

# The right to use Public Domain heritage

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## Background

The right of access to, and enjoyment of, culture is a fundamental principle that is enshrined in legal texts at national, EU and UN levels. Among others, this principle informs copyright legislation, notably by establishing the need for limitations to the scope of exclusive rights. In extension, it buttresses the special status of the Public Domain as a body of cultural heritage that ought to remain freely accessible for all to enjoy and to enable the creation of new cultural expressions.

A number of Member States, however, have laws in place that conflict with, and sometimes even contradict, this principle. The cultural heritage laws of Bulgaria, France, Greece, Italy, Portugal and Slovenia require permission and the payment of a fee for specific uses of reproductions of heritage in national collections – even if the work in question is in the Public Domain.

These laws were originally well-intended. In Italy, for instance, the stated principle behind the legislation was the “protection and enhancement” of cultural heritage and

to “promote the development of culture.”<sup>1</sup> It is also understood that measures that are directed at protecting the physical integrity of the cultural heritage found in a state territory, including rules that protect sites and collections against degradation, destruction or illicit trafficking, are highly warranted. However, by now, these rules have taken the shape of a quasi-copyright, the aim of which is, in Italy for instance, “to ensure an adequate economic valorisation of the national cultural heritage.”<sup>2</sup>

Such rules are problematic for a host of reasons. The introduction of an additional layer of exclusivity over materials that are out of copyright or have never been protected by copyright hollows out the Public Domain and conflicts with the right to access and enjoy culture, freedom of expression, and artistic freedom. It is also incompatible with copyright legislation and, in particular, contradicts Article 14 of the [Directive on Copyright and Related Rights in the Digital Single Market](#) (CDSM Directive), which stipulates that non-original reproductions of Public Domain works shall not be subject to copyright or related rights.

In this policy paper, we take a closer look at the cultural heritage laws of those Member States that impose restrictions on the use of reproductions of Public Domain works. We argue that copyright is the legal framework that regulates the dissemination of reproductions of works of cultural heritage in the EU, and we propose to introduce legislation to prevent Member States from restricting their reuse through other normative frameworks.

## A survey of cultural heritage laws in the EU

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The cultural heritage laws of a number of Member States curtail the Public Domain by creating an additional layer of protection for works that are out of copyright or have never been under copyright. Under these laws, faithful digital reproductions of works of cultural heritage — including works in the Public Domain — cannot be used without authorisation and usually require the payment of a fee for commercial purposes. In other words, legal or natural persons who would like to use these Public Domain works for commercial or other purposes specified in the respective law, need to obtain something that is eerily reminiscent of a licence. While these rules are not instruments of copyright law, they are functionally so similar to copyright that they can be characterised as a form of pseudo copyright, creating a conflict with copyright law.

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<sup>1</sup> Article 1(2) of [Legislative Decree 42 of 22 January 2004 \(Italian Cultural Heritage Code\)](#).

<sup>2</sup> [Ministerial Decree 161 of 11 April 2023](#).

Over the past couple of years, the Italian Cultural Heritage Code has gained particular notoriety when it comes to defending the Public Domain. While Italy's cultural heritage law is far from the only one in Europe that imposes limits on the use of Public Domain works, it is currently the only one — to our knowledge — that has led to litigation. The Italian Ministry of Culture, together with cultural heritage institutions, has sued a number of companies for failing to obtain authorisation and pay a fee, even after the transposition of Article 14 into Italian law. In fact, the Italian implementation of Article 14 includes a carve-out for the Cultural Heritage Code, which signifies that the Italian lawmaker is aware of the conflict of laws, but has decided to resolve the issue in favour of its cultural heritage law and against the clear intent of Article 14.

