized passed the test of not tarnishing or disrespecting the cultural value of the artworks at stake, presumably because of the artistic nature and because they were carried out in creative and cultural environments. Yet, the Galleria degli Uffizi has also allowed the use of several works in its collection, such as Botticelli's *The Birth of Venus*, to promote, inter alia, a medical congress of gynaecological endocrinology<sup>91</sup> and fashion design advertising and commercials<sup>92</sup> without addressing the issue of cultural incompatibility. Equally unproblematic authorizations have been issued for the use of da Vinci's iconic works for the promotion of bottles of wine [Figure 3]<sup>93</sup> and for Piero della Francesca's famous portrait to be printed on the packaging of cheese and ham delicacies [Figure 4].<sup>94</sup> Such authorizations have only rarely explicated the supportive arguments and only exceptionally confirmed that the initiative for which the authorization was sought was in line with the cultural value and institutional mission of the museum or gallery, suggesting that inquiry into motivation is a weak point in the application of the law.



Figure 3



Figure 4

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<sup>90</sup> More detailed information on authorizations are available in the Transparency portal of the institution: <https://trasparenza.uffizi.it/>

<sup>91</sup> <https://isqe2024.isgesociety.com>

<sup>92</sup> <https://www.ferragamo.com/it-it/fw23-advertising>

<sup>93</sup> <https://leonardodavinci.it>

<sup>94</sup> We refer to Piero della Francesca, *Ritratto di Federico da Montefeltro duca di Urbino*, Galleria delle Statue e delle Pitture degli Uffizi, Inv 1890 n 1615, lively portrayed in the catalogue of <https://srlrossi.com>.

### 3.2.2. *Ministry of Culture and Tourism v. Edizioni Condè Nast (2023)*

A strikingly similar approach in legal interpretation, considered evolutionary by some,<sup>95</sup> was followed by another Italian court of first instance, namely the Court of Florence, which on 20 April 2023 ruled on the unauthorized reproduction by lenticular technique of the image of David by Michelangelo [Figure 5] (held on the premises of Gallerie degli Uffizi in Florence) and its association with the portrait of a male model on the cover page of GQ magazine [Figure 6].<sup>96</sup>

In this case, the stylistic expression of the artwork (i.e. the pose of David) was what was visibly copied and used, and this was considered a reproduction of the work (not a mere transformative inspiration) equal to the act of taking a picture of it. The court concluded that such an unlicensed reproduction caused a distortion of the image (the artwork's expression) and of the cultural value of the artwork,<sup>97</sup> which undisputedly is cultural heritage. This unlawful use, according to the court, caused pecuniary and nonpecuniary harm. The court's arguments were based on a strict interpretation of Articles 107–108 ItCCHL, along with Article 9 of the Italian Constitution and, importantly, an interpretation of Article 10 ItCC stretching the application of the personal right to an image, typically held by a real, physical person, to the legal-person custodian of the cultural heritage.

The result was the factual recognition that a party had exclusive control over the commercial use of the image; this bears striking similarity to how copyright usually applies and is exercised.<sup>98</sup> The courts appear to be developing an exclusivity dimension on the basis of the Italian Constitution. This judicial activity suggests, again, a paternalistic and nationalistic view of cultural heritage, with the implications extending to the monetization of cultural heritage images and possibly extending to non-Italian cultural heritage held in Italy—the global significance of cultural heritage hence takes a backseat. Clearly, whether this approach accords with international and supranational legal norms and principles, including those introduced by the CDSMD and its national implementation in Italy, is dubious.

<sup>95</sup> [Girolamo Sciuillo, 'Nuovi paradigmi per la tutela del patrimonio culturale' \(2022\) 3 Aedon 122–123.](#)

<sup>96</sup> [Tribunale di Firenze, sent, 20 April 2023, Min beni e attività culturali e turismo c Soc Edizioni Condè Nast, Foro it, 2023, I, 2257.](#)

<sup>97</sup> [In light of the judgment, it seems irrelevant for the outcome of the application of the law how and by what means the act of reproduction was made. Additionally, issues of potential conflicts arising from lawful acquisitions of a reproduction are not contemplated.](#)

<sup>98</sup> [On pseudo-intellectual property rights, Caso \(2023\), notes how in these rulings Italian courts made a clear conceptual confusion merging private and public dimension, causing the paradoxical situation that the state is otherwise entitled to itself misuse the images of other artworks, as with the use of Botticelli's \*The Birth of Venus\* by the Ministry of Tourism for advertising purposes.](#)



Figure 5



Figure 6

### 3.2.3. *Ministry of Culture v. Studi D'arte Cave Michelangelo Srl et al.* (2023)

Finally, the most recent ruling by the Court of Florence (26 August 2023) concerned the image of Michelangelo's David, but from a slightly different perspective.<sup>99</sup> The controversy arose from the unauthorized reproduction of the iconic sculpture by the Italian company Studi d'Arte Cave Michelangelo [Figure 7] and its allegedly offensive use in the advertising campaign Bespoke, launched by the Italian company Brioni SpA operating in the sector of haute couture. In this case, the David replica was dressed in a formal suit to advertise a garment service under the slogan 'making a master suit for a true icon' [Figure 8]. This promotional content was featured in online publications of videos and photographs of the sculpture-mannequin and was also displayed on t-shirts.



