

# Visual art works in the public domain (Article 14 of Directive 2019/790)

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## Abstract

For the first time in the European Union (EU), Article 14 of Directive 2019/790 grants a positive status to public domain with reference to works of visual art. Any material resulting from acts of reproduction of a work of visual art in the public domain is not subject to copyright or related rights, unless such material is original, in the sense that it is the author's own creation. The provision's purpose is to prevent copyright-fraud, which has been practiced by museums and other owners. Avoid this practice is especially important in the digital market. Article 14 is clarificatory and codifies the concept of originality according to the Court of Justice settled case law. The provision also aims to avoid divergent approaches across the EU, which lead to uncertainty that affects cross-border dissemination of works of art in the public domain. The transposition of this provision should be minimalistic. Article 14 does not define what are works of visual art and does not determine the consequences of the infringement of the provision. Articles 2 and Recital 13 do not contain an exhaustive list of what should be considered a Cultural Heritage Institution. All these issues create doubts about the effectiveness of Article 14. Our purpose is to analyze Article 14 of Directive 2019/790 and the issues it raises.

## Keywords

Works of visual art; public domain; copyright; related rights; cultural heritage institutions; originality; work.

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## Summary

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## Resumo

Pela primeira vez na União Europeia (UE), o art. 14.º da Diretiva 2019/790 reconhece um estatuto positivo ao domínio público em relação às obras de arte visual. O material resultante de um ato de reprodução de uma obra de arte visual no domínio público não será protegido por direitos de autor ou direitos conexos, exceto se for original, no sentido de ser uma criação do autor. A norma visa impedir que obras no domínio público sejam consideradas indevidamente protegidas, o que tem sido prática corrente de museus e outros proprietários. Evitar esta prática fraudulenta é especialmente importante no mercado digital. O art. 14.º é uma norma clarificadora e codifica o conceito de originalidade, de acordo com a jurisprudência constante do Tribunal de Justiça. A norma visa também evitar abordagens divergentes na UE, que implicam incertezas e afetam a difusão transfronteiriça de obras de arte do domínio público. A sua transposição deveria ser minimalista. Todavia, o art. 14.º não define o que são obras de arte visual e não determina as consequências da sua infração. O art. 2.º e o Considerando 13 não contêm uma lista exaustiva do conceito de Instituição do Património Cultural. Há dúvidas fundadas sobre a eficácia da norma. Temos por objetivo analisar o art. 14.º e procurar responder às questões que o mesmo suscita.

## Palavras-chave

Obras de arte visual; domínio público; direito de autor; direitos conexos; instituições do património cultural; originalidade; obra.

## Sumário

**1.** Introdução; **2.** História; **3.** Fundamentação; **3.1.** Domínio público; **3.2.** Mercado transfronteiriço; **4.** Definições; **4.1.** Obras de arte visual; **4.2.** Reproduções; **4.3.** Material; **4.4.** Instituições do Património Cultural; **5.** Material que pode ser objeto de direitos de autor; **5.1.** Originalidade; **5.2.** Obra; **6.** Exclusão de direitos conexos; **7.** Venda de reproduções; **8.** Eficácia; **9.** Aplicação no tempo; **10.** Conclusões.

## 1. Introduction

Article 14 of Directive 2019/790<sup>2</sup>, headed “Works of visual art in the public domain”, states that: “Member States shall provide that when the term of protection of a work of applied art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author’s own intellectual creation”.

Once the copyright of a work of visual art has expired it may be reproduced, or in a broad sense, used, without the necessity of the author’s consent, since it is part of the public domain. In addition, no exclusive rights shall attach to any copy of a work of art in the public domain, unless the reproduction is its author’s own intellectual creation.

The “copyright fraud”, that is, the false claim of copyright protection, still practiced by many museums, other cultural heritage institutions<sup>3</sup> and private operators, under this provision, seems to be doomed to failure.

Nevertheless, it is regrettable that Article 14 of DSM Directive does not extend to all manuscripts, old documents, music sheets, and parchments that exist in collections of CHIs, on which these institutions regularly claim copyright protection. Also, Article 14 of DSM Directive does not sanction the false claim of copyright protection that may consist, *inter alia*, in inserting a copyright notice, in the use of technological measures, or of restrictive terms and conditions in the digital reproductions. This is very a common practice of many museums, other CHIs, and private operators, without legal ground for the prohibition<sup>4</sup>.

Despite its limitations, this provision is very important. For the first time in the EU, Article 14 of DSM Directive grants a positive status to works of visual art belonging to the public domain by forbidding any regaining of exclusivity therein. It also codifies the concept of work of visual art according to the Court of Justice of the European Union<sup>5</sup> case law.

## 2. History

The Commission’s Proposal did not contain any provision specifically devoted to the “public domain”, nor any provision concerning the reproduction of works of visual

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2 Directive (EU) 2019/790 of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. Hereinafter DSM Directive.

3 Hereinafter CHIs.

4 See, criticizing Article 14 of DSM regarding these two aspects, Séverine Dusollier, “The 2019 Directive in Copyright in the Digital Single Market: some progress, a few bad choices, and an overall failed ambition”, *Common Market Law Review*, 55 (2020), pp. 979-1029 (pp. 997-998).

5 Hereinafter CJ.

art. Article 14 of DSM Directive was an addition that was introduced during the final round of discussion at the European Parliament (EP). The provision is part of an amendments package put forward by the EP. The original wording of the amendment suggested the modification of Article 5 of the Proposal (Article 6 of DSM Directive), to mandate upon Member States to grant that any material resulting from an act of reproduction of material in the public domain should not be subject to copyright or related rights, provided that such reproduction was a faithful reproduction for purposes of preservation of the original material. The purpose was to place the public domain within the broader context of the issue of preservation of cultural heritage. The final version of the provision, has seen above, is different and separated from Article 5 of the Proposal (Article 6 of DSM Directive). While the text initially proposed by the EP included reproductions of all material that was in the public domain, the final version was restricted to works of visual art. This origin of Article 14 of DSM and its relation to what would be Article 6 also explains the specific reference to cultural heritage institutions (Recital 53).

Despite its limitations, for the first time in the EU, Article 14 of DSM Directive grants a positive status to works of visual art belonging to the public domain, which is considered to be remarkable<sup>6</sup>.

### 3. Rationale

Article 14 of the DSM Directive is to be inserted in the context of EU initiatives of both preservation of cultural heritage in a broad sense and open access. Also important is the consideration that the circulation of faithful reproductions of works of visual art in the public domain contributes to the access and promotion of culture and the access to cultural heritage<sup>7</sup>. Recital 53 helps to understand the reasons behind this provision.

Recital 53 clears that the expiry of the term of protection of copyright protected work entails the entry of that work into the public domain and thus the end of the rights granted by the EU in relation to that work. In what concerns visual arts, the circulation of faithful reproductions of works that are in the public domain “contrib-

<sup>6</sup> See, regarding the history of Article 14 of DSM Directive, Eleonora Rosati, *Copyright in the digital single market, Article-by-Article Commentary to the Provisions of Directive 2019/790*, Oxford University Press, Oxford, 2021, pp. 240-241; ECS-European Copyright Society (26 April, 2020), *Comment of the European Copyright Society on the Implementation of Art. 14 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market*, pp. 1-5 (p. 1), available at [ecs\\_cdsm\\_implementation\\_article\\_14\\_final.pdf](https://ecs-cdsm_implementation_article_14_final.pdf) (wordpress.com), last access on 05.05.2023; 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”, *Journal of Intellectual Law & Practice*, Vol. 17(11) (2022), pp. 924-939 (pp. 926-929); Séverine Dusollier, “The 2019 Directive in Copyright in the Digital Single Market...”, *op. cit.*, pp. 997-998; Alexandra Giannopoulou, «The New Copyright Directive: Article 14 or when the Public Domain Enters the New Copyright Directive», *Kluwer Copyright Blog*, (June 27, 2019) pp. 1-4 (p. 1), available at [The New Copyright Directive: Article 14 or when the Public Domain Enters the New Copyright Directive – Kluwer Copyright Blog](https://www.kluweriplaw.com/) (kluweriplaw.com), last access on 06.06.2023.