The relevant provisions governing uses of cultural heritage works and establishing a framework for the payment of fees is found in Section II of the Italian Cultural Heritage Code.<sup>3</sup> To clarify the practical application of those provisions, the Italian Ministry of Culture passed a ministerial decree, imposing minimum fees for certain uses and requiring prior verification of the compatibility of the intended use with the historical and artistic character of the work of cultural heritage in question.<sup>4</sup> Finally, when amending its copyright law to implement the CDSM Directive, Italy appended the language of Article 14 by stating that “[t]he provisions on the reproduction of cultural heritage contained in [the Cultural Heritage Code] remain unaffected.”<sup>5</sup>

Similar provisions exist in Greece. Here, authorisation and the payment of a fee are required for all commercial purposes. In addition, only the Ministry of Culture and Sports and the Hellenic Organization of Cultural Resources Development have “the right to produce exact copies of monuments,” which includes “immovable monuments belonging to the Greek State [...] as well as movable monuments belonging to the Greek State and located in museums or collections of the Ministry of Culture and Sports or in the legal possession of natural or legal persons.”<sup>6</sup> Mirroring the Italian implementation of the CDSM Directive, the Greek Copyright Act also expressly safeguards the provisions of its heritage law when implementing Article 14.<sup>7</sup>

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<sup>3</sup> For an in-depth analysis of the Italian cultural heritage law, see Giulia Dore and Giulia Priora's independent expert opinion commissioned and published by COMMUNIA.

<sup>4</sup> All uses, also for non-commercial purposes, require previous authorisation (“the concession for the use and reproduction of cultural goods shall in any case be subject to prior verification of the compatibility of the intended use of the reproduction with the historical-artistic character of the same cultural goods”) according to Article 2(2) of Ministerial Decree 161 of 11 April 2023.

<sup>5</sup> Article 32-*quarter* of the Italian Copyright Act.

<sup>6</sup> Article 46 (4-5) of Law 4858/2021 on the Protection of Antiquities And Cultural Heritage In General.

<sup>7</sup> See Article 31A (2) of the Greek Copyright Act, which implements Article 14 of the DSM Directive: “This shall apply without prejudice to the provisions of Law 4858/2021.”

The Slovenian Cultural Heritage Protection Act imposes limitations on uses of heritage that is protected as national monuments.<sup>8</sup> Article 44 prohibits “the use of the image and name of a monument without the consent of the owner” for commercial purposes, stating that “[t]he owner may also determine the amount of compensation for use by consent.” Under this law, a “cultural monument” is defined as a heritage asset that has been declared a monument or is listed in the inventory book of an authorised museum and encompasses all kinds of cultural heritage.<sup>9</sup>

Portugal restricts the use of images of works in the collections of museums, monuments and other buildings managed by the public business enterprise Museums and Monuments of Portugal. These limitations were introduced by means of an administrative order, and apply both to institutional images and user-captured images (e.g. photographs and film footage).<sup>10</sup> Under this regulation, “any use of images requires prior authorisation from the relevant department” and “under no circumstances may the images be copied or passed on to third parties,” subject however to a private use exception.<sup>11</sup> The administrative order details the fees that may be applied for the use of images. Yet it is not clear what the sanctions are if the user fails to request prior authorization, as the order refers back to the Portuguese Copyright Code in the event of an infringement.<sup>12</sup>

The French Cultural Heritage Code contains a provision that prohibits commercial uses of reproductions of buildings that are defined as national monuments. Express authorisation is required and may or may not be contingent on the payment of a fee.<sup>13</sup>

Finally, Bulgaria is an outlier in that its Cultural Heritage Law refers to copyright explicitly. Here, “[c]opies, replicas and objects with a commercial purpose can be made only with the consent of the owner of an immovable cultural good [...] and for cultural goods in the collections of museums, libraries and archives by the director of the relevant institution.” Remunerative agreements shall be negotiated “in compliance with the requirements of the Law on Copyright and Related Rights.”<sup>14</sup> In addition, reproductions of recently discovered archeological artefacts must be “carried out in compliance with the requirements of the Law on Copyright and Related Rights.”<sup>15</sup>

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<sup>8</sup> [Cultural Heritage Protection \(ZVKD-1\)](#).

<sup>9</sup> For an overview of the varying national implementations of Article 14 across the EU, see COMMUNIA’s [Post-DSM Copyright Report](#) as well as the [Europeana Knowledge Base](#).

<sup>10</sup> [Regulation on the Use of Images of Museums, Monuments and other Properties allocated to the Directorate-General for Cultural Heritage \(Administrative Order 10946/2014\)](#).