Figure 7



Figure 8

The Italian Ministry of Culture sued both companies, alleging that the use of the image of Michelangelo's David for commercial purposes was abusive<sup>100</sup> and

<sup>99</sup> Tribunale di Firenze, 26 August 2023, *Min Cultura c Studi D'arte Cave Michelangelo Srl e Brioni Spa* (unpublished).

<sup>100</sup> The ruling followed the earlier imposition of precautionary measures by the Court of Florence on 11 April 2022.

demanding pecuniary and nonpecuniary damages. The defendants sought, *contrariis reiectis*, a declaration of a lack of territorial jurisdiction and dismissal of the plaintiffs' claims on the merits as being unfounded in fact and in law; they also sought dismissal due to the vagueness of the petition. Most importantly, the defendants advised the national judge to refer the matter to the Court of Justice of the EU for a preliminary ruling on the compatibility of the Italian norms with EU copyright law. They questioned whether a national law providing limitless exclusive control over the reproduction of cultural heritage, in any form or manner and beyond the term of protection of copyright, was compatible with EU law. Further, the defendants requested that the Court of Florence refer the matter to the Italian Constitutional Court for a review of the constitutional legitimacy of the ItCCHL in regard to its alleged violation of the principles of equality, development of culture and research, and economic freedom, protected, respectively, by Articles 3, 9, 41 of the Italian Constitution. None of these requests were addressed by the Florence court of first instance, which found the interpretation of the norms to be clear and constitutionally sound.

However, the court's ruling is suspect. It aligns with the judicial route of rigidly applying cultural heritage norms and pushes this approach to the utmost limits. Reiterating the assertion of territorial jurisdiction in relation to the *forum commissi delicti*,<sup>101</sup> the Florence court reaffirmed the long-arm applicability of the personality right to an image of cultural heritage,<sup>102</sup> advocating for the joint application of Article 10 ItCC and Articles 107 and 108 ItCCHL. The court determined that the lack of authorization did not allow it to assess the compatibility of the use of the (reproduction of the) artwork with its cultural value and character. Seemingly convinced that the conduct of the two companies involved were in direct violation of the law, the Court went so far as to claim that the images depicting the dressed-up statue completely debased and humiliated the extraordinary symbolism and cultural value of the artwork. Finally, the court held that the lack of consent also deprived the custodian of the artwork from receiving its due fees, thus resulting in clear monetary damages,<sup>103</sup> which are particularly high for images of works that are particularly representative.<sup>104</sup>

The court focused on how a nation is a group of people who share an origin, language, history, and cultural identity and seemingly suggested that the law is ultimately intended to protect the collective cultural identity of Italian citizens from being

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<sup>101</sup> As the place where the damage occurred and the negative effects of the injury, Florence, which is also the place where the cultural good is held, whose image is object of the argued injury, confirming the previous precautionary order of 2 February 2022.

<sup>102</sup> Such right is enshrined in Art 10 Italian Civil Code and here founded in the express provisions of Arts 107 and 108 of the CCHC, allegedly norms of direct implementation of Art 9 of the Italian Constitution.

<sup>103</sup> For the quantification of damages, it orders the referral of the case.

<sup>104</sup> See the table attached to the Ministerial Decree no 161 of 11 April 2023 as amended.

misrepresented. This nationalism trumps all else.<sup>105</sup> The court thus expressly excluded the commercial use of celebrated works of art from advertising as appropriate, fundamentally opining that it made a mockery of Italian cultural heritage.<sup>106</sup>

The Court went much further in its reasoning, seemingly making, ex post and on behalf of the Galleria, a discretionary evaluation regarding the compatibility of the use at stake with the cultural destination and the historical-artistic inestimable value of the artwork. The judge even put himself in the position of Michelangelo and concluded that the use of the replica in the manner of a mannequin undeniably conflicted with the artist's conceptual idea behind the sculpture, which was the outstanding artistic expression of a male nude that was originally conceived to remain as such and, according to the judge's interpretation, should certainly not be dressed up for showing sartorial skills.<sup>107</sup>

The missing consideration of copyright legal provisions in the court's reasoning seems to have been deliberate choice rather than a random oversight. In support of this, the court was very careful in judging the despicable use of the image, as the expression of the artwork, never arguing that the replica had harmed the decency and reputation of the original *David*. Despite never mentioning copyright rules and principles, the judge seemingly contested the legitimacy of the act of making the replica of a masterpiece *per se*. This suggests an idea of reproduction that strikingly echoes its widespread meaning in copyright terms. Moreover, the confident exegesis of the court indisputably extended into the realm of copyright when it mentioned that the marketing gimmick of a new sartorial challenge did not exhibit any degree of creativity or amount the creation of a new work; rather, it was an output that capitalized on the original *David*. In the words of the judge, 'the image and the idea of the sculpture [...] are absolutely recognisable in the sculpture's use in the campaign, so nobody could believe it is a reproduction of a work different from Michelangelo's one'.<sup>108</sup> In this light, the tacit denial by the Italian judge of the highly meaningful role played by copyright regulations and principles in cases like this one is an awkward oversight, to say the least.

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<sup>105</sup> Tribunale di Firenze, 26 August 2023, at page 14.

<sup>106</sup> *Id.*, at page 17.

<sup>107</sup> *Ibid* (emphasis added).

<sup>108</sup> Tribunale di Firenze, 26 August 2023, at page 17 (translation by the authors).