<sup>7</sup> See, in this sense, Eleonora Rosati, *Copyright...*, *op. cit.*, p. 241.

utes to the access to and promotion of culture, and the access to cultural heritage”. In the context of digital environment “the protection of such reproductions through copyright or related rights is inconsistent with the expiry of the copyright protection of works”. Also, the existing differences in the national laws of EU Member States regarding the protection of such reproductions “give rise to legal uncertainty and affect the cross-border dissemination of works of visual arts in the public domain. Certain reproductions of works of visual arts in the public domain should, therefore, not be protected by copyright or related rights”. But none of what was stated shall affect the possibility of CHIs to continue to sell reproductions, such as postcards.

As derives from Recital 53, the reasons behind Article 14 of DSM Directive seem to be two:

### 3.1. Public domain

One of purposes of Article 14 of DSM Directive is to prevent faithful reproductions of public domain works of visual arts to be vested with regained exclusive protection, by copyright or any related right in the reproduction itself.

This is a regular practice, namely in many museums, where photographs of works in their collections are accompanied by a copyright notice requiring authorization or a license from the museum before any use. This copyright claim is, as a rule, illegitimate, because the photograph is normally a faithful reproduction of the painting or other type of work (e.g., sculpture, artistic installation) that is already in the public domain, which means that the photograph has no “originality” and cannot be protected by copyright.

Article 14 is considered very important, amongst other users, by art historians. It prevents new copyright being claimed, namely by museums, regarding reproductions of art works which were never protected by copyright or that had copyright protection, but that protection already expired and are now in the public domain. Thus, a photograph that is a faithful reproduction of Mona Lisa, by Leonardo da Vinci, The Kiss, by Klimt, Liberté, by Helena Vieira da Silva, does not qualify for copyright protection. This new provision is “the end of image reproduction fees, because copyright is the glue which holds image fees in place”<sup>8</sup>. Many museums use copyright to control the circulation of images of works in their collections, even of historic works which long ago fell out of copyright or were made even before copyright existed. Museums like the “Galleria degli Uffizi”, in Florence, or the “Rijksmuseum”, in Amsterdam, do not claim to hold any copyright over the digitalized images of works that do not have copyright protection. Other museums, like the “Pinacoteca di Brera” or the

<sup>8</sup> See, Bendor Grosvenor, “The end of museum image fees?”, *Art History News* (March 28, 2019), pp. 1-5 (p. 2), available at [The end of museum image fees? – Art History News – by Bendor Grosvenor](#), last access on 05.05.2023. On this subject, see, also, Eleonora Rosati, “DSM Directive Series #3: How far does Article 14 go?”, *The IPKAT* (April 09, 2019), pp. 1-5 (pp. 3-4), available at [DSM Directive Series #3: How far does Article 14 go? – The IPKat \(ipkitten.blogspot.com\)](#), last access on 05.05.2023; Cristiana Sappa, “Hosting...”, *op. cit.*, pp. 928-929.

“Kunsthistorische Museum” of Vienna, already introduced some open access practices when the use of reproductions is for non-commercial purposes. But museums like “Musée d’Orsay”, in Paris, *inter alia*, claim to hold copyright over the digitalized images of the works of their collections, though these works are in the public domain, or were made before copyright existed. Article 14 of DSM Directive clears that photographs of historic art works taken to make a faithful reproduction of them shall not be protected by copyright across the EU. They may only be protected if they are the photographer’s own intellectual creation, that is, if they are photographic works. Considering Recital 53 and the intent of DSM Directive, any future arguments in the EU that art photographs of works in public domain which seek to be faithful reproductions of the original work underlying them should be protected by copyright or related rights seems to be doomed to failure.

But the long-standing practice of claiming copyright regarding non-original reproductions that Article 14 confronts goes beyond museums. CHIs, picture library agencies, and other private or public owners, built business models around claiming copyright in public domain faithful reproductions and charging the public fees to use those images<sup>9</sup>.

The public domain should be available for everyone to use and for whatever purpose. Namely to make new cultural goods, to generate new knowledge, *inter alia*. This is the issue that Article 14 is addressing<sup>10</sup>. Copies of cultural goods embedding works of art in the public domain have a high economic value, namely for creators of multimedia, and audiovisual works, as developers of NFTs. But the combined reading of the provision with Recital 53 clearly indicates presence of non-economic interests related to the public domain. Thus, besides the need to maintain a certain level of competition in a market where intellectual property rights can easily introduce monopolistic positions and avoid the abuse of those positions, Article 14 aims to reach “a reasonable and well-balanced economic and social *welfare*”<sup>11</sup>. This non-economic purpose is clear in Recital 53, with its reference to the access to cultural heritage, and is confirmed by the location of the provision in Title III of DSM, “Measures to improve licensing practices and to ensure wider access to content”. A wider access facilitates a wider subsequent exploitation, but also an easier enhancement of educational and cultural purposes<sup>12</sup>. Introduction of Article 14 improves public domain

9 See Andrea Wallace and Ariadna Matas, “Keeping digitised works in the public domain: how the copyright directive makes it a reality”, *Europeana Foundation* (September 1, 2020) , pp. 1-7 (p. 3), available at Keeping digitised works in the public domain: how the copyright directive makes it a reality | Europeana PRO, last access on 06.06.2023; Cristiana Sappa, “Hosting...”, *op. cit.*, pp. 926-929.

10 In this sense, see Andrea Wallace and Ariadna Matas, “Keeping...”, *op. cit.*, pp. 1-7 (p. 4).

11 Cristiana Sappa’s words, “Hosting...”, *op. cit.*, p. 927.

12 See, in this sense, Cristiana Sappa, “Hosting...”, *op. cit.*, pp. 926-927. This author stresses the importance of some aspects that may have played a role as for the introduction of Article 14 of DSM. First, digitalization of cultural heritage done by private market operators, mainly based in the US, already during the last phase of the analogic world (e.g., Bridgeman Art Library, now Bridgeman Images, Getty Trust Foundation, company Corbis), but also by other commercial photo image archives based in the UK, EU, and Canada. More recently, Google also became one of the main actors in the creation of archives of digital works of visual art. At first, CHIs, when contacted by these private operators, only received a financial

for both economic and non-economic purposes. It will be interesting to see how all the entities will react after national transposition of Article 14 of DSM Directive. It is possible that some may try to resist, namely by limiting the access to reproduction materials using contracts, restrictive website terms and conditions, or by not making data available at all. It is an open question to know whether the enhancement of public domain, expressed in Article 14 of DSM Directive, will find resistance in national provisions and factual practices of the EU Member States<sup>13</sup>.

### 3.2. Cross-border market

The second reason behind Article 14 of DSM Directive is to avoid divergent approaches across the EU, to avoid legal uncertainty that affects cross-border dissemination of works of art in the public domain.

