ISSN 2281-5147

Opinio Juris in Comparatione

Studies in Comparative and National Law

Vol. 1, n. 1/2020

Digital Single Market Copyright Directive: Making (Digital) Room for Works of Visual Art in the Public Domain

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Abstract

Establishing that Member States shall provide that any material resulting from an act of reproduction of works of visual art in the public domain is not subject to copyright or related rights, unless the material is original, art. 14 of the Digital Single Market Copyright Directive aims to promote the wider access and circulation of cultural contents. The realization of its objective in the digital and cross-border dimension is ambitious, as it requires extensive harmonization. This proves difficult not only because of some ambiguities that characterize the norm and primarily, amongst those, the absence of a definition of works of visual art, but most of all for the complex juridical scenario evoked: art. 14 stands at the interplay of the Copyright law and, possibly, other norms belonging to different domains, depending on the peculiarities of each Member State. While affirming that art. 14 shall be welcomed as a needed, if not definitive, passage towards further legal certainty, this

* Graduated from University of Trento, Faculty of Law. A special thanks goes to Heike Koehler and Berenike Salome Jacob for helping me with the translations of recent documents related to the implementation of DMS Copyright Directive from German to Italian. All the errors remain my own. All links were last visited as of the 15th of November 2020.

contribution tries to give account of the present challenges, with special focus on related rights in photographs and analysing the German and Italian on-going transposition efforts.

KEYWORDS

Art. 14 Digital Single Market Copyright Directive – Public domain – Reproduction – Works of visual art

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Introducing Article 14 of the Digital Single Market Copyright Directive

The art. 14 of the Directive (EU) 2019/790 for Copyright in the Digital Single Market (also "DSM Copyright Directive" in the text)[1] introduces a new rule for the reproductions of works of visual art in the public domain.

The Directive is primarily aimed at advancing harmonization in the Digital Single Market, with special regards to cross-border circulation of online contents[2]. It represents the

[1] Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 17 April 2019, available at <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

[2] Recitals n. 1 e n. 3 of DSM Copyright Directive further explain the objective of harmonization in the Digital Single Market. See also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, 6 May 2015,

outcome of a long cumbersome legislative path. This started with the first Commission's proposal in early September 2016[3], and became soon one of the most controversial and discussed legislative journey in the history of the European Union[4].

The set of exceptions and limitations of the European Copyright acquis, on which the Information Society Directive (also "InfoSoc Directive" in the text) had previously intervened exercising horizontal effects[5], is dramatically renovated. This contends the evolving complex role of exceptions and limitations in the EU Copyright Law[6]. Especially in the digital environment, exceptions and limitations are framed according to well-known tensions and represented as incidental derogations to exclusive rights or, in contrast, as affirmations of the interests of online users[7].

The Directive caught the strongest attention world-wide, causing major debate about the significance of freedom of expression and censorship in the web space. Most conspicuous interest has been dedicated to articles 15 and 17, respectively dealing with the novel

available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>, and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a modern, more European copyright framework*, the 9th of December 2015, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0626&from=EN>.

[3] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, 14 September 2016, available at <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>.

[4] A beneficial timeline is available from CREATe, EU Copyright Reform, last updated on the 26th of March 2019, available at <https://www.create.ac.uk/policy-responses/eu-copyright-reform/>. It was observed the consistent application of trilogues, operating procedures for reaching agreements between the European Commission, European Parliament, and the Council of the EU during the legislative process. See European Parliament decision on the conclusion of the Joint Declaration on practical arrangements for the co-decision procedure, the 22nd of May 2007, available at <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0194+0+DOC+XML+V0//EN>.

[5] Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, 22 May 2001, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001L0029. See in particular art. 5>.

[6] The literature on the point is vast. See C. Sganga, *A new era for EU copyright exceptions and limitations? Judicial flexibility and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice,* in *ERA Forum* 21, pp. 311-339, 2020, available at <https://doi.org/10.1007/s12027-020-00623-9>; J.P Quintais., *The New Copyright in the Digital Single Market Directive: A Critical Look*, in *European Intellectual Property Review*, 1, 2020, pp. 4-7, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424770>, also referring to J.P. Quintais, *Copyright in the Age of Online access - Alternative compensation Systems in EU Law*, The Netherlands, 2017, pp. 151-243 and M.C. Janssens, *The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation,* in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright,* Cheltenham, 2009. On the possibility to read exceptions under the notion of a social function clause in EU Copyright Law see C. Sganga, *Propertizing European Copyright*, Cheltenham, 2018, pp. 250-252.

[7] F. Mezzanotte, *Le «eccezioni e limitazioni» al diritto d'autore UE (parte II: Le libere utilizzazioni nell'ambiente digitale)*, in *AIDA*, 2017, pp. 301-302. For a more general overview, *ibidem*, 303-308. The debate around exceptions and limitations of EU Copyright Law in the digital environment and the possibility of a users' right approach also frequently crosses the US doctrine of fair use in a comparative key. See, inter alia, R. L. Okediji (ed.), *Copyright Law in an Age of Limitations and Exceptions*, Cambridge, 2017.

press publishers' right (also renowned as the "link tax") and the use of protected content by online sharing services providers[8].

However, what is of interest for our purposes is the EU Legislator's effort to promote wider access to cultural content, and to enhance the role of cultural heritage institutions, with a remarked attention to the increasingly digital practices[9]. This paper focuses on the revolutionary impact of art. 14 of the DSM Copyright Directive: shading light on the possibility to reproduce works of visual art in the public domain, it moves towards the flourishing of open culture.

The norm affirms that, with regards to works of visual art for which the copyright has expired – namely, works belonging to the public domain – any material resulting from an act of reproduction shall not be subject to copyright or related rights. This is unless the material is original, hence it represents the author's own intellectual creation. Recital 53 guides the reading of the norm, clarifying its context and objective, plus it introduces the reference to the *faithful* character of the reproductions and to the possibility for museums to sell postcards, which remains intact.

The article and the recital were only added at a later stage in the text[10], but part of the article was already present as a final addition to *ex* art. 5, now art. 6. This is a mandatory exception aimed at enhancing digitisation processes for preservation of cultural heritage[11].