## 4. Beyond the rulings: Normative and social implications of the cases

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### 4.1. Judicial engineering of exclusivity of cultural heritage

These three judicial decisions have attracted significant interest, especially but not exclusively in the academic world. Not only by way of very strictly interpreting the ItCCHL but also by relying on personality rights, the courts expanded the scope of exclusive legal entitlements to new boundaries and refuted any apparent connection to copyright law in the cases at issue. The disputes are currently pending and are expected to lead to the involvement of higher courts, either at the national or supranational level.

Even in the absence of further rulings, one significant element of these decisions was the courts crafting a newly devised mechanism of exclusivity resulting in the exercise of absolute and exclusive control over, especially but not necessarily limited to, the commercial uses of cultural heritage images<sup>109</sup>; this can be appropriately described as a form of pseudo-copyright.

The rulings discussed above, highly self-referential and markedly creative in their reasoning, consistently leave the impression that the legal protection of the public domain is at risk and, instead of proving the non-applicability of copyright rules and principles in the cases at stake, the cases implicitly support the opposite. On the one hand, in the decisions, the ItCCHL was interpreted as the one and only regulatory reference in the matter of reproduction of cultural heritage, which would incontestably justify the restrictions therein imposed. Any other legal norms, from any other relevant domains, such as copyright or public sector information, as discussed further on, were completely ignored. On the other hand, the courts advanced the application of selected norms, intentionally selected and accommodated by way of analogies and the extension of the legal applicability, to unilaterally support the claims of cultural heritage institutions holding the artwork at issue under their custody.

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<sup>109</sup> The only limited instances in which the use is not subject to authorization are those falling under comma 3bis of Art 108 ItCCHL: 'The following activities, carried out on a non-profit basis for the purposes of study, research, free expression of thought or creative expression, promotion of knowledge of cultural heritage, are in any case free 1) the reproduction of cultural goods other than [...] archival goods subject to restrictions on consultation [...] in a way that does not entail any physical contact with the good, nor the exposure of the same to light sources, nor, within cultural institutions, the use of stands or tripods; (2) the dissemination by any means of images of cultural goods, legitimately acquired, in such a way that they cannot be further reproduced for profit [...].'

The choice to rely uniquely on the comfort zone of the sovereignty of the ItCCHL to instead acknowledge the relevance of copyright rules, partially harmonized at the EU level, is consistently pointing at the intention to disregard potential clashes with international and supranational attempts to promote more participatory enjoyment of cultural heritage. This is further corroborated by what appears to be a desperate attempt to bring additional palisades to the questionable political choice of imposing highly centralized and outdated restrictions on the reproduction and use of cultural heritage images, in the hope of achieving the longed-for sustainable development of cultural heritage.<sup>110</sup>

## **4.2. The elephant in the room: Why Article 14 CDSMD should apply**

Article 14 CDSMD is fully and meaningfully relevant to the cases analysed above and any cases with similar factual backgrounds. Its scope and the reason why it was advanced in the first place was to warrant that copyright does not extend to reproductions of visual art in the public domain, unless the resulting output meets the originality threshold and can thus be considered a whole new artwork. As explained above, the fundamental effect of Article 14 is that reproductions of visual artworks in the public domain are free and unlimited not only in terms of access but also use. The choice made by the Italian legislature, in implementing Article 14 CDSMD into Article 32-querter of the ItCA, which expressly derogates ItCCHL provisions, can only confirm the high relevance of copyright law in these scenarios.

It is true that the provision, as transposed in the Italian legal system, does not explicitly affirm a new copyright on visual artworks in the public domain that also qualify as cultural heritage, but the interpretation of the ItCCHL made by the judiciary establishes what, for instance, the Court of Venice plainly refers to as ‘exclusive rights of exploitation’ that distinctly resemble a pseudo- or surrogate copyright. None of the artworks involved in these cases under consideration were likely to be contested as not belonging to the public domain, also those that were never subject to copyright protection.<sup>111</sup> Consequently, copies of such artworks should be free to be accessed and used by anyone for any purpose.

By and large, the legal cases reveal a constriction of the principle of the public domain that is worrisome from any of the possible normative standpoints on the matter. In

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<sup>110</sup> This approach is quite clear in Antonio Leo Tarasco, *Ingegneria culturale e immagini del patrimonio culturale, in Italia e Francia: profili giuridici e reddituali*, in AL Tarasco, R. Miccù (eds), *Il patrimonio culturale e le sue immagini. Diritto, gestione e nuove tecnologie*. Editoriale Scientifica, 2022, 111–148.

<sup>111</sup> This despite Article 14 CDSMD relies on a definition of public domain *stricto sensu* as the category of works on which copyright expired. National legal systems, however, are left free to apply a broader definition of public domain, including also works and subject matter that never enjoyed copyright protection.

light of the sturdy application of the ItCCHL and the tenuous attempt to push the personality rights to an arguable and feeble edge, what the respondents—and many scholars—suggest is manifest: A conflict with Article 14 CDSMD exists and cannot be overlooked.

### 4.3. Are we missing pieces? Public sector information overlaps

Alongside copyright law, public sector information (hereinafter PSI) plays a significant but equally overlooked role in this matter.<sup>112</sup> Largely referred to as open (government) data (i.e. information collected, produced, or paid for by public bodies and made freely available for reuse for any purpose), PSI has been carefully regulated since Directive 2003/98/EC and subsequent revisions, the latest being Directive 2019/1024 (Open Data Directive, ODD). Documents falling under these Directives include cultural data, which should be reusable without any constraints beyond those explicitly stated.<sup>113</sup> This straightforward principle has been reiterated in the ODD, which explicitly addresses digital cultural heritage and thereby affirms the principle that, once digitized, public domain materials should remain freely accessible.