In some Member States national laws there is a related right, or even a special copyright on photographs, which does not require originality, so there were doubts

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compensation in exchange of granting the access to the cultural goods for realizing the digital collections. In the middle of the Information Society, public sector bodies and CHIs also started this practice in the EU, though the reasons were mainly non-economic. Cultural heritage institutions aimed to preserve better information and to comply with their educational and cultural mission, namely by making available digital images of cultural goods. To foster the implementation of these educational and cultural purposes in a more coordinated way, Europeana project was officially launched in November 2008. But CHIs also have market interests, they recognize digital reproductions as a sustainable self-funding tool. When CHIs have digital versions of a cultural heritage work, they can sell such reproductions to third parties allowing them to create derivative works (e.g., literary, audiovisual, and multimedia works) or directly create these derivative works and put them on the market. Should digitalization happen for economic or non-economic purposes, it is the first step for accessing or exploiting the digital material. Framing the exploitation of digital material is one of the purposes of DSM Directive, in many provisions, including Article 14. Secondly, the structure of the cultural heritage reproductions market may also have played an important role in the introduction of Article 14 of DSM Directive. A few giants, like Bridgeman, Getty Trust, and Google, created large databases related to this subject matter because of unbalanced agreements between them and CHIs. In many of these agreements these private sector giants bear the costs of the digitalization of CHIS works but they also become the right owners of the digital collections. CHIs only receive digital copies for their use. Within this context, companies that invested time and resources have the possibility to claim and exercise exclusive rights on reproductions to have a return on investment through royalties imposed via contractual tools. This increases the costs for anyone who wants to create derivative works based on these reproductions for commercial reasons, but also for CHIs that aim at creating dissemination initiatives to favour the access to information on cultural heritage, since in many cases they are not the right owners. Confirming that mere reproductions of visual art works are in the public domain offers the possibility of entering or remaining in the market for those business that still do not have a solid position in the market, unlike Bridgman, Getty Trust or Google. Thus, Article 14 of DSM Directive seems to introduce aspects of competition law into the digital single market. Also, this provision benefits CHIs that wish to introduce initiatives for their own educational and cultural purposes, including when they are deprived of useful digital copies of the works they have in their collections. This provision was introduced while in the meantime an increasing number of initiatives to make cultural heritage reproductions available, often under open licenses, was carried out by members of the civil society, like Wikimedia, Communia and Creative Commons, and by many museums. Together with public and institutional initiatives, such as Europeana, and individual users of social networks, all these activities were important to make digital cultural heritage available online as widely as possible. In this sense, and with more details, see Cristiana Sappa, "Hosting...", *op. cit.*, pp. 926-929.

13 In this sense, see Andrea Wallace and Ariadna Matas, "Keeping...", *op. cit.*, pp. 1-7 (p. 4); Cristiana Sappa, "Hosting...", *op. cit.*, p. 929.



to know whether there can be a renewed exclusive protection of these related or special rights. The protection of non-original photographs was introduced by Article 6 of Term Directive 93/98/CEE and confirmed under Article 6 of Term Directive 2006/116/CE. Member States were left free to choose whether to introduce a related right on some photographs, and, in case this option was chosen, no mandatory term of protection had to be complied with. Articles 87 ff of the Italian Copyright Act protect “simple photographs”, which include faithful reproduction of art works. Article 128 of Spanish “Ley de Propiedad Intelectual” also protects simple photographs in general (*las meras fotografías*). In Germany, there is a related right protecting some photographs under § 72 of Urheberrecht Gesetz (UrhG).

The insertion of Article 14 in the DSM occurred late and was connected to a, at that point, recent litigation in Germany concerning digitalized images of works in the public domain. That case was about the digitisation of art in the public domain and whether museums could grant exclusive rights on photographs of public domain artworks. The court found that granting exclusive rights on photographs did not contradict the rationale of the public domain. The Federal Court of Justice of Germany (Bundesgerichtshof) ruled that faithful photographic reproductions of works of visual art in the public domain enjoy protection under the German fifty years related right for simple (that is, non-original) photographs<sup>14</sup>. The decision, of 20 December 2018, was favourable to the protection of some digital version of museum works in the public domain. The litigation was between the Reiss-Engelhorn-Museen, in Mannheim, and the Wikimedia Foundation and concerned the divulgation of 17 reproductions of works that were on the Wikimedia Commons website. The museum had published on a catalogue the photographs of the public domain works it exhibited in its premises. This publication occurred when the museum acquired the rights on those photographs. Meanwhile, a Wikimedia volunteer visitor took photographs of these works, not respecting the prohibition of taking those pictures. The visitor then scanned the photographs to make them available online. The museum brought a legal action on the grounds of copyright infringement and breach of contract. The case reached the Bundesgerichtshof. The Court considered that a photograph of a painting can be protected when the photographer takes a certain number of decisions while taking the photographs, namely regarding the moment when to take the photograph, the lights, the distance, the angles, and the framing of the object that is to be reproduced. This seems to point out to the existence of copyright protection. Nevertheless, the Court did not consider the photograph at issue a work of photography, protected under §2.5 UrhG, but a photograph protected under §72 UrhG, thus having a protection as a related right. The publication of digitalized images of the online catalogue was considered an infringement of the related right covering reproductions under of works under §72 UrhG. The court found that photographs of public domain artworks taken by the Wikimedia volunteer breached the museum’s contract and ordered the photos to be taken down.

14 BGH, 20.12.2018 – I ZR 104/17. With more detail, see S Michel, “Digitalization of art in the public domain-museum urges Wikimedia to take down reproductions of out-of-protection artworks”, *Journal of Intellectual Property Law & Practice*, Vol. 14 (6) (2019), pp. 427-429. See also, Cristiana Sappa, “Hosting...”, *op. cit.*, pp. 924-939 (p. 935).



This case was decided before Germany transposed Article 14 at the national level. The new §68 UrhG respects this DSM Directive provision. Thus, Article 14 of DSM Directive seems to put an end to this question, by asking Member States not to grant copyright or any other exclusive right in material that reproduces works of visual art in the public domain, except for reproductions that are original, in the sense that they are the author's own intellectual creations. However, how Cristiana Sappa points out "even in case of a reasonably expected interpretation reversal because of compliance-related reasons, the facts into the decision show that limits and impediments to the free circulation of faithful reproductions of works in public domain may derive by contractual clauses"<sup>15</sup>.

Article 14, rather than a change, is a particularly important clarification of the EU copyright law that already exists or that has been developed by case law of the CJ. A simple reproduction of a work that is in the public domain is not enough to create new copyright because it cannot be considered as work, that is, as the author's own intellectual original creation<sup>16</sup>. Article 14 codifies CJ case law regarding the concept of originality. Until now there was a formal harmonization of the concept of "originality" only regarding computer programs (Computer Program Directives) databases (Database Directive) and photographs (Term Directives). The effect of this provision, though being a clarification of the existing concepts in EU copyright in this area, is also very important because it requires all Member States to comply with the provision. With the introduction of Article 14, the question is to know if and to what extent the possibility of protection of simple photographs, allowed by the Term Directive 2006/116, has been affected. From the text of Article 14, we understand that if a Member State recognizes protection of a non-original photograph as related right, that right cannot be recognized anymore insofar the photograph in question is of a work of visual art in the public domain. Thus, for example, a simple photography of a work of art that is part of the collection of a museum shall not be protected by related rights if the work of art never had copyright protection, or if is already in the public domain<sup>17</sup>.