[8] For an overview, see S. Stalla-Bourdillon, E. Rosati, K. Turk, C. Angelopoulos, A. Kuczerawy, M. Peguera, M. Husovec, *A Brief Exegesis of the Proposed Copyright Directive*, 2016, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296>. Focusing on the distributive rationale in the reform see G. Priora, *Catching sight of a glimmer of light: Fair renumeration and the emerging distributive rationale in the reform of EU Copyright Law,* 10 JIPITEC, 330, 2019, available at <https://www.jipitec.eu/issues/jipitec-10-3-2019/5043>.

[9] For an overview, see J. Keller, *Explainer*: *What will the new EU copyright rules change for Europe's Cultural Heritage Institutions,* in Europeana Pro Blog, 9June 2019 (adjourned as of November 2019), available at <https://pro.europeana.eu/post/explainer-what-will-the-new-eu-copyright-rules-change-for-europe-s-cultural-heritage-institutions>. Next to the already mentioned art. 6, Articles 8 and 9 concern the use out-of-commerce works, for which see R. Tryggvadoittir, *The EU proposal to ensure wider access to content in cultural heritage institutions*, in CiTiP Blog, 24 October 2017, available at <https://www.law.kuleuven.be/citip/blog/the-eu-proposal-to-ensure-wider-access-to-content-in-cultural-heritage-institutions/>. About art. 12, foreseeing a mechanism for collective licensing with an extended effect that may be of useful application within the cultural heritage management, see J. Axhamn, *The New Copyright Directive: Collective licensing as a way to strike a fair balance between creator and user interests in copyright legislation (Article 12),* in CiTiP Blog, 25 June 2019, available at <http://copyrightblog.kluweriplaw.com/2019/06/25/the-new-copyright-directive-collective-licensing-as-a-way-to-strike-a-fair-balance-between-creator-and-user-interests-in-copyright-legislation-article-12/>. art. 3 is also seminal for cultural institutions, as they are included as the subjects who may perform text and data mining activities in the sense of the Directive – namely the extractions and reproductions of copyrighted works for the purposes of scientific research, provided they have lawful access and the fulfilment of the conditions set by art. 4: see R. Caso, *Il conflitto tra diritto d'autore e ricerca scientifica nella disciplina del text and data mining della direttiva sul mercato unico digitale*, in *Trento Law and Technology Research Group*, Research Paper n. 38, 2020, available at <https://zenodo.org/record/3648626#.X5WmKy9aab8>. Finally, art. 5 impacts the cultural heritage institutions as it introduces the possibility of the digital use of copyrighted works (and other subject matter) for the sole purpose of illustration for teaching.

[10] Art. 14 and recital 53 were introduced as art. 10b and recital 30a during the revision of the text that took place in the final trilogues between the European Parliament, Council and Commission. See Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Working Paper, the 16th of February 2019, available at <https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2019/02-26/Copyright-AnnextoCOREPERletter_EN.pdf>.

[11] The addition was the result of the first revision of the Commission's proposal by the European Parliament. See the amendments adopted by the European Parliament on the proposal for a directive of the European Parliament and of

The bond with art. 6 confirms that art. 14 addresses the subject of public domain to promote the dissemination of cultural content. A choice was eventually made to give public domain explicit recognition in a new provision of autonomous significance[12].
The original text of art. 14 proposed by the Parliament broadly referred to reproductions of (all) materials in the public domain[13], while the scope was later narrowed to works *of visual art* only. Nonetheless, the introduction of art. 14 still indicates a powerful turn in the challenge for the online dissemination of cultural contents in the EU, within the broader narrative on copyright social function and the promotion of cultural rights[14].
Public domain is a key element of the movement for a more open culture[15]. The lack of adequate resources to correctly identify works in the public domain[16] and legal uncertainty around their use are obvious obstacles to their circulation – which shall be immensely empowered in the digital environment, especially on the Internet. With regards to Copyright Law, art. 14 represents the opportunity to enhance legal certainty[17] and it welcomes the appeal of scholars, activists and users that what is in the public domain shall be in the public domain in the digital environment as well[18].

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the Council on copyright in the Digital Single Market, the 12nd of September 2018, available at: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0337_EN.html. art. 6 prescribes Member States to allow cultural heritage institutions to make copies of any work (or other subject matter) that is permanently in their collections, in any format or medium, for purposes of preservation, to the extent necessary for such preservation.

[12] J.P. Quintais, *cit*., p. 15, p. 22.

[13] As evidenced by the analysis of A. Giannopoulou, *The New Copyright Directive: Article 14 or when the Public Domain Enters the New Copyright Directive*, in *Kluwer Copyright Blog*, 27 June 2019, available at <http://copyrightblog.kluwerilaw.com/author/agiannopoulou1/>.

[14] For a study framing cultural rights within Human Rights Law and Intellectual Property see C. Sganga, *Right to Culture and Copyright: Participation and Access*, in C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property,* Cheltenham, 2015, pp. 560-576, (also available at <https://ssrn.com/abstract=2602690>).

[15] Public domain as a central element for the promotion of culture is well represented in the literature. See J. Boyle, *The Public Domain: Enclosing the Commons of the Mind,* New Haven, 2008, available at <http://www.james-boyle.com>. On the digital environment, see M. Dulong de Rosnay, J.C. De Martin (Eds.), *The Digital Public Domain – Foundations for an Open culture*, OpenBook Publishers, Cambridge, 2012, available at <https://www.openbookpublishers.com/product/93>. For an interesting perspective, with attention to historical developments, see G. Frosio, *Reconciling Copyright with Cumulative Creativity – The third paradigm*, Cheltenam, 2018.

[16] K. Petraszova, *Building on IPR knowledge exchange in the cultural heritage sector,* in *inDICEs Project*, 19 October 2020, available at <https://indices-culture.eu/building-on-ipr-knowledge-exchange-in-the-cultural-heritage-sector/>.

[17] See recital 53, where it states: «In addition, differences between the national copyright laws governing the protection of such reproductions give rise to legal uncertainty and affect the cross-border dissemination of works of visual arts in the public domain (...)». As noted by A. Giannopoulou, *cit*., both in the European Parliament's press release *Digital Single Market: EU negotiators reach a breakthrough to modernise copyright rules*, 13 February 2019, available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_528>, and the European Commission's Memo n. 1849, *Questions and Answers – European Parliament's vote in favour of modernised rules fit for digital age*, the 26th of March 2019, available at <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1849>, the reference to legal certainty is explicit. As it is possible to read the latter: «Thanks to this provision, all users will be able to disseminate online with full legal certainty copies of works of art in the public domain».