At the same time, it is undisputed that the ODD includes specific derogations for cultural heritage. First, the principle that the reuse of documents shall be free of charge does not apply to cultural institutions, including museums.<sup>114</sup> Second, the digitization of cultural resources also receives special treatment, as the provision of exclusive arrangements does not apply.<sup>115</sup> Finally, the requirement to make high-value datasets available free of charge does not apply to cultural institutions.<sup>116</sup>

However, the ODD highlights the substantial value of digital cultural resources held by such institutions, including their metadata, revealing a huge potential for innovative reuse. The significant impact that the utilization of such valuable resources can have in many sectors, including but not limited to education and tourism, is clearly stated in the preamble of the Directive,<sup>117</sup> acknowledging the possibility of only a limited period

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<sup>112</sup> It is rather clear in P Booth, T Navarrete, and A Ogundipe, 'Museum Open Data Ecosystems: A Comparative Study' (2022) 78 *Journal of Documentation* 761–779; Andrea Wallace and Ellen Euler, 'Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments'.

<sup>113</sup> The principle plainly applies to cultural data produced by non-CHIs, as those produced by CHIs undergo specific derogations.

<sup>114</sup> Art 6(2)(b) ODD.

<sup>115</sup> Art 12(2) ODD.

<sup>116</sup> Art 14(4) ODD. Wallace and Euler highlight how Arts 12 and 14(4) could be precisely regarded as relevant gaps for national implementation to fill. Andrea Wallace and Ellen Euler, 'Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments', Section 5.

<sup>117</sup> Recitals 49 and 65 ODD.

of exclusivity, unspecified otherwise, to recover investments made for digitization purposes.

Despite the apparent clarity of PSI principles and specific provisions, they have often been largely misinterpreted, as evident in the aforementioned rulings. None of the three cases discussed the (not even the plausible) conflict of unfounded interpretations of cultural heritage legal provisions with the PSI framework. This is possibly due to an overly hasty reading of the ODD, focusing only on the statement in its Recital 49 that states that, for the digitization of cultural resources undertaken in public–private partnerships, a limited (generally not exceeding 10 years) period of exclusivity might be necessary to recoup the investment. The Italian courts largely ignored the significance of Recital 65 ODD that, considering the noteworthy amount of valuable PSI resources held by cultural heritage institutions, including digital public domain material, unequivocally promote their innovative reuse.

Rejecting the relevance of PSI in the matter of regulating the use of reproductions of cultural heritage works in the public domain, the Italian courts ignored the considerable informational value that these resources can have.<sup>118</sup>

#### **4.4. Then the absence of coordination demands balanced legal interpretation**

The Italian case law discussed shows the incontrovertible conclusion that the future of cultural heritage is at stake. One of the main causes of trouble lies in the lack of coordination among cultural heritage, copyright, and data legal frameworks.<sup>119</sup> Until the national or supranational legislature intervenes to clarify their relationships and potential conflicts, it should be a responsibility of the Member State, Italy in this specific case, to interpret national norms systematically and holistically, and in compliance with international and EU law.

A systematic and teleologically sound reading of the whole system of norms regulating cultural heritage, which obviously cannot be limited to the national boundaries of the ItCCHL, prompts an interpretation of the existing norms as upholding and promoting access to, enjoyment of, and use of cultural heritage. This is clear and consistent all the way from international law, with particular emphasis on the Faro Convention that Italy signed in 2013 and ratified in 2020,<sup>120</sup> all the way to Article 9 of the Italian Constitution, which advocates for cultural development and

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<sup>118</sup> On this, see A Wallace, ‘Surrogate Intellectual Property Rights in the Cultural Sector’, pp 352 ff.

<sup>119</sup> G Dore, R Caso, P Guarda, and M Arisi (2023) D5.7 Final Policy Recommendations for EU Lawmakers. <https://doi.org/10.5281/zenodo.7544364>.

<sup>120</sup> Faro Convention.

research while safeguarding the nation's natural and cultural heritage, which can be clearly pursued by encouraging the utilization of cultural heritage images.

Legal interpretation must be balanced also in light of the fact that, apart from some works that represent the premier holdings of a cultural heritage institution or state, most works are likely to remain in storage, largely unseen and unavailable and therefore inaccessible and unknown.<sup>121</sup> Imposing limitations on the reproduction and further reuse of cultural heritage that is in the public domain by either advocating proprietary claims or expanding the scope of personality rights can be counterproductive or even legally unsound. The counterproductivity and ineffectiveness underlying this choice is not supported by adequate proof that exclusivity is necessary to the enhancement of culture, running counter to the legal standing that the right to access and participate in cultural life currently holds in international, supranational, and national legal frameworks.<sup>122</sup>

## 5. Incompatibility of the Italian provisions with EU law

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The transposition of Article 14 CDSMD into Italian law was not a surprise to many academics and advocates supporting the public domain<sup>123</sup> and who warned the Italian legislature but were nevertheless largely ignored. The issue is not new, and there have been other rulings demonstrating a similarly conservative approach, but it was only after the draft of the CDSMD that the most dramatic outcomes and glaring

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<sup>121</sup> Limiting its reproduction implies restraining its availability, especially when it is the cultural resource physical medium embodying the work is hardly visible yet highly contended. See the 2019 dispute with Louvre: Tribunale Amministrativo Regionale (TAR) Veneto, 16 October 2019.