## 4. Definitions

Although the wording of Article 14 seems to be straightforward, essential concepts like "works of visual art", "public domain", "reproduction" or "material" are not defined in the DSM. This leads to questions that need to be answered at the stage of implementation.

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15 Cristiana Sappa, "Hosting...", *op. cit.*, pp. 924-939 (p. 935).

16 See Eleonora Rosati, "DSM Directive...", *op. cit.*, pp. 1-5 (p. 2). In the same sense, Bendor Grosvenor, "The end of museum image fees?", *op. cit.*, pp. 1-5 (p. 3).

17 For the relation between the Term Directive and the DSM, insofar as Article 14 concerns, see Eleonora Rosati, "DSM Directive...", *op. cit.*, pp. 1-5 (pp. 3-4).

#### 4.1. Works of visual art

Article 14 covers “works of visual art”. This gives rise to a question regarding the extent of the works covered. Does Article 14 apply also to the reproduction of public domain design works, works of architecture and maps, which in some Member States are also listed as works of visual arts, while in other Member States are listed in separate categories of copyrighted works? The question is not easy to answer, since: a) EU Directives do not contain a binding, autonomous list of categories to be considered as “works”; b) the language and systematic structure of International Treaties (to which the CJ often refers to interpret provisions of EU copyright law) does not help in this case. Article 2 of the Bern Convention does not use the term “visual art” but refers to a broader category of “artistic works” and provides a non-exhaustive list that may fall into the category of “visual art” (namely, works of drawing, painting, architecture, sculpture, engraving and lithography); c) in the Bern Convention “photographic works” are listed in a separate category, as are “works of applied art”, “maps”, “sketches” and “three-dimensional works relative to geography, topography, architecture or science”<sup>18</sup>.

The large understanding expressed in the Bern Convention seems to indicate that the expression “works of visual art” should be constructed in a broad sense<sup>19</sup>. If we understood “works of visual art” in a narrow sense, copyright protected photographic works, technical drawings and maps would be excluded, thus exclusive related rights under national laws could still attach to faithful reproductions of public domain photographs, old maps and similar. A narrow understanding of the concept of “works of visual art” would go against the purpose of Article 14. Recital 53 emphasizes access to promotion of culture and access to cultural heritage.

For all these reasons, a broad understanding of “works of visual art” ought to be adopted. Article 14 should also apply to non-creative reproductions of public domain photographic works, works of applied art and maps, or else one would grant greater derivative protection to such works than to works of visual art (in a strict sense).

Thus, amongst others, the category of “works of visual art” ought to encompass: a) artistic works, in two dimensions (drawings, paintings, serigraphs, lithographs, engravings, etc.) and three dimensions (sculptures, statues, works of architecture, monuments, etc.), regardless of their nature and purpose; b) photographs and photographic works; c) works of applied art, including designs and models; d) technical drawings and maps.

18 According to Article 2(1) of Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), artistic works include: (...) “works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science”.

19 See, in this sense, ECS-European Copyright Society, *Comment...*, *op. cit.*, pp. 1-5 (p. 2); Eleonora Rosati, *Copyright...*, *op. cit.*, pp. 242-243.

As Eleonora Rosati points out: “Overall, the notion of ‘works of visual arts’ refers to any figurative work that is perceptible to the eye, irrespective of both, its form of expression and the intention of its author”<sup>20</sup>.

## 4.2. Reproductions

The concept of reproduction, considering the broad sense given by EU directives, namely Article 2 of Directive 2001/29<sup>21</sup>, refers to any act of copying, either direct or indirect, temporary or permanent, by any means and in any form, in whole or in part.

If reproductions are not the author’s own intellectual creation, according to Article 14, no new rights shall apply. As we said before, the concept of reproduction covers reproductions done in any form, but they must be faithful ones. Recital 53 refers to faithful reproductions. Thus, it may cover all types of reproductions, digital or analogical, either in 2D or 3D. It is a fact that 2D reproductions in most cases are non-original and 3D reproductions may or may not be the result of their authors’ own intellectual creation. But what matters is to know if any type of reproduction of the original work that in the public domain is faithful or if it transforms it in any creative way. In the first case we are before faithful reproductions<sup>22</sup>.

## 4.3. Material

The concept of “material” resulting from an act of reproduction is broad. It can be a work, a performance, a broadcast, a film, or any other subject matter. There are no restrictions, regarding the notion of material, within the meaning of Article 14<sup>23</sup>. Article 14 anticipates that technologies and media inevitably change. If it applies to any material resulting from an act of reproduction, this may also include metadata, software code, raw data from 3D scans or digital photography, as well as any materials produced via future technologies, regardless the format<sup>24</sup>.

If we refer to material that may be eligible for protection by copyright, the concept is strict, it must be an “original work”, satisfying the requirements for protection. Material resulting from an act of reproduction of a work of visual art in the public domain can only be protected by copyright. Protection under related rights shall not be possible.

20 Eleonora Rosati, *Copyright...*, *op. cit.*, p. 243; in the same sense, defending a broad approach to the concept of “works of visual art”, see Andrea Wallace and Ariadna Matas, “Keeping...”, *op. cit.*, pp. 1-7 (p. 4); ECS – European Copyright Society, *Comment...*, *op. cit.*, pp. 1-5 (p. 2).

21 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society *OJ L 167*, 22.6.2001, pp. 10-19. Hereinafter InfoSoc Directive.

22 For the concept of reproduction, see Eleonora Rosati, *Copyright...*, *op. cit.*, p. 243. In relation to 2D or 3D reproductions, see ECS – European Copyright Society, *Comment...*, *op. cit.*, pp. 1-5 (p. 3); with more detail, see Cristiana Sappa, “Hosting...”, *op. cit.*, pp. 924-939 (pp. 931-934).

23 For the notion of material, see Eleonora Rosati, *Copyright...*, *op. cit.*, p. 243.

24 In this sense, Andrea Wallace and Ariadna Matas, “Keeping...”, *op. cit.*, pp. 1-7 (p. 4).

It is doubtful if Article 14 exempts all uses regarding faithful, non-original reproductions after the term of the reproduced work has expired, irrespective of the moment when that reproduction was made. According to the ECS-European Copyright Society, what matters is the moment when the reproduction is being used, irrespective of the moment when it was made. This interpretation seems to be more in line with the aim of Article 14, which is to contribute to the access and to the promotion of culture, and to the access to cultural heritage (Recital 53), even if it might imply cutting back of rights already vested<sup>25</sup>. Though recognizing that this interpretation is more adequate to the purpose of Article 14 of DSM Directive, we doubt if it is in accordance with Article 26 of the same Directive that doesn't seem to allow cutting back of rights still in force.

#### 4.4. Cultural Heritage Institutions

Article 2(3) defines “cultural heritage institution” as a “publicly accessible library or museum, an archive or a film or audio heritage institution. Recital 13 states that cultural heritage institutions should cover “publicly accessible libraries and museums, regardless of the type of works or other subject matter that they hold in their permanent collections, as well as archives, film or audio institutions. They should also be understood to include, amongst others, national libraries, national archives and, as far as their archives and publicly accessible libraires are concerned, educational establishments, research organizations and public sector broadcasting organizations”.