[18] See for instance COMMUNIA, Policy Recommendations, available at <https://www.communia-association.org/recommendations/>, Public Domain Manifesto, available at <https://publicdomainmanifesto.org/manifesto/>, Europeana Public Domain Charter, available at <https://www.europeana.eu/en/rights/public-domain-charter>. The Policy Recommendation n.5 of COMMUNIA reads: «Digital reproductions of works that are in the Public Domain must also belong to the

However, while the aim of art. 14 may at first glance appear plain and simple – i.e. clarifying the copyright status of faithful reproductions of certain public domain works in the EU acquis – the provision evokes a complex juridical scenario. The norm stands at the interplay of several rights, where interests of authors, users and cultural heritage institutions, such as GLAM (acronym for Galleries, Libraries, Archives and Museums), are critically at stake. As captured by the literature, given the broad potential of art. 14 and the highly diversified Members States framework, its implementation requires greater efforts, and vital challenges to reach the desired further harmonization shall be tackled.
This contribution tries to give account of them, and it is organised as follows. The second section of the paper proceeds with a brief overview of the key-elements of art. 14 and recital 53, acknowledging their scope. The interplay with related rights in copyright forms a special focus and while different practices shall be affected by the implementation of art. 14 the most relevant example to understand its impact would probably be the photographs of public domain works of visual art. In the third section two examples of the on-going transposition efforts by Member States, selected for their interesting backdrops, are critically examined. The fourth section tries to outline a few considerations about the courses of action needed to transpose the provision while seeking the objective of a further harmonisation. Short conclusions follow.

1. The scope of Article 14

The present section analyses the scope of art. 14. The public domain constitutes a fundamental key to its understanding, at the core of the objective of art. 14: the valorisation of cultural heritage and the promotion of the access to culture.
On top of this, art. 14 concerns *any material* resulting from an act of reproduction of *works of visual art*, a notion to be defined. It also makes a distinction whether the material is original or not, in adherence to the increasingly harmonized originality standard in the EU acquis. The provision is addressed to the digital environment, revealing the impact on certain types of reproductions which may have online circulation. Art. 14 specifies that non-original materials shall not be protected *by copyright or related rights*.
All the mentioned elements will be analysed separately, before focusing on what seems to be one of the most interesting use-cases impacted by art. 14: photographs.

Public Domain (...)». Principle n. 2 Europeana Public Domain Charter states: «What is in the Public Domain needs to remain in the Public Domain. Exclusive control over Public Domain works cannot be re-established by claiming exclusive rights in technical reproductions of the works, or by using technical and or contractual measures to limit access to technical reproductions of such works. Works that are in the Public Domain in analogue form continue to be in the Public Domain once they have been digitised».

1.1. Works of visual art, in the public domain

The title of art. 14 is «Works of visual art in the public domain». The norm refers to any material resulting from acts of reproduction of works of visual art, *when the term of protection of the work has expired*. In explicating so, art. 14 represents the first codification of the notion of public domain[19]. As the first part of recital 53 states: «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».

A few words must be spent on a very crucial distinction: the expression «when the term of protection has expired» could «mark a point in time from which onwards reproductions newly made would not give rise to any new rights, whereas existing rights with regard to reproductions made before that point in time would continue to exist»[20]. In the same vein, it can be asked whether works that have never benefit from copyright protection shall be covered. These doubts seem to introduce some uncertainty in the interpretation with regards to both the material scope of the norm and its application in time.

Turning to the expression *work of visual arts*, it must be kept in mind that the norm was only later narrowed to these types of works. In the current text, recital 53 seems to justify this choice, when it affirms that «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». One question that remains to be asked is why, and what can be deemed to fall into this domain.

The definition of works of visual art is not provided in the Directive. It may be looked for elsewhere in EU Copyright law. A reference is found in the Annex n. 3 of the Directive 2012/28/EU[21], as explicitly recognized by the German example of transposition (on which section 3.1 further elaborates), but it represents an open list. The Annex refers to the sources to verify the status of a work as orphan, and states that works of visual art comprise «fine art, photography, illustration, design, architecture, sketches of the latter works, and other such works that are contained in books, journals, newspapers and magazines or other works»[22].

The reference to the international framework of the Berne Convention has not proven beneficial, as such a category is missing in favour of a more analytic and detailed descrip-

[19] A. Giannopoulou, *cit.*

[20] European Copyright Society (ECS), *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,* 26 April 2020, pp. 3-4, available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs_cdsm_implementation_article_14_final.pdf>.

[21] Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works, 25 October 2012, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0028&from=EN>.

[22] In a similar fashion, see the European Commission's Memo n. 1849, *Questions and Answers – European Parliament's vote in favour of modernised rules fit for digital age*, cit.: «For instance, anybody will be able to copy, use and share online photos of *paintings, sculptures and works of art in the public domain* when they find them in the internet (...)».

tion of literary and artistic works as protected subject matter[23]. With regards to Member State law, the landscape is one of fragmentation as well, since they list works protected by copyright differently[24].
Overall, the reference remains unclear, at the overlap with different nomenclatures and categorization of works and the intuitive understanding of works of visual art as visual in fruition. This is of critical importance because the definition of works of visual art is the backbone of the material scope of the norm.