<sup>122</sup> For a tentative sketch of the right to culture at the outset of EU evolving copyright law, see G Dore and P Turan, 'When Copyright Meets Digital Cultural Heritage: Picturing an EU Right to Culture in Freedom of Panorama and Reproduction of Public Domain Art' (2024) IIC - International Review of Intellectual Property and Competition Law. <https://link.springer.com/article/10.1007/s40319-023-01408-6>.

<sup>123</sup> 'The Italian Transposition of the CDSM Directive: A Missed Opportunity?' *Communia* (2021) <https://communia-association.org/2021/04/28/the-italian-transposition-of-cdsm-a-missed-chance/>; Creative Commons Italian Chapter (2021). Appello comune agli Stati dell'Unione europea e agli istituti culturali per la liberalizzazione dell'uso delle immagini del patrimonio cultura e in pubblico dominio. <https://creativecommons.it/chapterIT/index.php/1249/>.

collisions with EU law were revealed.<sup>124</sup> The case law evolutions on the matter are not limited to the three rulings presented in detail in this analysis. Controversies surrounding the unauthorized use of the images of artworks in Italian cultural institutions for marketing purposes pre-date the most recent cases—namely an older ruling by the Tribunale of Florence on the use of *David* in 2017<sup>125</sup> and one concerning the unauthorized use of the image of the Teatro Massimo in Palermo in an advertisement<sup>126</sup> are among the most cited ones. It is thus a ripe time to consider, in light of the entirety of legal developments in the country, the main arguments signalling the persistent violation of EU law by the Italian legal system.

## 5.1. Overly restrictive transposition of Article 14 CDSMD and failure to meet obligation of result

The Italian transposition of Article 14 CDSMD into Article 32-quater ItCA demonstrated incompatibility with EU law, from several different perspectives. This is highly relevant because of the priority afforded EU law in the case of conflict with national laws and the principle of the direct effect of EU law in cases of ineffective transposition of a Directive by a Member State.<sup>127</sup>

Member States can depart from the wording of Directives. However, they are bound by an obligation of result, meaning that the national way of transposing a provision needs to fully enable the achievement of its specific objectives.<sup>128</sup> The wording adopted by the Italian legislature in Article 32-quater ItCA resonates and partially accords with Article 14 CDSMD. However, the twist introduced in the second sentence, which is not rooted in the wording of the Directive, has a significant impact on the legal effect of its application.

<sup>124</sup> Cristiana Sappa, 'Hosting the Public Domain Into a Minefield: The Resistance to Art. 14 of the DSM Directive and to the Related Rules That Transpose It Into National Law' (2022) 17 *Journal of Intellectual Property Law & Practice* 924–939.

<sup>125</sup> Tribunale di Firenze, decided on October 25–26, 2017; Tribunale di Firenze, decided on April 11, 2022.

<sup>126</sup> Tribunale di Palermo, decided on September 15, 2017 and published on September 21, 2017.

<sup>127</sup> See, among others, Case C-14/83 *Von Colson v Land Nordrhein-Westfalen* (1984) upholding that national legislation must be interpreted in light of Directives, see para 15 ('Although that provision [Art 288 TFEU] leaves member states free to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation, imposed on all the member states to which the directive is addressed, to adopt, within the framework of their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues').

<sup>128</sup> Treaty on the Functioning of the European Union, Art 288.

First of all, from the analysis of the wording of Article 14 CDSMD and Article 32-quater, it emerges that the former does not allow Member States to exclude certain types of works from its objective scope of application, which is already limited to works of visual art. Nothing in the Recitals and further explanatory documentation refers to such a possibility. On the contrary, the CDSMD is a Directive of minimum harmonization, which obliges Member States to transpose Article 14 and permits them to expand its scope of protection, not shrink it.

Second, the teleological interpretation of Article 14 CDSMD and Article 32-quater ItCA do not seem to accord. In light of Recital 53 CDSMD, the underlying rationale of Article 14 can be summarized in two key normative statements: First, works that belong to the public domain shall remain in the public domain when digitized or otherwise copied in a faithful way. Second, public domain works shall be widely accessible and enjoyable by society. The legal scholarship solidly supports this teleological interpretation, without raising any uncertainties or controversial aspects against it. As Dusollier reported after compiling the leading doctrinal interpretations of the CDSMD, Article 14 CDSMD ‘grants a positive status to works belonging to the public domain, by prohibiting any regaining of exclusivity therein, thereby enhancing public access to such cultural heritage’.<sup>129</sup> In the same vein, the European Copyright Society unanimously interpreted the provision to suggest a compliant and effective transposition ‘[would] ensure that the “access to and promotion of culture, and the access to cultural heritage” (...) is not unduly undermined’ and guarantee that ‘the freedom provided (...) cannot be eliminated by reference to a property right unlimited in time in the object that has faithfully been reproduced’.<sup>130</sup>

However, the rationale reflected in the second sentence of Article 32-quater ItCA presents points of discontinuity with the twofold objective of Article 14 CDSMD. First, the aim to ensure that works belonging to the public domain remain in the public domain when digitized or are otherwise faithfully copied encounters a significant degree of legal uncertainty, if not a proper *de jure* limitation, in the exclusion of works in the public domain that qualify as cultural or historical assets. Article 32-quater ItCA not only preserves their cultural heritage status but also puts an end to their status as public domain works in a copyright sense, requiring an authorization or remuneration for their reproduction and follow-on uses.