Joining Article 2(2) and Recital 13 of DSM Directive we can conclude that CHIs include: publicly accessible libraires and museums, regardless of the type of works or other subject matter that they have in their permanent collections; archives; film or audio heritage institutions; national libraries and national archives; educational establishments, research organizations, and public sector broadcasting organizations, as far as their archives and publicly accessible libraries are concerned<sup>26</sup>. From the

<sup>25</sup> Advocating in this sense, ECS-European Copyright Society, *Comment...*, *op. cit.*, pp. 1-5 (p. 4). As the ECS states, Article 14 of DSM Directive refers that “...when the term of protection of a work of visual art has expired, any material resulting from an act on reproduction of that work...”. The formulation can give rise to conflicting readings. According to one reading, “when” is a point in time from which onwards reproductions newly made will not give rise to any new rights. Existing rights regarding reproductions made before that point in time shall continue to exist. This interpretation would mean that even after the expiry of the term of protection of the reproduced work, users would have to know whether the reproduction was made before or after that date, to avoid infringement of rights. According to another interpretation, “when” marks the moment in time after which any reproductions covered by Article 14 shall not have exclusive rights, whether they were made before or after the expiry of protection of the work that was reproduced. The last interpretation seems to be more in line with the aim of Article 14, which is to contribute to the access and to the promotion of culture, and to the access to cultural heritage (Recital 53), even if it might imply cutting back of rights already vested.

<sup>26</sup> We follow the wording of Eleonora Rosati, *Copyright...*, *op. cit.*, pp. 243-244. Portugal has recently transposed the DSM, by DL no. 47/2023, of June 19, 2023 (published in Diário da República no. 117/2023, Série I, of 2023.06.19). New Article 74-A(9)(a) of Portuguese Copyright and Related Rights Code (Código do Direito de Autor e dos Direitos Conexos, hereinafter CDADC) follows the DSM definition of CHIs. Under paragraph 9 (a), for the purposes of this section, it is considered (a) “Instituição responsável pelo património cultural uma biblioteca ou um museu que sejam acessíveis ao público, um arquivo, um estabelecimento de ensino, ou um organismo de investigação e de radiodifusão do

wording of Article 2(2) and Recital 13 we can deduce that this list is not exclusive, which may give rise to different implementations of the notion of CHIs by Member States, with all the problems attached to non-harmonized national concepts within the EU<sup>27</sup>. Recital 13 only refers “regardless of the type of works or other subject matter that they hold in their permanent collections” to publicly accessible libraires and museums. Because of their nature, these institutions hold works and other subject matter that can be considered cultural heritage<sup>28</sup>. The requirement of public accessibility is only expressed regarding libraries and museums. Other institutions qualified as CHIs do not have to fulfil this requirement<sup>29</sup>.

## 5. Material that can be subject to copyright protection

According to Article 14, no material resulting from an act of reproduction of a work of visual art that is already in the public domain shall be subject to copyright, unless if that material constitutes an original work. The provision excludes protection under other kinds of rights, namely protection under related rights.

In the EU, to achieve copyright protection, the material in question must fulfill two requirements: the material must be a work, and that work must be an original creation of the author. The notions of “work” and “originality” are autonomous and independent concepts of the EU, as results from EU case-law and EU directives. The EU only demands these requirements to protect the reproduced material under copyright, and no further requirements ought to be necessary according to national laws. This means that, according to EU Directives and settled case-law, “originality” and “work” ought to have uniform application throughout the EU<sup>30</sup>.

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setor público, no que diz respeito aos seus arquivos, ou uma instituição responsável pelo património cinematográfico ou sonoro”. Article (9)(b) determines, in a broad sense, what is part of the collection of CHIs. The wording is: (...) “uma obra ou outro material protegido é parte integrante e permanente de uma instituição responsável pelo património cultural quando as cópias dessa obra ou outro material protegido sejam propriedade ou estejam definitivamente na posse dessa instituição, nomeadamente na sequência de transferências de propriedade, acordos de concessão de licenças, obrigações de depósito legal ou acordos de custódia a longo prazo”.

27 As Eleonora Rosati stresses, *Copyright...*, *op. cit.*, p. 244.

28 In this sense, Eleonora Rosati, *Copyright...*, *op. cit.*, p. 244.

29 In the same sense, Eleonora Rosati, *Copyright...*, *op. cit.*, p. 244.

30 In this sense, Eleonora Rosati, *Copyright...*, *op. cit.*, p. 244. As the author points out, these demands are an expression of the principle of autonomy of EU law, settled in the case law of the EU. See, with reference to several EU CJ judgments, Eleonora Rosati, *Copyright...*, *op. cit.*, p. 245. Nevertheless, the practice of national courts shows that uniform interpretation is far from being a reality in what concerns cumulative protection of designs, works of design and works of applied art and copyright protected works. See, on this subject, Pedro Sousa e Silva, “Tutela Jusautorale de obras de *design* na esteira do Acórdão Cofemel: Nada de Novo debaixo do Céu”, *Revista de Direito Intelectual*, 1 (2023), pp. 171-196.

## 5.1. Originality

Article 14 states that material resulting from an act of reproduction of a work of visual art in the public dominion shall be protected if that material is original in the sense that it is the author's own creation. This provision codifies the concept of originality.

Before this provision, there was a limited codification regarding software, in Computer Programs Directive (Article 1(3) of both, Computer Programs Directive 91/250 and then Computer Programs Directive 2009/24), databases, in Database Directive (Article 3(1) of Directive 96/9) and photographs, in Term Directives (Article 6 of both Term Directive 93/98 and then Term Directive 2006/116). All these Directives refer to the concept of originality as being the author's own intellectual creation.

Article 14 codifies the settled case law of the EU, considering that the material resulting from an act of reproduction "is original in the sense that it is the author's own intellectual creation"<sup>31</sup>.

The CJ, in the *Infopaq* ruling of 2009<sup>32</sup> started the case law harmonization of the concept of originality regarding subject matter falling within the scope of InfoSoc Directive. The CJ considered that work was a concept derived from the Bern Convention. Although the Convention does not have a specific definition of work, the concept implies that subject matter shall be protected by copyright if it is sufficiently original in the sense of being an intellectual creation of its author (paragraph 34). InfoSoc Directive is based on the same principles of the above-mentioned directives that have an expressed notion of originality (paragraphs 35, 36 and 37). In case of a newspaper, which may be a literary work, through the choice, sequence, and combination of elements, like words (which themselves are not protected), the author may express his creativity in an original manner and achieve an intellectual creation (paragraphs 45 to 51). Thus, the CJ ruled that an act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, may be an act of reproduction in part within the meaning of Article 2 of InfoSoc Directive if the elements thus reproduced are the expression of the intellectual creation of its author. It is for the national court to make this determination.

In *SAS Institute* case<sup>33</sup>, some questions asked by the national court regarded the interpretation of Article 2(a) of InfoSoc Directive. The national court wanted to know if the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright is an infringement of that right in the latter manual, which is considered by the CJ a literary work for the purposes of InfoSoc Directive (paragraphs 63, 64).

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31 This is emphasized, namely, by Eleonora Rosati, *Copyright...*, *op. cit.*, p. 245.

32 Judgment of 16.07.2009, *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, EU:C:2009:465.

33 Judgement of 02.05.2012, *SAS Institute Inc. v World Programming Ltd*, C-410/10, EU:C:2012:259.

The CJ held that various parts of a work may enjoy protection under Article 2(a) of InfoSoc Directive if they contain elements which are the expression of the intellectual creation of the author of the work (paragraph 65). In the *SAS Institute* case, though the keywords, syntax, commands and combinations of commands, options, defaults, and iterations consisting of words, figures or mathematical concepts, in isolation, as such, are not an intellectual creation of the author of the computer program (paragraph 66), through the choice, sequence and combination of those words, figures or mathematical concepts, the author may express his creativity in an original manner and achieve a result, namely the user manual for the computer program, which is an intellectual creation (paragraphs 67 to 70). In this case, as in *Infopac*, the CJ stressed that there can be originality when there is a choice, sequence, and combination of elements made by the author.