1.2. Non-original reproductions in the digital environment

In the EU copyright acquis, the right to reproduction entails to reproduction in any means or form, direct or indirect, temporary or permanent, in whole or in part. Art. 2 of the InfoSoc Directive harmonized the right to reproduction including digital practices, in line with the Agreed Statement attached to the WIPO Treaty stating that the right to reproduction fully applies in the digital environment[25].
Art. 14 explicitly stresses the relevance of the digital environment for the act of reproduction, and recital 53 appears to indicate that it is precisely here that the protection of non-original reproductions is inconsistent with the expiry of the copyright. Also, art. 14 refers to *any material* resulting from an act of reproduction, which seems to imply a further stretch and to reinforce an open approach towards the outcome of the reproduction.
Furthermore, the norm especially addresses non-original reproductions. More specifically, Member States are required to provide that the materials resulting from an act of reproduction shall not be subject to copyright or related rights, unless they are original in the sense that they are the authors' own intellectual creations.
Originality has always been a vital element differentiating copyright traditions in the EU, also linked to the justification of copyright. Its threshold has consequently proven of problematic harmonization in EU Copyright Law. The Term Directive, the Software Directive and the Database Directive harmonized the originality standard as the «author's own intellectual creation». This only realized a vertical harmonization, namely confined to the related subjects[26]. The horizontal harmonization was eventually unlocked a few years later,

[23] European Copyright Society (ECS), cit., 2. See Berne Convention for the Protection of Literary and Artistic Works Paris Act, the 24th of July 1971, as amended on 28 September 1979, art. 2: «Protected works».

[24] T.E. Synodinou., *The Foundations of the Concept of Work in European Copyright Law,* in T-E. Synodinou (ed.), *Codification of European Copyright, Challenges and perspectives*, The Netherlands, 2012, pp. 106-111.

[25] Agreed Statements concerning the WIPO Copyright Treaty, adopted by the Diplomatic Conference on the 20th of December 1996, see Agreed Statement Concerning Article 1(4).

[26] Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and certain related rights, the 12nd of December 2006, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0116>; Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases, the 11st of March 1996, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996L0009>; Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs, of the 23rd of April 2009, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0024>. See T. Margoni, *The Harmonisation of EU Copyright Law: The Originality Standard*,

when the European Court of Justice gave to this notion a uniform interpretation within the InfoSoc Directive, in the *Infopaq* landmark decision of 2009[27].
At present art. 14 of the DSM Copyright Directive contains a new general reference to the «author's own intellectual creation» standard, defined by the mentioned legislative texts and confirmed by the European Court of Justice. This reference is suggested to represent the next timely step in the on-going harmonization of the concept of originality and a codification of the case law on the point[28].
At the same time, it is worthwhile noting that recital 53 mentions the circulation of *faithful* reproductions. This may introduce a degree of uncertainty in the interpretation of art. 14, as it emphasizes the documentary character of the act of reproduction. How it is possible to combine the element of faithfulness with the originality standard remains unclear. Additionally, recital 53 concludes that *certain* reproductions of works of visual art in the public domain should not be protected, confirming such room for ambiguity.

1.3. The interplay of different rights

Art. 14 requires Member States to provide that any non-original material resulting from an act of reproduction is not subject to *copyright or related rights*. Despite this linear affirmation, its meaning unfolds in multiple directions. This is also why the rule introduced by art. 14 seems difficult to be defined and framed within the set of exceptions and limitations in the DSM Copyright Directive[29]. In this regard, it must also be noted that art. 14 is part of the Title III, concerning «Measures to improve licensing practices and ensure wider access to content», but also stands out, as it constitutes the only norm of Chapter 4, entitled «Works of visual art in the public domain».
The enforcement against practices of illegitimate appropriation of copyright for public domain works, also known as copyfraud[30], is not addressed. Also, in declaring the absence of copyright or related rights, the norm makes room for different uses of the material, in-

in M. Perry (ed.), *Global Governance of Intellectual Property in the 21st Century, Reflecting Policy Through Change*, Switzerland, 2016, pp. 91-94.

[27] European Court of Justice, *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, Judgment of the Court of the 16th of July 2009, available at <http://curia.europa.eu/juris/document/document.jsf?docid=72482&doclang=EN#>. For an overview, also on criticalities, see *inter alia* T.E. Synodinou, *cit.*, 97-102 and E. Rosati, *Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision,* 58 J. COPYRIGHT Soc'y U.S.A. 795 (2010); Sganga, *Propertizing European Copyright*, *cit.*, 123-125.

[28] On this point A. Giannopoulou, *cit.*; E. Rosati, *DSM Directive Series #3: How far does Article 14 go?*, in *The IP Kat*, the 9th of April 2019, available at <https://ipkitten.blogspot.com/2019/04/dsm-directive-series-3-how-far-does.html>; A. Wallace, E. Euler, *Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments*, in *IIC – International Review of Intellectual Property and Competition Law*, 2020, n. 51, 838, available at: <https://ssrn.com/abstract=3575772>.

[29] This is worth future research within the debate on the evolving nature of exceptions and limitations in EU Copyright Law, on which see note 6.

[30] As noted by A. Giannopoulou, *cit.* The reference is to J. Mazzone, *Copyfraud,* Brooklyn Law School Legal Studies Paper No. 40, 2006, available at <https://ssrn.com/abstract=787244>.

cluding the commercial one[31]. Interestingly, recital 53 mentions that this shall not prevent cultural heritage institutions from *selling* reproductions, such as postcards, suggesting an impact on these particular actors and related use-cases.
Deepening into the realm of the norm, on the one hand art. 14 addresses non-original reproductions and excludes copyright. As illustrated, in doing so the norm implies to consider the increasingly harmonized standard of originality in the EU Copyright acquis, notwithstanding the same art. 14 seems to represent an essential passage in this adventurous story.
On the other hand, even though the resulting material would not be protected by copyright as original, non-original reproductions can surely be protected by neighbouring rights. Here art. 14 fundamentally addresses a subject characterized by considerable fragmentation and a lesser degree of harmonization between Member States. Thus, the reference to related rights arguably provides the decisive element to understand the impact of the norm and helps to envision its most relevant use cases, as explained in the next section 2.4.
For the sake of completeness, it shall be mentioned that the use cases addressed by art. 14 may also meet the existing exceptions and limitations of exclusive rights in EU Copyright law, and this equally points to a fragmentated horizon between Member States. Finally, from a more general perspective, other norms, belonging to different domain than copyright, may prove relevant to the same use cases and even contrast the realization of the objective of art. 14. This issue seems to be better understood by a case-by-case study of the national frameworks. In fact, it has especially emerged in the analysis of the transposition of the norm in Italy, where norms protecting the cultural heritage may limit reproductions of works of visual art in the public domain which fall into the definition of cultural goods, as highlighted in section 3.2.