<sup>11</sup> See Sections 3.1, 3.2 and 15.2 of Administrative Order 10946/2014.

<sup>12</sup> See Section 3.7 of Administrative Order 10946/2014: “Any use of images other than that provided for in these Regulations constitutes a breach of the applicable legislation, namely the Code of Copyright and Related Rights, and is liable to civil action [...]”

<sup>13</sup> [Article L621-42 of the Cultural Heritage Code](#).

<sup>14</sup> [Article 177 \(1\) of the Cultural Heritage Law \(as amended in 2019\)](#).

<sup>15</sup> [Article 179 \(4\) of the Cultural Heritage Law \(as amended in 2019\)](#).

While all of these laws contain similar provisions, Italy's Cultural Heritage Code has attracted public scrutiny because of a recent campaign to enforce the law before the courts. The Italian Ministry of Culture and cultural heritage institutions have brought lawsuits against a number of companies for their alleged unauthorised use of Public Domain works. Defendants include American mass media publisher Condé Nast (for using Michelangelo's David on a magazine cover of GQ Italia), French fashion label Jean Paul Gaultier (for using Botticelli's The Birth of Venus in a clothing collection) and German toy maker Ravensburger (for using Leonardo Da Vinci's Vitruvian Man on a jigsaw puzzle).<sup>16</sup>

The Ravensburger case is particularly interesting. The Gallerie dell'Accademia di Venezia sued the Italian branch of the German company Ravensburger for the use of Leonardo Da Vinci's Vitruvian Man. The Gallerie claimed that Ravensburger's use of the work violated Articles 107-109 of the Italian Cultural Heritage Code regarding the exploitation of the work and Articles 6, 7 and 10 of the Italian Civil Code concerning the "personality rights" of the work, alleging "disfigurement" through the unsupervised use of the reproduction on merchandise.

What is notable about the Ravensburger case is that the Italian Ministry of Culture and the Gallerie are seeking compensation for sales not only on the territory of Italy but also in other EU Member States. Ravensburger took the case to the regional court of Stuttgart (Germany) to determine the inapplicability of the Italian Cultural Heritage Code to sales outside of Italy. While the court explicitly disregarded the question of the compatibility of the Italian law with Article 14 of the CDSM Directive, the court sided with Ravensburger that the Italian Cultural Heritage Code is subject to the principle of territoriality and cannot be enforced outside of its jurisdiction.

## Tipping the balance

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In the EU, and most parts of the world for that matter, copyright is *the* legal framework that governs the conditions for access and use of creative expressions, including their reproduction. The introduction of another regulatory framework for access and dissemination, which mimics the restrictions that are inherent to the copyright system, creates a never-ending exclusivity that contradicts the internal logic of intellectual property protection.

Copyright is predicated on the idea that, once a work's term of protection expires, it enters into the Public Domain and becomes free for all to access and use. Granting an exclusive set of rights to creators is seen as a positive tradeoff considering the overall societal benefits of adding more creative works to a general shared body of cultural

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<sup>16</sup> Dore and Priora cover these cases extensively in their independent expert opinion (p. 23ff).

expressions. The temporal limitation (the fact that protection is limited in time and that rights eventually expire) is the essential counterpart to the granting of a legal monopoly. Continuing to restrict the exploitation by others through an additional layer of protection, once the creator's monopoly has expired, disrupts the delicate balance achieved in copyright and curtails its inherent purpose to foster the dissemination of knowledge and culture, including those embodied in cultural heritage.