Third, the Italian transposition of Article 14 CDSMD carries the potential to hollow out the provision from its entire objective scope. This is because of the extremely broad definition of cultural heritage applicable in the country. The ItCCHL, by including in the definition of cultural heritage an open-ended list of works and resources typically qualifying as copyright subject matter and by allowing any potential work or asset

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<sup>129</sup> Séverine Dusollier, ‘The 2019 Directive on Copyright in the Digital Single Market: Some Progress, A Few Bad Choices, and An Overall Failed Ambition’ (2020) 57 *Common Market Law Review* 998 (emphasis added).

<sup>130</sup> European Copyright Society, ‘Comment on the Implementation of Art 14 of the Directive EU/2019/790 on Copyright in the Digital Single Market’ (26 April 2020) 5.

embedding enough cultural significance to be awarded, upon request, an ad hoc declaration granting cultural heritage status, Article 32-quater ItCA excludes a massive amount of public domain works of visual art. In other words, Article 14 CDSMD may have an extremely narrow scope of application in Italy, as the vast majority of public domain artworks for which the demand exists for reproduction and use quality or could qualify, upon request, as cultural heritage.

Fourth and finally, the objective of Article 14 CDSMD for the wider cross-border dissemination and enjoyment of culture by the whole of EU society is seriously jeopardized by the legal fragmentation created by the Italian transposition. The legal systems of the other EU Member States do not bilaterally or multilaterally recognize the special status of Italian cultural heritage.<sup>131</sup> This is highly relevant considering the possibility of a copy being lawfully made by, for instance, a tourist, of a public domain work that qualifies as cultural heritage in Italy but not in other Member States. Such a copy could be freely made available and used across the EU in virtue of the (full) application of Article 14 CDSMD, except in the Italian territory due to cultural heritage legal limitations. This amounts to a significant distortion of the promotion of cross-border uses that Article 14 CDSMD aims to achieve in the digital era.

Supposedly to avoid these mismatches, the vast majority of Member States understood and transposed Article 14 CDSMD without explicitly introducing such an exemption for cultural heritage.<sup>132</sup> However, Italy is not completely an isolated case. The Greek legislature transposed the CDSMD by copying verbatim the wording of Article 14,<sup>133</sup> but still has a similar limitation to its scope due to the untouched national Law on Cultural Heritage.<sup>134</sup> This corroborates the need to inquire whether cultural heritage might legitimately be considered a special category of public domain works in light of Article 14 CDSMD.

This leads to the embrace of an *a contrario* line of legal reasoning: If Article 14 CDSMD aimed at 'unlocking' and incentivizing the free access and use of public domain works of visual art but allowed, or implicitly aimed, to exclude the artworks belonging to the collections of cultural institutions and historical monuments located

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<sup>131</sup> Nor works of public domain located in third countries are exempted from potentially qualify as Italian cultural heritage, as, for instance, artworks located in foreign countries for specific exhibitions or official ceremonies, which had been permitted to exit the country for a limited time. On the point see ItCCHL, Art 10 not excluding the potential qualification of cultural good to works located abroad, and Arts 66 and 67 regulating the temporary exit of cultural goods from the national territory.

<sup>132</sup> For an overview of the national transpositions, see Andrea Wallace, 'Article 14 and the Public Domain: The State of Play Across Europe' *Europeana* (1 February 2024) <https://pro.europeana.eu/post/article-14-and-the-public-domain-the-state-of-play-across-europe>.

<sup>133</sup> Art 31A Greek Copyright Act, as introduced by Legislative Act No 4996/2022 of 24 November 2022.

<sup>134</sup> Law on the Protection of Antiquities and Cultural Heritage No 3028/02 of 2002.



in the national territory, which works of visual art would the provision incentivize EU citizens and institutions to digitize and enjoy? This apagogic interpretation of Article 32-quater ItCA reveals an important element, namely the critical overlap between the categories of public domain works and cultural heritage goods, which, from a literal perspective, might be overseen, but when embracing a teleological understanding emerges as one of the crucial points of ineffectiveness of the Italian transposition: If Article 14 CDSMD essentially aims to promote culture, those public domain works featuring that cultural value should be the first to be enhanced for their accessibility, digitization, and free use.

## **5.2. Misjudgment of cultural heritage's systematic ties with other legal domains**

The incompatibility of Italy's national provisions with EU law regulating the reproduction of cultural heritage, predicted by the very constrained literal, teleological, and apagogic interpretations behind the transposition of Article 14 CDSMD, have become reality, and shortly, they will be reinforced by the case law. This raises two further arguments of systematic and contextual legal interpretation, both supporting the incompatibility of the current Italian legal provisions with EU law.

In fact, the statement in the national implementation of the provision that the (specific) provisions on the reproduction of cultural goods remain unaffected is understandably not enough to denote incompatibility. It is precisely the judicial interpretation of Italian law that signals the overbearing conflict with EU norms, on at least three grounds.