1.4. Focus: on reproductions, related rights and photographs

Considering the use cases of art. 14, while photographs are worth special attention, there is a plurality of works or subject matter protected by national copyright law which could be of relevance. In the online circulation and fruition of cultural contents the reproductive potential of audio-visual contents, protected by copyright as original, and by the related right of fixation within the EU, must be considered. Similarly, 3D reproductions and works which can be accessed online represent great resources for the reproduction of, especially, artworks. These appear use case of interest, plus for their peculiar characteristics they arguably attract protection as original works[32]. Finally, the further stretch implied by art.

[31] See also the European Commission's Memo n. 1849, *Questions and Answers – European Parliament's vote in favour of modernised rules fit for digital age*, cit., stating that with art. 14 «For instance, anybody will be able to copy, use and share online photos of paintings, sculptures and works of art in the public domain when they find them in the internet and reuse them, including for commercial purposes or to upload them in Wikipedia (...)».

[32] European Copyright Society (ECS), *cit.*, 3.

14 referring to *any material* to be enjoyed by digital means suggests considering more structured works as well or contents incorporated in applications. Increasingly important media for the fruition of cultural contents take the form of a collection, with their own structure and organization, as for example databases, including multimedia works[33]. This type of works, as established by the Database Directive of 1996, may be copyrighted, but also entitle to the *sui generis right* that safeguards the efforts of compilation and organization of the overall work, without extending to its single parts[34].

With regards to photographs, their importance for the digital reproduction and fruition of contents – almost every content – is out of the question[35]. This is of special significance for promoting the access to culture, and photography also constitutes a powerful tool for the digitisation and preservation of cultural heritage[36]. In addition, as photographs are adherent means to reproduce reality but are at the same time a form of art, copyright on photographs leads to discuss the very essence of the originality standard. This is precisely the reasoning proposed in the formulation of art. 14, distinguishing original and non-original reproductions of public domain works of visual art.

Partly owing to the matter of their originality, copyright protection of photographs has proved cumbersome and fragmented since the inclusion in the Berne Convention. At that time, as a new technology, photography was not universally perceived as a mean to produce works which could be copyright subject matter. Interestingly, the Closing Protocol of 1886, while opting for a compromised solution with regards to countries where photographs would already be considered artistic works, assured protection to authorised photographs of protected works of art in all countries[37]. This provision was ruled out when a first agreement about the protection of photographic works as original was reached, within the Berlin revision of 1908. Only with the Brussels revision of 1948 photographic works and works expressed by analogous processes were included in art. 2. This resulted in the application of the character of intellectual creation to them in fully and enabled each State to apply to photographs its own standard of originality[38].

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[33] G. Finocchiaro, *La valorizzazione delle opere d'arte on-line e in particolare la diffusione on-line di fotografie di opere d'arte. Profili giuridici,* in *Aedon*, *Rivista d'arti e diritto online*, 2, 2009, available at <http://www.aedon.mulino.it/archivio/2009/2/finocchiaro.htm>.

[34] Art. 7.1 of the Database Directive states: «Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification, or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively of the contents of that database».

[35] The memo of the Commission points outs that with art. 14 anybody will be able to copy, use and share *online photos* of paintings, sculptures and works of art in the public domain. See European Commission's Memo n. 1849, *Questions and Answers – European Parliament's vote in favour of modernised rules fit for digital age*, *cit.*

[36] For a detailed study, see T. Margoni, *The digitisation of cultural heritage: originality, derivative works and (non) original photographs* 2014, available at <http://eprints.gla.ac.uk/149774/1/149774.pdf>.

[37] S. Ricketson, *International Conventions*, in Y. Gendreau, A. Nordemann, R. Oesch (eds.), *Copyright and photographs – An international Survey*, London, 1999, pp. 18-19.

[38] *Ibidem*, 22-25.

In EU Copyright law, art. 6 of the Term Directive, Directive 2006/116/EC[39], reiterates that protection of photographs as original works arises when the photographs constitute the author's own intellectual creation – the standard which is now recognised horizontal reach – excluding other criteria. Despite these results, the standard of originality for photographs has proven to be discordant, and the simplicity of a portrait was discussed in *Painer* case in 2011[40] as a potential obstacle to copyrighted pictures. In this striking decision, European Court of Justice confirmed that simplicity or realism would not be a limit.

Photographs are central to the reform brought by art. 14 also because simple photographs receive protection by neighbouring rights in a number of countries in the EU. Prominent examples are the Italian discipline of simple photographs (*fotografie semplici)* in the Law on the protection of copyright and related rights (*Legge sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio*, also "Lda" in the text)[41] and the protection of *Lichtbilder* in German Copyright law (*Gesetz über Urheberrecht und verwandte Schutzrechte, Urheberrechtsgesetz*, also "UrhG" in the text)[42]. Both are based on art. 6 of the Term Directive, which next to the protection of photographs as authors' intellectual own creations, makes room for the protection of *other photographs* by Member States, within the subject of related rights[43].

Protection of photographs reproducing public domain works was precisely contended[44] in Germany, where the *Museumsfotos* case discussed § 72 of the UrhG, and in United Kingdom, with regards to Section 4 the Copyright, Designs and Patent Act of 1988[45]. In both cases, images of paintings hold by Museal institutions were published on Wikipedia, leading the institutions which detained the work and had the photographs realized to

[39] Art. 6, entitled «Protection of photographs», states: «Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs».

[40] European Court of Justice, *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, C-145/10, Judgment of the Court (Third Chamber) of the 1st of December 2011, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=115785&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=15117428>.

[41] Art. 87-92, Law on the protection of Copyright and other rights related to its exercise (*Legge sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio),* Law. n. 633, the 22nd of April 1941, as last amended by Law n. 37, 3 May 2019.

[42] § 72 Photographs (*Lichtbilder*), Act on Copyright and Related Rights (*Gesetz über Urheberrecht und verwandte Schutzrechte, Urheberrechtsgesetz*), 9 September 1965, as last amended by Article 1 of the Act of the 28th of November 2018.

[43] For an overview, see T. Margoni, *Non Original Photographs in Comparative EU Copyright Law*, in J. Gilchrist, B. Fitzgerald (eds.), *Copyright, Property and the Social Contract*, Switzerland, 2018, 157-180.