In *Bezpečnostní softwarová asociace case*<sup>34</sup>, the CJ analysed whether the graphic user interface of a computer program could be protected by the ordinary law of copyright in light of InfoSoc Directive (paragraph 44) and considered that copyright within the meaning this Directive is liable to apply only in relation to a subject-matter that is original in the sense that it is its author's own intellectual creation (paragraph 45). The Court stressed that the graphic user interface can, as a work, be protected by copyright if it is its author's own intellectual creation (paragraph 46). If the expression of those components is dictated by their technical function, the criterion of originality is not met (paragraphs 48 and 49). In such a situation, the components of a graphic user interface do not allow the author to express his creativity in an original manner and achieve a result which is an intellectual creation of that author (paragraphs 50 and 51). The CJ stressed the importance of creativity. If there is no freedom of choice (*Spielraum*), originality is ruled out.

In *Football Association Premier League*<sup>35</sup>, the CJ gave emphasis again to creative freedom as being fundamental for a work to have originality. Sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the InfoSoc Directive. This applies, namely to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright (paragraphs 98 and 99).

In *Painer*<sup>36</sup>, the CJ stressed that originality requires that the author has the possibility to make free and creative choices, to give the work his "personal touch". The fourth question referred by the CJ was to know whether Article 6 of Term Directive 93/98 ought to be interpreted as meaning that a portrait photograph could, under that provision, be protected by copyright (paragraph 86). The CJ held that copyright only

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<sup>34</sup> Judgment of 22.12.2010, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury*, C-393/09, EU:C:2010:816.

<sup>35</sup> Judgement of 04.11.2011, *Football Association Premier League Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)*, EU:C:2011:631.

<sup>36</sup> Judgement of 01.12.2011, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, C-145/10, EU:C:2011:789.



applies to a subject matter, such as a photograph, if it is original, in the sense that the photograph in question is the author's own intellectual creation (paragraph 87). According to Recital 17 of Term Directive 93/98, if the intellectual creation reflects the author's personality, it is a creation of the author (paragraph 88). That happens if the author can express his creative abilities in the production of that work, by making free and creative choices (paragraph 89). Regarding portrait photographs, the photographer can make free and creative choices in many ways and at various points in its production (paragraph 90). The photographer can choose the background, the subject's pose and the lighting, for example, in the phase of preparation of the photography. The photographer, when taking the portrait photograph, can choose the framing, the angle of view and the desired atmosphere. When selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or use computer software (paragraph 92). These various choices allow the author of a portrait photograph to stamp the created work with his "personal touch" (paragraph 93). Thus, in portrait photographs the freedom of the author to exercise creativity is not necessarily minor, or non-existent (paragraph 93). Thus, a portrait photograph can, under Article 6 of Term Directive 93/98, be protected by copyright if, which it is for the national court to determine in each case, the photograph is an intellectual creation of the author because it reflects the author's personality and expresses his free and creative choices in the production of that photograph (paragraph 94)<sup>37</sup>.

In *Football Dataco*<sup>38</sup>, the CJ made clear that skill, labour and effort are not enough to grant originality, in order to assure copyright protection for databases (paragraph 37). Regarding databases, the criterion of originality is satisfied when, through the selection or arrangement of the data, the author expresses his creative ability in an original manner, by making free and creative choices (paragraph 38) and thus stamps his "personal touch". The criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom (paragraph 39). Article 3(1) and Recital 16 of Directive 96/9 demand no other criteria than that of originality to determine the eligibility of a database for the copyright protection provided for by that directive (paragraph 40). As a consequence, the intellectual effort and skill of creating that data are not relevant in

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37 The second part of the question was to know if copyright protection of portrait photographs ought to be inferior the protection enjoyed by other works, particularly photographic works (paragraph 86). The CJ stressed that the author of a protected work, under Article 2(a) of InfoSoc Directive, has the exclusive right to authorize or prohibit its direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part (paragraph 95). The provision must be interpreted in a broad sense (paragraph 96). Nothing in InfoSoc or in other directive applicable in this matter supports that the extent of the protection should depend on possible differences in the degree of creative freedom in the production of various categories of works (paragraph 97). Portrait photographs protection, under Article 2(a) of Infosoc Directive, cannot be inferior to the one enjoyed by other works, namely other photographic works (paragraph 98). If the national court concludes that the portrait photograph in question is a work, its protection is not inferior to that enjoyed by any other works, including other photographic works (paragraph 99).

38 Judgement of 01.03.2012, *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others*, C-604/10, EU:C:2012;115.

order to assess the eligibility of the database at issue for protection by copyright; it is irrelevant, for that purpose, whether or not the selection or arrangement of that data includes the addition of important significance to that data; the significant labour and skill required for setting up the database cannot, as such, justify protection by copyright if they do not express any originality in the selection or arrangement of the data which the database contains (paragraph 46 of the ruling). The CJ also stated that Directive 96/9 must be interpreted in the sense that it precludes national legislation to grant copyright protection under conditions which are different to those set out in Article 3(1) of the Directive (see paragraphs 47 to 52 of the ruling).

In *Funke Medien* case<sup>39</sup>, the CJ stated that subject matter can be protected by copyright under InfoSoc Directive only if such subject matter can be classified as ‘work’ (paragraph 18). To be protected as “work”, the subject matter must be original in the sense that it is its author’s own intellectual creation, reflecting the author’s personality, which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices (paragraph 19). Only something which is the expression of the author’s own intellectual creation may be classified as a ‘work’ within the meaning of InfoSoc Directive (paragraph 20). It is for the national court to determine whether military status reports, such as those at issue in the main proceedings, or certain elements thereof, may be regarded as “works” within the meaning of Article 2(a) and of Article 3(1) of InfoSoc Directive and therefore be protected by copyright (paragraphs 21, 22, 23). If military status reports, such as those at issue, are purely informative documents, the content of which is essentially determined by the information which they contain, so that such information and the expression of those reports become indissociable and that those reports are entirely characterized by their technical function, precluding all originality, it should be considered that, in drafting those reports, it was impossible for the author to express his creativity in an original manner and to achieve a result which is that author’s own intellectual creation (paragraphs 24 and 25).

In *Cofemel* Case<sup>40</sup>, the question at issue was whether the copying of the design of G-Star’s ARC jeans and “ROWDY” t-shirts and sweatshirts ought to be considered an infringement of the copyright of G-Star. The CJ considered it is settled case-law that for a subject matter to be considered original, it is both necessary and sufficient that it reflects the personality of its author, as an expression of his free and creative choices (paragraph 30). There is no originality when the realization of the subject matter was dictated by technical considerations, rules, or other constraints, leaving no room for creative freedom (paragraph 31).

In *Brompton* Case<sup>41</sup>, the question at issue was to know whether the design of a folding bicycle could benefit from copyright protection, though it was mainly functional or

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39 Judgment of 29.07.2019, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, C-469/17, EU:C:2019:623.