Attributing perpetual exclusivity to our shared cultural heritage also has serious consequences for the enjoyment of fundamental rights, particularly for the right of access to, and enjoyment of, culture. This right is grounded on the human right obligation enshrined in Article 27(1) of the Universal Declaration of Human Rights (1948) and Article 15 of the UN Covenant on Economic, Social and Cultural Rights (1966), and it is predicated on the idea that our shared cultural heritage is a public good.<sup>17</sup> It is also reflected in the EU Charter of Fundamental Rights, particularly in Article 13 on the freedom of the arts, but also in Article 11 (freedom of expression and information). It is also a cornerstone of the Council of Europe's Faro Convention, which recognizes the value of cultural heritage for society.<sup>18</sup>

The provisions in the cultural heritage laws discussed in this paper are built on the idea that not only the physical dimension of cultural heritage needs protection, but that this protection should extend to the ideational and personality dimensions of a work. There is a fear that certain uses of cultural heritage might break decorum, which is reflected in the granting of personality rights to cultural heritage works by the Italian courts. Not only is there little evidence that suggests that "inappropriate uses" are a problem,<sup>19</sup> this notion is also incompatible with the idea of an open society where individuals are able to enjoy freedom of expression and artistic freedom, drawing on cultural heritage in any way that they see fit. Making judgement calls on what is appropriate or not in such cases borders on censorship.

Not only conflicts this view with fundamental rights, it is also counterproductive to discourage certain uses of cultural heritage works. Works like Botticelli's Birth of Venus and Da Vinci's Vitruvian Man have remained relevant not in spite of (commercial) creators referencing or incorporating the work but because of such uses. The transformative use of cultural heritage doesn't diminish the work, but ensures that it lives on as part of our cultural memory and contemporary creativity.

Economic arguments for charging fees for commercial uses of cultural heritage are equally dubious. It is implausible that fees can offset the costs of preserving cultural

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<sup>17</sup> The UNESCO Mondiacult Declaration (2022) strengthens this understanding.

<sup>18</sup> Article 4(a) of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), commonly referred to as the Faro Convention, stipulates that "everyone, alone or collectively, has the right to benefit from the cultural heritage and to contribute towards its enrichment."

<sup>19</sup> See Creative Commons' Report "What are the barriers to open culture?" (2022).

heritage.<sup>20</sup> Even if one accepts the premise that it is legitimate for a state to claim financial benefit from the use of Public Domain works in national collections, it stands to reason that the administrative costs of doing so far outweigh the reward. With cultural heritage institutions bootstrapped for resources, it is highly questionable whether the best use of staff time is to assess the appropriateness of uses and collect fees. Scarce staff resources should rather be used for socially more beneficial purposes, such as, but not limited to, fostering research on heritage, promoting inclusive interactions with heritage, and increasing access for people and communities that have historically been disenfranchised and need to reconnect with heritage.

In fact, there are strong economic arguments against limiting the reuse of cultural heritage. A key argument is the potential economic spillovers generated by culture-based entrepreneurship. So many new creative jobs and businesses can tap into the Public Domain, creating wealth that eventually vastly surpasses whatever revenue institutions can amass with fees.

## Conflicts with the EU copyright framework

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The introduction of new forms of exclusivity over cultural heritage works that are in the Public Domain not only raises fundamental right concerns, but also a host of issues for EU copyright law. The constitution of a new and indefinite exclusive right, which functions as a substitute copyright for out-of-copyright works, contradicts at the very least the intent of various pieces of existing EU legislation.

Recent EU copyright legislation, including the [Orphan Works Directive \(2012\)](#) and the [CDSM Directive \(2019\)](#) display a greater commitment towards the freedom to access, enjoy and engage with cultural heritage. Overall, these laws and a number of additional documents give stronger recognition to the importance of preservation and dissemination of cultural heritage, with Article 14 of the CDSM Directive introducing an explicit Public Domain safeguard.<sup>21</sup>

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<sup>20</sup> A [2004 study by Simon Tanner \(p. 40\)](#) reveals “that the level of revenue raised by museums through imaging and rights is small relative to the overall revenue earning capacity of the museum from retail, ticket sales, membership and fundraising.”

<sup>21</sup> See Dore and Priora’s independent expert opinion (p. 15-18). See also Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation ([2006/585/EC](#)); Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation ([2011/711/EU](#)); and Commission Staff Working Document Evaluation of the Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural

Article 14 of the CDSM Directive on “works of visual art in the public domain” requires Member States to exclude faithful reproductions of Public Domain works from the scope of protection of copyright and related rights. The intention of the European lawmaker was to protect the Public Domain from misappropriation by mandating that digital surrogates of Public Domain artworks should in turn remain in the Public Domain, keeping them available for all to use.