[44] With regards to Germany the reference is to the case involving Reiss-Engelhorn Museum v. Wikimedia et al., Judgment of December 20, 2018 – I ZR 104/17 – Museum photos – I ZR 104/17. For an overview on the UK context, mentioning the controversy involving the National Portrait Gallery and Wikimedia Foundation in United Kingdom see S. Stokes, *Photographing the public domain – EU to remove Copyright protection from public domain art images*, the 18th of March 2019, www.blakemorgan.co.uk, available at <https://www.blakemorgan.co.uk/photographing-the-public-domain-eu-to-remove-copyright-protection-from-public-domain-art-images/>. For the same issue as framed in the US context, the main reference is to the *Bridgeman* case, Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (final decision).

[45] Section 4 of the Copyright, Designs and Patent Act of 1988 defines photographs as artistic works, which find copyright protection according to Section 1 of the same Act.

claim copyright infringement. In both cases, the focus of the debate was the non-original character of the photographic reproduction of the paintings.
Only the German case eventually led to a decision, which confirmed the protection of the non-original reproductions according to the national Copyright law, within neighbouring rights. Conversely, despite what could be foreseen as a low threshold for originality, in 2015 a notice published by the UK Intellectual Property Office clarified that the digitised image of a work for which copyright had expired could not be considered original, pointing out to the definition of originality given in the *InfoPaq* decision[46]. As the notice reports, to make a faithful reproduction of an existing work would imply minimal room to exercise free and creative choices.
This overview brings the attention to the existing practice of GLAM in claiming exclusive rights on photographic reproductions of the public domain works they detain[47] and more in general to non-original photographs as fundamental use cases addressed by art. 14 DSM Copyright Directive. It seems possible to agree that Art. 14 may finally respond «to a controversial question, as to whether digital images of out-of-copyright works may give rise to new copyright claims and, thus, in a way affect the public domain status of the underlying work»[48]. It is arguably clear that art. 14 would trigger a change for those Member States which protect non-original photographs when it comes to the protection of public domain works of visual art. This discourse proceeds in the next section, with the analysis of the transposition in the Italian and German context, where such protection is granted.

2. The transposition of Article 14 Digital Single Market Copyright Directive: two examples

Amongst different examples on the ongoing implementation of Art. 14 DSM Copyright Directive[49], Italy and Germany have been chosen because of the passages, including draft measures, already taken in the transposition and based on the interest raised by the com-

[46] UK Intellectual Property Office, *Digital images, photographs and the internet*, Copyright Notice n.1/2014, adjourned in 2015, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481194/c-notice-201401.pdf>.

[47] As discussed by P. Keller, *Implementing the Copyright Directive: Protecting the Public Domain with Article 14*, COMMUNIA, 25 June 2019, available at <https://www.communia-association.org/2019/06/25/implementing-copyright-directive-protecting-public-domain-article-14/>.

[48] M-C. Janssens., *inDICES: Empowering IPR For Cultural Heritage Institutions, in inDICEs Project*, the 20th of July 2020, available at: https://indices-culture.eu/indices-empowering-ipr-for-cultural-heritage-institutions/.

[49] For the implementation and preparatory works the portals created by CREATe and COMMUNIA represent precious resources. See CREATe, *Copyright in the Digital Single Market Directive - Implementation an EU Copyright Reform Resource*, available at <https://www.create.ac.uk/cdsm-implementation-resource-page/> and COMMUNIA DSM Directive Implementation Portal, available at <https://www.notion.so/DSM-Directive-Implementation-Portal-97518afab71247c-fa27f0ddeee770673>.

parison of their background. More specifically on this point, both the Member States have national legislation protecting non-original photographs by means of neighbouring rights, in accordance with art. 6 Term Directive. Since the analysis has shown how these dispositions are affected by art. 14, these examples may offer interesting insights. Nevertheless, they also contain fundamental suggestions on how the necessary efforts for the transposition may encompass provisions other than copyright.

Turning briefly to Member States in which the protection of non-original photographs is not accorded, the examples of the Netherlands and Belgium follow. These cases seem to imply that not introducing specific norms to transpose art. 14 may also be an option where no such incompatible norms are present[50]. The application of general rules is for instance suggested in the Explanatory notes accompanying the first draft proposal for the transposition of the DSM Copyright Directive in the Netherlands[51], even though the legislative process at the time of the writing is on-going[52]. In Belgium, on the 19th of June 2020, the Intellectual Property Council (*Conséil pour la Propriété Intellectuelle*) published an opinion on the transposition of the DSM Copyright Directive. The opinion advises not to address specific laws to integrate the content of art. 14, based on the fact that the national law would be already compliant[53]. The working part of the document underlines that general rules would apply, the reference being Article XI.165 CRC for original works and Article XI.166 CDE for the public domain[54]. This choice is further supported by the need to avoid risks of confusion and legal uncertainty[55].

[50] For the Netherlands see R. Van Oerle, *The Netherlands*, in Y. Gendreau, A. Nordemann, R. Oesch (eds.), *Copyright and photographs - An international Survey*, Kluwer Law International, London, 1999, 207-208. Originality of photographs in Belgian law is critically discussed, with some references to case law, by A. Strowel, N. Ide, *Belgium*, in *ibidem*, pp. 82-83.

[51] Proposal to amend the Copyright Act, the Related Rights Act and the Database Act in connection with the implementation of Directive (EU) 2019 / PM of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market (*Wetsvoorstel houdende wijziging van de Auteurswet, de Wet op de naburige rechten en de Databankenwet in verband met de implementatie van Richtlijn (EU) 2019/PM van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG)*, Explanatory notes, 9, available at: https://www.internetconsultatie.nl/auteursrecht.

[52] For an overview consult the reference web page for the implementation of DSM Copyright Directive, House of Representatives of the General States *(Tweede Kamer Der Staten-Generaal)*, Implementation Act on the Copyright Directive in the Digital Single Market *(Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt)*, available at <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2020Z08336&dossier=35454>.