The first problem is the misconstrued relationship of the cultural heritage law with other legal domains, principally copyright law. The legislature has limited itself to providing cross-references between cultural heritage and copyright laws (mirroring Article 32-quater ItCA, Article 107 ItCCHL affirms no prejudice to copyright provisions), doing nothing to clarify the ambiguity concerning the hierarchy of the norms nor providing any criteria to indicate priority in the case of conflict. Within this framework, the judiciary has nonetheless taken it for granted that the two legal corpora are unconditionally sovereign and rejected any connection between the two. Even when expressly challenged in this regard by the parties to the proceeding, who asked for a referral to the Court of Justice, the judge found such a referral unnecessary. The Italian government confirmed this line of interpretation when it issued, through the Ministry of Culture, a secondary act to implement Article 108 ItCCHL (d.m.161/2023) and yet more stringently regulate the use of reproductions of culture heritage, again without in any way contemplating the possible conflict with European copyright law even with respect to the specific category of visual works of art in the public domain. Likewise persuaded of the irrelevance of copyright, some scholars

maintain the same approach.<sup>135</sup> Given these premises, considering cultural heritage law as unconditionally overarching and denying any needs for coordination (i.e. extending its restrictions on reproductions of works of visual art in the public domain) is illogical and unreasonable, especially if it leads to the annihilation of the scopes pursued by the Article 14 CDSMD and the treacherous disruption of core copyright principles as previously discussed.

Second, insisting on the nonapplicability or triviality of the ODD, especially to the point where the principle is upheld that public domain digitized materials should remain as such, contrasts with the literal and purposive reading of its provision. There is a largely shared assumption that it is sufficient to flag in Article 6 ODD that the general principle providing for the free-of-charge reuse of documents does not apply to cultural heritage institutions such as museums (holding the cultural heritage), which may also charge above the marginal costs incurred for the reproduction, provision, and dissemination of documents. However, such construal tends to ignore that there is not an affirmative obligation to charge (nor to make profits); rather, this is an option that is indeed to be interpreted in line with specific criteria. One of them is highlighted in Recital 38, which states that the ability to charge above marginal cost is functional and not meant to hinder their normal operations; additionally, the total income from supplying and allowing the reuse of documents over the appropriate accounting period should not exceed the cost of collection, production, reproduction, dissemination, preservation, and rights clearance, together with a reasonable return on investment. These specifications, together with the principles scattered in the Directive, were transposed into national law through Legislative Decree 200/2021, and they should all be adequately considered to avoid an interpretation of national provisions that is not compatible with EU law.

Third, interpreting the Italian cultural heritage provisions in such a manner that they are understood to nearly prohibit any unauthorized reproduction of cultural heritage, particularly for commercial use, regrettably juxtaposes the systematic and purposive reasoning that the courts have adopted. Further at issue is the categorical nationalistic slant that features the current judicial construal of Articles 106–108 ItCCHL. This approach disregards the multilayered nature of cultural heritage regulation and the constrained position of national laws in a broader supranational framework. International conventions protect heritage as the common and irreplaceable property of humankind, to be protected from harms and diminishment but also to be enhanced and inclusively available. However, it is indisputable that its unique public dimension goes beyond the national boundaries of the state where the heritage pieces are held and that the mission of cultural heritage institutions is not limited to preservation but extends to supporting the broadest possible access to, enjoyment, and use of cultural materials by all. A strict and unreserved application of ItCCHL is therefore in direct

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<sup>135</sup> Only to mention one, Girolamo Sciuillo, 'Nuovi paradigmi per la tutela del patrimonio culturale' (2022) 3 *Aedon* 122–123; id, 'Il dm 161 del 2023: un'analisi giuridica' (2023) 2 *Aedon* 244–252.

opposition to the principle of promoting the most robust potential reuse of cultural heritage, which is also echoed in the EU policy for culture that emphasizes how the participatory breadth of its governance is aimed to promote human development, cultural diversity, creative dialogue, and quality of life.<sup>136</sup> A clear example of this is to be traced to the Faro Convention, which put forward the concepts of heritage communities and a common social responsibility that refuses exclusive rights to protect the public interest and likewise promotes engagement with heritage for the benefit of society.

Finally, in addition to these reasons for the incompatibility with EU law, it is worth considering that the interpretation of cultural heritage norms that currently dominates the case law lacks inner coherence even within the whole domestic framework. It distorts the meaning and scope of national constitutional norms such as Article 9 Italian Constitution, from which it derives the absolute need to control at any cost the use of reproductions of cultural heritage. In large part, it manipulates the principle that the state and, with different legislative powers, regional and municipal entities must protect and preserve heritage for the purposes of public enjoyment and its enhancement and to preserve national memory and development of culture. A rigid application of ItCCHL provisions that recognizes the economic value of culture only for the benefit of the state (*rectius*, the nation) discourages the participation of enterprises in the processes of profitable development, cultural entrepreneurship, and tourism. Ministerial decree 161/2023, which does not even align with the earlier national plan for digitization,<sup>137</sup> fits into this peculiar situation by forcing the hand of cultural heritage institutions to monetize cultural heritage without giving any careful thought to the actual needs and costs that a progressive increase in authorization or concession operations would entail.<sup>138</sup> This can only worsen the difficult apprehension of the demands of protection, enjoyment, and enhancement, also featuring cultural heritage management. Without a change of direction, the current misconstruction of cultural heritage regulations will not only be irreconcilable with EU law but also with its future self.

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<sup>136</sup> These objectives are already pursued by EU policy initiatives such as the Common European Data Spaces (<https://digital-strategy.ec.europa.eu/en/policies/data-spaces>) and The Cultural Heritage Cloud ([https://research-and-innovation.ec.europa.eu/research-area/social-sciences-and-humanities/cultural-heritage-and-cultural-and-creative-industries-ccis/cultural-heritage-cloud\\_en](https://research-and-innovation.ec.europa.eu/research-area/social-sciences-and-humanities/cultural-heritage-and-cultural-and-creative-industries-ccis/cultural-heritage-cloud_en)).