40 Judgment of 12.09.2019, *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV*, C-683/17, EU:C:2019:721.

41 Judgement of 11.06.2020, *Sl, Brompton Bicycle Ltd v Chedech/Get2Get*, C-833/18, EU:C:2020:461.

technic. The CJ ruled that, according to settled case-law, if the realization of a subject matter has been dictated by technical considerations, rules or other constraints which have left no room for creative freedom, it has no originality and cannot be protected by copyright (paragraph 24). A subject matter satisfying the condition of originality may be eligible for copyright protection, even if its realization has been dictated by technical considerations, provided that these technical considerations do not prevent the author from reflecting his personality in that subject matter, as an expression of free and creative choices (paragraph 26). That cannot be the case where the realization of a subject matter has been dictated by technical considerations, rules or other constraints which left no room for creative freedom or a such limited room that the idea and its expression become indissociable (paragraph 31). If the shape of the product is only dictated by its technical function, that product cannot be covered by copyright protection (paragraph 33). It is for the referring court to determine whether, through that choice of the shape of the product, its author has expressed his creative ability in an original manner by making free and creative choices and has designed the product in such a way that it reflects his personality (paragraph 34).

## 5.2. Work

The term “work”, referred under InfoSoc Directive, requires the subject matter to be expressed in a way that makes it identifiable with sufficient precision and objectivity. In the process of classification of the protected subject matter as “work”, there cannot be any subjectivity. Nevertheless, the subject matter in question does not have to constitute an expression in a permanent form, as it was stressed in *Levola Hengelo*<sup>42</sup>. The Court stated that the concept of “work” necessarily entails the existence of a subject matter that is identifiable with sufficient precision and objectivity (*Levola Hengelo*, paragraph 40, and *Cofemel*, paragraph 32). This is, first, because the authorities responsible to ensure that the exclusive rights inherent to copyright protection are protected must be able to identify clear and precisely the protected subject matter. Third parties against whom the copyright owner may claim infringement of copyrights must also be able to identify the subject matter in the same way (*Cofemel*, paragraph 33). Second, the need to ensure that there is no element of subjectivity, which goes against legal certainty, in the process of identification of the material as “work”, implies that the subject matter must have been expressed in an objective manner (*Levola Hengelo*, paragraph 41; *Cofemel*, paragraph 33). The required precision and objectivity are not achieved when the identification of the subject matter in question is essentially based on the sensations of the individual who perceives that subject matter. These sensations are necessarily subjective (*Levola Hengelo*, paragraph 42; *Cofemel*, paragraph 34).

<sup>42</sup> Judgement of 13.11. 2018, *Levola Hengelo BV v Smilde Foods BV*, C-310/17, EU:C:2018:899, paragraph 40: “...for there to be a ‘work’ as referred to in Directive 2001/29, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form”.

In Brompton Case, the CJ repeated that the concept of ‘work’ which is the subject of InfoSoc Directive necessarily entails the existence of a subject matter that is identifiable with sufficient precision and objectivity (paragraph 25, referring to *Cofemel*, paragraph 32).

## 6. Exclusion of related rights

According to Article 14, “Material” shall only be eligible for protection under copyright. Article 6 of Term Directive 2006/116, besides protecting works of photography, also allows Member States to protect photographs that are not eligible for copyright protection because they cannot be considered an author’s own creation, that is, they do not have “originality”. Some Member States protect simple photographs by introducing a national related right (Germany, Italy, and Spain, *inter alia*, grant this protection). According to the best interpretation of the relation between simple photographs protection, allowed by Article 6 of Term Directive, and Article 14 of DSM, Member States are prevented from introducing a related right that would also extend to simple photographic reproductions of works of visual art that are already in the public domain. Member States that protect simple photographs as a related right must restrict its application, excluding simple photographic reproductions of works of art in the public domain from its scope. Because Article 14 is a special provision, it precludes Member States from protection of material resulting from reproductions of works of visual art in the public domain by any type of related right, including the one allowed under Article 6 of the Term Directive<sup>43</sup>.

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43 In this sense, see Eleonora Rosati, *Copyright...*, *op. cit.*, p. 248; Eleonora Rosati, “DSM Directive...”, pp. 1-5 (pp. 3-4); ECS-European Copyright Society, *Comment...*, *op. cit.*, pp. 1-5 (p. 3). The same approach should be followed regarding other EU law provisions, or unharmonized rights under national laws of the Member States. In this sense, see Eleonora Rosati, *Copyright...*, *op. cit.*, pp. 248-249; ECS-European Law Society *Comment...*, *op. cit.* pp. 1-5 (p. 3). Regarding the Term Directive 2006/116, Article 4 allows protection of previous unpublished works and Article 5 allows critical and scientific publications. According to Article 4: “Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public”. According to Article 5: “Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published”. If these publications are works of visual arts, or include works of visual arts, and if they satisfy the requirement of “originality” (which is probable to happen, regarding critical or scientific publications) they can be protectable. In this sense, see Eleonora Rosati, *Copyright...*, *op. cit.*, pp. 248-249; see also Cristiana Sappa, “Hosting...”, *op. cit.*, pp. 924-936 (pp. 935-936). Regarding the incentive given by Article 4 of the Term Directive to the divulgation of unpublished works (*editio princeps*), we think that Article 14 of DSM should not apply if such works have “originality”, because works of visual art published or communicated for the first time when already into the public domain would introduce an unjustified discriminatory treatment compared to works of different nature (with more detail, see Cristiana Sappa, “Hosting...”, *op. cit.*, pp. 924-936 (pp. 935-936). Article 39 CDADC, headed “Obras no domínio público” grants a patrimonial right of 25 years to whoever lawfully publishes or discloses a previously unknown work, after the expiry of patrimonial copyright protection (1) and to critical or scientific lawful publications of works that are in the public domain (2).

## 7. Sale of reproductions

As stated in Recital 53, Article 14 does not prevent CHIs or anyone else, *inter alia*, tourist offices, photographic agencies, souvenir establishments, or any kind of establishments from selling reproductions, such as postcards, of works of visual art in the public domain.

## 8. Effectiveness

Article 14 was introduced to foster public domain and to prevent inconsistent approaches of Member States in order to avoid legal uncertainty that affects the cross-border dissemination of works of visual art (in a broad sense) in the public domain. Member States' freedom to legislate, regarding this provision, is very limited. Article 14 (as Article 6) requires Member States to adopt a minimalistic approach in the process of transposition of the DSM, prohibiting Member States to alter the scope of Article 14<sup>44</sup>.

Nevertheless, it is not certain if public domain will still face factual and legal resistance in Member States after the transposition of Article 14 of DSM.

Member States transposed the provision in slightly different ways. Some countries, like Portugal (Article 39-A of CDADC<sup>45</sup>), Spain (Article 72 of the Spanish Real Decreto-Ley 24/202), and Italy (new Art. 32 quarter of the Italian Legislative Decree 42/2004) made a copy paste of it. Others, like France, did not transpose the provision because they considered the current legal framework as already compliant with Article 14 of DSM Directive. German §68 Urheberrechtsgesetz only states that the reproduction of public domain visual works is not protected by related rights of Parts 2 and 3 of the law. We must wait and see if these different approaches will affect a harmonized interpretation of Article 14 of DSM Directive, which is not desirable because, *inter alia*, it will affect the cross-border market<sup>46</sup>.

44 In this sense, see Eleonora Rosati, *Copyright...*, *op. cit.*, p. 249. For the discussion about the methods of transposition, in general, see R. Král, "On the choice of methods of transposition of EU Directives", *EL Rev-European Law Review*, 41(2) (2016), pp. 220-242.

45 Introduced by recent DL no. 47/2023, of June 19, 2023 in CDADC. In Portuguese, the wording of new Article 39-A, headed "Obras de arte visual no domínio público", is: "Depois de expirado o prazo de proteção de uma obra de arte visual, qualquer material resultante de um ato de reprodução dessa obra no domínio público só é protegido por direito de autor ou direito conexo se for original, resultando da criação intelectual do seu próprio autor".