[53] Opinion of the Intellectual Property Council concerning the transposition into Belgian law of Directive (EU) 2019/790 of the 17 of April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9 / EC and 2001/29, the 19th of June 2020 (*Avis du Conseil de la Propriété intellectuelle du 19 juin 2020 concernant la transposition en droit belge de la directive 2019/790/UE du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE*), available at <https://economie.fgov.be/sites/default/files/Files/Intellectual-property/Avis%20Conseils%20Propriété%20intellectuelle/Avis-CPI-19062020.pdf>.

[54] Economic Law Code Book XI «Intellectual Property» (*Code de droit économique Livre XI «Propriété Intellectuelle»*), 28 February 2013.

[55] Opinion of the Intellectual Property Council (*Avis du Conséil pour la Propriété Intellectuelle*), *cit.*, pp. 222-223.

2.1. Germany

The German context is worth examination for the availability of a draft bill for the transposition of the DSM Copyright Directive which explicitly addresses the matter of public domain works. Secondly, due to its discipline of photographs, the country was the stage of one of the few mentioned judicial decisions regarding reproductions of public domain works.

In the UrhG a distinction is made between *Lichtbildwerke*, photographs which satisfy the requirement of individuality and reach the necessary level of creation protected by copyright[56], and *Lichbilder*, namely simple photographs, protected by neighbouring rights based on § 72[57]. As above mentioned, the *Museumsfotos* case of 2018 confirmed that in accordance with § 72 UrhG a faithful photographic reproduction of a painting belonging to the public domain should be protected.

The outcome of *Museumsfotos* and § 72 were at the centre of intense discussion within the consultation process for the implementation of art. 14 of the DSM Copyright Directive that took place from the 17th of April 2019[58]. Reproductions of public domain works were addressed as a tipping point by different stakeholders, for the legal uncertainty such reproductions are surrounded with. Next to § 72, also § 51 Sentence 3, regarding the exception for quotations (*Zitate*) and referring to the use of images or other reproductions of the quoted work, was mentioned to contribute to such blurred scenario.

In the same manner, attention was brought to the definition of works of visual art and on how to frame 3D reproductions, also 2D reproductions of 3D objects. Opinions examining the different purposes of the reproduction envisaged by the norm and considerations about both positive and negative potential consequences for GLAM and other professionals were not missing.

In the draft proposal dated the 13th of October 2020[59] the legislator has fittingly opted for a thorough approach to implement art. 14, with the creation of a new provision, § 68. As it is possible to read in the related explanatory document, the introduction of a new provision may clarify the status of faithful reproductions of works of visual art in the public domain. It would also include both photographs under §72 and reproductions consisting of

[56] The originality standard is enshrined in § 2, par. 2 of the UrhG.

[57] By express provision, economic rights and moral rights are applicable to simple photographs by analogy. See A. Nordemann, *Germany*, in Y. Gendreau, A. Nordemann, R. Oesch (eds.), *Copyright and photographs – An international Survey*, London, 1999, pp. 135-136, pp. 137-139.

[58] Consultation documents are available at the website of the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*), Public consultation on the implementation of the EU Directives on copyright law (DSM-RL (EU) 2019/790 and Online-SatCab-RL (EU) 2019/789), available at <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Konsultation_Umsetzung_EU_Richtlinien_Urheberrecht.html?nn=6712350>.

[59] Draft legislative proposal to adapt Copyright Law to the Digital Single Market (*Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes*), adjourned on the 2th of September 2020, available at <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Urheberrecht.pdf?__blob=publicationFile&v=7>. The first draft regarding the transposition of art. 14 is dated back to the 24th of June 2020, and it is available at <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf?__blob=publicationFile&v=2>.

sequences of images and sounds that are not protected as cinematographic works under § 95[60]. § 68 plainly states that the reproductions of works of visual art in the public domain are not protected by neighbouring rights and remarks that the norm would not address reproductions that represent creations of the author.
Noteworthy, the document confronts the issue whether works that were never protected by copyright or works whose term of protection has passed would be covered. It specifies that the norm would apply both to reproductions created after the law becomes effective and to the ones created before. This is considered in line with art. 26.1 of the DSM Copyright Directive, concerning the application in time and the only way to provide legal certainty[61].
What is of extreme interest for the present work, following the observations made by many during the consultation, the explanatory document further elaborates on the expression *works of visual art*[62]. With sensitive consideration for the issue in point, it is explained that the notion shall be deemed an autonomous concept within EU Law, to be referred to the open list in Annex n. 3 of Directive 2012/28/EU[63]. Crucially, in the German text of the DSM Copyright Directive the term *works of visual art* was translated as *Werk der bildenden Künste* (works of fine art), in correspondence to § 2.1 point 4 of the UrhG[64]. The newly introduced § 68 refers to *Visuelles Werk* (visual works) instead. As the document recites, only the expression *Visuelles Werk* shows a broader semantic spectrum, addressing works that can be perceived visually beyond the definition of *works of fine art* in the UrhG, thus promoting the goal of art. 14 DSM Copyright Directive and allowing the diffusion of reproductions and the access to common cultural heritage[65].
To conclude, due to the creation of a new provision of independent significance and the clarity that accompanies both its terminological choice and temporal scope, several of the uncertainties surrounding the transposition of art. 14 might find a response in the German context. The draft bill was open for consultation until the 6th of November 2020 and at the time of the writing the legislative process is proceeding.

2.2. Italy

The implementation of art. 14 DSM Copyright Directive in the Italian national legal framework shall be discussed starting from the protection of non-original photographs by neigh-

[60] *Ibidem*, 54.

[61] *Ibidem*, 54, 114-115. Art. 26.1 of the DSM Copyright Directive states: «This Directive shall apply in respect of all works and other subject matter that are protected by national law in the field of copyright on or after 7 June 2021».

[62] *Ibidem*, 113-114.

[63] *Ibidem*, 113-114.

[64] The reference is to § 2.1 point 4 of the UrgH, «Works of fine art» (*Werk der bildenden Kunste)*: «Works of fine arts, including works of architecture and applied arts and designs of such works».

[65] Draft legislative proposal to adapt Copyright Law to the Digital Single Market (*Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes)*, *cit*., pp. 113-114.

bouring rights granted by the national copyright law. As it is for the German example, these rules seem to contrast the objective of art. 14.