<sup>137</sup> 'National Plan for the Digitization of the Cultural Heritage, Version 1.0', June 2022 <https://docs.italia.it/italia/icdp/icdp-pnd-docs/it/v1.0-giugno-2022/index.html>, referring in the description of its objectives to the 'traditional conservative polycentrism' epitomizing Italian cultural protection and management, ie a choral market effort by public and private entities towards the conservation of national cultural heritage.

<sup>138</sup> It is indeed worth clarifying that exclusive control is not necessary or instrumental to seek revenue streams from cultural heritage and that freeing commercialization does not impede cultural heritage institutions or the state itself to seek economic value from cultural resources.

## 6. Conclusions: A frustrated balance of fundamental rights

The Italian scenario confirms that substantial tension exists between copyright and cultural heritage legal frameworks and are highly problematic in terms of their legal consequences. To address all the elements of the legal frameworks herein sketched, clearcut regulatory clarifications and an overall balanced systematic interpretation of the norms are needed. In the absence of such explicit regulatory guidance in national or supranational legislation concerning the relationships and potential conflicts between the cultural heritage, copyright, and data legal domains, it falls upon EU Member States to interpret existing laws reasonably and systematically, always in alignment with international and EU legal principles.

This study, focused specifically on the compliance of the relevant Italian legal provisions with EU law obligations, revealed a twofold problem of the imbalanced protection of rights and interests at stake, in particular between the rights and interests of the Italian state and its cultural heritage institutions on the one side and those of the Italian and EU citizens on the other. Such imbalance emerges, in a negative way, from disregarding copyright rules and principles in the application of the ItCCHL, as the case law strongly demonstrates; however, it also emerges, in a positive manner, in the potential joint application of the copyright and cultural heritage legal systems as currently envisioned and drafted.

The need for a solid balance of rights and interests comes from international and EU legal obligations. Italy's commitment to international covenants validates its dedication to preserving and making available, usable, and enjoyable cultural heritage as a value of humankind. As explored in the initial part of the study, the UDHR, ICESCR, and the Faro Convention strongly and consistently impose the need for national efforts towards access and inclusive participation to cultural development worldwide. The Charter of Fundamental Rights of the EU and the evolving EU secondary legislation further and solidly underscore this commitment, by way of a specific legal status that cultural rights occupy in EU law, both *stricto sensu* as a constitutional safeguard of artistic freedom and freedom of expression (Articles 11 and 13 CFREU) and, importantly, as the legal basis of cultural participation, cultural diversity, and cultural inclusivity in society (Articles 14, 22, 25, 26 CFREU). The vital human and fundamental rights dimension of the dilemma between holding back and making available public domain cultural heritage artworks makes the need for a balanced national regulatory and judicial interpretative approach ever more critical.

Ideally, forthcoming judicial interpretations would more explicitly engage with cultural heritage, copyright, and data regulations when deciding on the merits of the use of public domain cultural heritage. The balance of rights and interests in the relevant

Italian legal provisions, including Article 32-quater of the ItCA, faces very significant obstacles. Besides unveiling an overly broad leeway, the provision lets the Italian state, its cultural institutions, and its judges arbitrarily determine the scope and impact of cultural heritage regulation vis-à-vis other equally relevant legal provisions and domains. This study revealed that the newly introduced provision fails to effectively comply with and meet the objectives of Article 14 CDSMD by shrinking its scope of application below the required minimum of harmonization, excluding from the category of public domain works those belonging to the cluster of cultural heritage. Such a derogation is not explicitly addressed in the CDSM Directive. Moreover, cultural works represent not a minor subcategory but the kernel of the public domain that Article 14 CDSMD aims to unlock and disseminate widely across the EU Member States. Therefore, excluding cultural heritage from the scope of its application leads to a breach of the principle of effective transposition and a teleological mismatch between the two provisions.

Restricting the reproduction of public domain cultural heritage and strictly limiting the uses thereof has far-reaching societal implications that evidently involve infringement of international and EU laws in practice. A conservative legal approach clearly and meaningfully hinders access to such works, their creative, educational, and entrepreneurial reuses, the building of new cultural expressions, and the freedom of each community and individual to honour and build on traditional cultural traits of their own identity by engaging with cultural heritage and contributing to the future and enrichment of collective cultural experiences.

As a final remark, preservation and enhancement of cultural heritage in the digital age require a balanced approach that, while respecting IP including copyright, prioritizes the broader public interest in accessing, using, and enjoying cultural works. Furthermore, the absence of explicit EU competence over cultural heritage should not necessarily justify inaction, nor be the basis for deeming the regulation of cultural heritage laws not a EU concern. Neither should we refrain from exploring possible amendments of the relevant treaties to grant the EU additional competences or powers in this pivotal field. In the meantime, it is imperative—for the legislature, courts, and scholars – to resist the temptation to make culture a matter of states pursuing a nostalgic rhetoric of nationalism or even the simple but equally dreadful mission to fill the state coffers. It is equally imperative for legal interpreters to construe and apply provisions consistently and fairly, in a manner that fosters cultural exchange and innovation and upholds the fundamental rights to culture for all.

## About COMMUNIA

The COMMUNIA association advocates for policies that expand the Public Domain and increase access to and reuse of culture and knowledge. It acts as a network of like-minded activists, researchers and practitioners based in Europe and the United States who seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

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