Recital 53 on the one hand, underscores the fundamental right rationale for keeping reproductions of Public Domain works free of exclusive protection:

The expiry of the term of protection of a work entails the entry of that work into the public domain and the expiry of the rights that Union copyright law provides in relation to that work. 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.

On the other hand, it also highlights the issues associated with having varying legal regimes in different Member States, as this “give[s] rise to legal uncertainty and affect[s] the cross-border dissemination of works of visual arts in the public domain.”

The cultural heritage laws of Bulgaria, France, Greece, Italy, Portugal and Slovenia are thus clearly at odds with the stated goal of Article 14. Even though the restrictions imposed by cultural heritage laws do not originate in copyright law, they are functionally so similar to copyright protection that they neuter the desired effect of promoting the use of reproductions of cultural heritage works after expiry of copyright protection.

Greece and Italy’s transpositions of Article 14 also violate the obligation of result on a more general level by threatening the EU’s objective of cross-border harmonisation. Italy and Greece’s carve-out of their cultural heritage laws from Article 14 constitutes a deliberate hollowing-out of Art. 14, setting a worrying precedent for the single market.

While the contradiction with Article 14 of the CDSM Directive is most obvious, the restrictions imposed by cultural heritage laws also conflict with the intent of the [Open Data Directive \(2019\)](#). The application of the Open Data Directive to documents held by cultural heritage institutions is limited. The Directive nonetheless emphasises the “huge potential [of cultural heritage collections and related metadata] for innovative re-use in sectors such as learning and tourism” in recital 65. Recital 49 acknowledges the possibility of a short period of exclusivity (no longer than 10 years) where private partners assist public institutions in digitising materials. Importantly, that period

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material and digital preservation ([SWD/2021/0015 final](#)). [Europeana](#) is of course the flagship embodiment of the idea of free access to cultural heritage for all.



should be as short as possible “to comply with the principle that public domain material should stay in the public domain once it is digitised.”

Conflicts of law are not uncommon but all require resolution for the legal system to function based on principles of certainty, clarity and predictability. The incompatibility between copyright and cultural heritage laws — the status quo — is highly problematic and requires urgent legislative intervention to honour and sustain fundamental rights related to culture, creativity, and freedom of expression. Member states with cultural heritage laws that restrict the use of reproductions of Public Domain violate the *acquis* in the area of copyright. This undermines the *effet utile* of European law and sets a worrying precedent for other areas of legislation, where conflict is bound to arise. European legislators must consider both the manifest corruption of Article 14 when assessing legislative action.

## Conclusions and Recommendations

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As expressed in COMMUNIA's Public Domain Manifesto, the Public Domain is essential to creativity, as it ensures that once the term of copyright or other exclusive rights elapses, creative works can become “the raw material from which new knowledge is derived and new cultural works are created. The Public Domain acts as a protective mechanism that ensures that this raw material is available at its cost of reproduction — close to zero — and that all members of society can build upon it.”

Hollowing out the Public Domain through restrictions on the use of reproductions of cultural heritage disrupts the delicate balance of copyright. This jeopardises the enjoyment of multiple fundamental rights, including the right to access and enjoy culture, freedom of expression and artistic freedom, and undermines the internal market of the EU.

The European legislator, through Article 14 of the CDSM Directive, introduced a new Public Domain safeguard to ensure that what is in the Public Domain, stays in the Public Domain. At least six Member States have legislation in place that directly contradicts Article 14 of the CDSM Directive.

The EU should ensure that this principle is respected by prohibiting Member States from instrumentalizing their cultural heritage laws to introduce new copyright-like restrictions on the use of reproductions of cultural heritage that is in the Public Domain whether for commercial or other purposes.

## RECOMMENDATION

### **Protect the right to use Public Domain heritage at EU level**

We call on the EU legislator to introduce EU-wide legislation providing that, when the term of protection of a work or subject matter has expired, any material resulting from an act of reproduction of that work is not subject to any restrictions arising from cultural heritage laws, including any requirement to obtain permission and/or payment of a fee.


## About COMMUNIA

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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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