46 On 20 April 2023, the Italian Civil Court of first instance of Florence (Tribunale civile di Firenze) issued a decision that considered unlawful the reproduction by lenticular technique of the image of Michelangelo's David and its juxtaposition with the image of a male model on the cover of GQ magazine. The reproduction was not authorized by Galleria degli Uffizi where the work is kept. The decision of the Court was that "unauthorized reproduction of the image of the nation's State-protected cultural property, in a manner distorting the cultural purpose of the same property, constitutes a civil tort that must be compensated in both pecuniary and non-pecuniary damages". The Court applied the Italian law: art. 9 of the Constitution, art. 107-108 of the Legislative Decree 42/2004, Cultural Heritage Code "Codice dei Beni Culturali" (and, by analogy, art. 10 of the Civil Code). The decision is like a judgment, of the Civil Court of first instance of Venice (Tribunale civile di Venezia) in the Vitruvian Man (Uomo Vitruviano)

Factual and unfair practices (the so-called “copyright fraud”) have been practiced by CHIs, private market operators and even by the public sector bodies (as seen in footnote 46). It consists in claiming protection regarding what is not protected anymore. Even after the transposition of Article 14, “copyright fraud”, in fact, may continue, namely with the use of technological protection measures that prevent the accesses to high-resolution photographs on websites, or by preventing the access to the collections online. Also, the use of restrictive terms and conditions can affect such access. Other option is to put a copyright signal next to the non-protected material. Average users, who do not know anything about copyright, with this type of deceptive and misleading messages, will be discouraged, and all these practices can affect the circulation of the reproduced works. Such a risk remains, despite the presence of Article 14 of DSM<sup>47</sup>. There are doubts about the effectiveness of DSM. As Bendor Grosvenor points out, the Directive marks an important battle that was won in the fight against image fees, but it is not the end of the war<sup>48</sup>. Article 14, though very important, does not tell whether a contract imposing limitations or exclusions of Article 14 content is void, nor national rules that are transposing the provision state the consequences of infringement<sup>49</sup>.

## 9. Application in time

Regarding the temporal application of Article 14, Article 26 provides that the Directive shall be applicable to all works and other subject matter that are protected

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case. As Roberto Caso refers, these court rulings over the commercial use of images of Michelangelo’s David and Leonardo’s Vitruvian Man coexist with the reproduction of the image of Botticelli’s Venus for the Italian Ministry of Tourism’s “Open to meraviglia” advertising campaign. The Italian State seems to have the power to decide when the use of cultural heritage is compatible with the cultural heritage’s scope, which is very controversial. Also, the Italian Ministry of Culture has published new “Guidelines for the determination of the minimum amounts of fees and charges for the concession of use of property handed over to state institutes and places of culture of the Ministry of Culture (Ministerial Decree of April 11, 2023, No. 161)”. These Guidelines have also triggered a strong debate. According to the Guidelines, for example, a university press must pay the Public Sector (Ministry of Culture or public museum) for the reproduction, in a book, of images of public cultural property. As in the Tribunale di Venezia and Tribunale di Firenze’s decisions, the idea is to transform the State into a commercial actor competing with other companies in the market of the commercial reproduction of cultural heritage images. “The compatibility of this pseudo-intellectual property with the Italian Constitution and European Union law remains doubtful. Under EU law the Italian public cultural property seems to be inconsistent with art. 14 of the DSM directive on works of visual art in the public domain”. The recent Italian cases confirm that the public domain is threatened not only by intellectual property but also by this pseudo-intellectual property of the State. This case (and the problems it raises) was reported by Roberto Caso (University of Trento), on June 15, 2023, in *Kluwer Copyright Blog*.

47 In this sense, see Cristiana Sappa, “Hosting...”, *op. cit.*, pp. 924-939 (p. 937).

48 See, Bendor Grosvenor, “The end of museum image fees?”, *op. cit.*, pp. 1-5 (p. 3).

49 Cristiana Sappa writes that Article 14 does not seem to prevent the tokenization of works in the public domain and the creation of NFTs. The author gives the example of the initiative of the Vatican museums that created an NFT collection of hosted goods. On one hand, digital copies of the goods collected in museums may be freely available on many museum websites, Europeana or Wikimedia. But, on the other hand, digital copies of the same works of visual art in the public domain are being privatized via NFTs and blockchain technologies. Contractual freedom in this area is not desirable – “Hosting...”, *op. cit.*, pp. 924-939 (p. 937).



on or after 7 June 2021. In what concerns Article 14 this does not mean that this provision shall only apply to works and other subject matter that were protected as of 7 June after they have subsequently entered in public domain. The purpose of Article 14 is essentially clarificatory. This means that this provision shall apply to any material that results from an act of reproduction of a work of visual art that is in the public domain, irrespective if the work was or was no longer protected on 7 June 2021<sup>50</sup>.

## 10. Conclusions

Article 14 of DSM, for the first time in the EU, grants a positive status public domain with reference to works of visual art. Once the patrimonial copyright of a work of visual art has expired, it may be reproduced (in a broad sense) without the author's consent since it is in the public domain. No exclusive rights shall attach to any copy of a public domain work of visual art unless that reproduction constitutes its author's own creation. One of the purposes of Article 14 of DSM is to prevent faithful reproductions of public domain works of visual art to be vested with regained exclusive protection, by copyright or any related right in the reproduction itself. The provision aims to prevent "copyright-fraud" which has been a practice of museums, other CHIs, private operators, and even public sector bodies. The public domain should be available for everyone to use for economic and non-economic purposes, namely, to generate new cultural goods and new knowledge. Thus, Article 14 is a clarificatory provision, which also codifies the concept of originality, according to the CJ settled case law.

Article 14 also has a second purpose, aims to avoid divergent approaches across the EU, which lead to uncertainty that affects cross-border dissemination of works of art in the public domain. The transposition of this provision should be minimalistic to avoid different interpretations of Member States.

Nevertheless, Article 14 of DSM Directive has some flaws. It does not define what are works of visual art, though the concept ought to be understood under the broad sense of artworks, as referred to in the Bern Convention. The provision does not determine the consequences of its infringement, that is, what are the consequences when the practice of "copyright fraud" continues, namely by using technological measures and restrictive terms and conditions. These acts, and similar ones, should be considered void, but that is not expressly stated, and can lead to conflict and uncertainty. Also, Article 2 and Recital 13 do not contain an exhaustive list of what should be considered CHIs. Opting for an open concept can also lead to uncer-

<sup>50</sup> As clearly stated by Eleonora Rosati, *Copyright...*, *op. cit.*, p. 249. Article 14(2) of Portuguese DL no. 47/2023, of June 19, 2023, though written in a strange way, states that this decree-law does not apply to works and other protected material that are not protected by copyright or other related rights before 7 of June of 2021. Because the new Article 39-A of CDADC that transposes to Portugal Article 14 of DSM is a mere clarificatory provision, on the same grounds as Eleonora Rosati, we consider that Article 39-A of CDADC is immediately applicable to all works or related rights that are in the public domain before 7 of June of 2021.



tainty in the cross-border market. All these issues, specially the second one, raise doubts about the effectiveness of Article 14 of DSM Directive, once transposed into national laws. To accomplish the goals of Article 14, courts shall have to interpret it in a consistent way with modern approaches that favour circulation and re-use of information.