Art. 2.1 n. 17 of Lda links the copyright protection of photographs to the originality standard[66]. Chapter V (*«Diritti relativi alle fotografie»*) of Title II, concerning related rights (*«Disposizioni sui diritti connessi all'esercizio del diritto di autore»*), establishes additional rules for what are defined simple photographs (*fotografie semplici*), protected by related rights even in absence of any degree of originality.

According to art. 87.1 these rules apply to the images of people or aspects, elements or facts of natural and social life, obtained with the photographic process or with a similar one, with the express mention of reproductions of works of figurative art (*arte figurativa)* and photograms of cinematographic works. Art. 87.2 specifically excludes from this discipline photographs of writings, documents, business papers, material objects, and similar products.

For a duration of 20 years (art. 92), the author is reserved a few rights, including the right to reproduce the work, with no prejudice for the copyright of the reproduced work of figurative art (*arte figurativa*) (art. 88). Key information accompanies the reproduction of these photographs (art. 90). Moral rights, differently from Germany, are deemed to be excluded[67].

Next to these provisions, the national legislation in the field of cultural heritage and landscape (*D.lgs. 22 gennaio 2004, n. 42, Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137*, also "Code of cultural heritage and landscape")[68], a sub-set of administrative law, seems also worth attention. Section II of the Code of cultural heritage and landscape contains provisions on the use of cultural goods, defined by articles 2 and 10[69], and establishes limitations to the reproduction thereof,

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[66] The art. 1.1 of the Lda states that works protected under the present law are the intellectual works of creative character (*opere dell'ingegno di carattere creativo*), which belong to literature, music, figurative arts, architecture, theater and cinematography, whatever the mode or form of expression. Content and duration of the law are detailed in Chapter II, by articles 12 to 32-*ter*, including art. 13, which describes the right of reproduction.

[67] C. Ubertazzi, *Italy*, in Y. Gendreau, A. Nordemann, R. Oesch (eds.), *Copyright and photographs – An international Survey*, London, 1999, pp. 171-178.

[68] Code of cultural heritage and landscape (*Codice dei beni culturali e del paesaggio*), Legislative decree n. 42, 22 January 2004, also known as Codice Urbani, as modified by Legislative Decree. n. 156, 24 March 2006.

[69] Art. 2 of the Code of cultural heritage and landscape defines cultural heritage (*patrimonio culturale)* and distinguishes between cultural goods (*beni culturali)* and landscape assets (*beni paesaggistici)* (art. 2.1). Cultural goods are immovables and movables which, pursuant to articles 10 and 11, present artistic, historical, archaeological, ethno-anthropological, archival and bibliographic interest and other things which are identified by law or on the basis of law as evidencing the value of civilization (art. 2.2). On the other hand, landscape assets are defined as the buildings and areas indicated in article 134, which are an expression of the historical, cultural, natural, morphological and aesthetic values of the territory, and other assets identified by law or on the basis of the law (art. 2.3). These definitions are completed by art. 2.4, which explains that the assets of the cultural heritage belonging to the public are intended for use by the community, compatibly with the needs of institutional use and provided that there are no reasons for protection. Art. 10 of the Code of cultural goods and landscape defines cultural goods, as including movables and immovables belonging to different entities, specifically listed, as including the State, the Regions and others, and presenting artistic, historical, archaeological or ethnoanthropological interest (art. 10.1), and others. Art. 13 regards the so-called declaration of cultural interest

based on the detention of the goods by the relevant entities. Works of visual art in the public domain extensively fall into this discipline.
The entities, art. 107 says, allow the reproduction and the instrumental and temporary use of the good. Importantly, art. 108 also ties the reproduction to the payment of fees to be established by the detaining entity, while only a reimbursement of expenses is asked for reproductions by private parties for private use or study, or by public parties when the reproduction is intended to the valorisation of the good. However, the introduction of paragraph 3-*bis* of art. 108 by the so-called "Art Bonus" Law Decree[70], which became Law in July 2014[71], brought a long-advocated reform for the reproduction of cultural goods that are not for-profit[72]. The new rule covers non-profit activities for the purposes of study, research, freedom of expression, also creative expression, and promotion of the knowledge of the cultural heritage. Both the reproduction (art. 108.3-*bis*, n.1) and the divulgation of images of goods (art. 108.3-*bis*, n.2) are declared "free" (*libere*) upon certain conditions[73]. This enhanced the realization of the constitutional protection that art. 9 and art. 33 of the Italian Constitution confer to the development of culture and research, and to cultural heritage[74].
Since it unburdens the reproductions for non-profit, the discipline, as recently modified, seems to accommodate the aim of art. 14 DSM Copyright Directive. Notwithstanding, art. 14 concerns the right to reproduction of works of visual art in the public domain in its entirety, without differentiating between commercial or non-for-profit scopes. It is thus clear that the existing rules in the Code of cultural heritage and landscape may still contrast with the realization of the objective of art. 14 in a number of cases.

(*dichiarazione dell'interesse culturale*) and essentially explains that this is oriented to ascertain the presence of the interest as defined by art. 10 in relevant cases.

[70] Law Decree n. 83, the 31st of May 2014, containing urgent dispositions for the protection of cultural heritage, the development of culture and re-launching of tourism (*Recante disposizioni urgenti per la tutela del patrimonio culturale, lo sviluppo della cultura e il rilancio del turismo*), so-called "Art Bonus".

[71] Law n. 106, 29 July 2014, Law conversion, with modifications, of the Law Decree n. 81, 31 May 2014, containing urgent dispositions for the protection of cultural heritage, the development of culture and re-launching of tourism.

[72] G. Gallo, *Il decreto Art Bonus e la riproducibilità dei beni culturali*, in *Aedon*, *Rivista d'arti e diritto online*, n. 3, 2014, available at <http://aedon.mulino.it/archivio/2014/3/gallo.htm>.

[73] This result was also achieved through further modifications of art. 108.3-bis, introduced by Law n. 124 of the 4th of August 2017, n.124, Annual law for market and competition (*Legge annuale per il mercato e la concorrenza*). The debate around inconsistencies of the reform of 2014, on which for istance see M. Modolo, A. Tumicelli, *Una possibile riforma sulla riproduzione dei beni bibliografici ed archivistici*, in *Aedon, Rivista d'arti e diritto online*, 1, 2016, available at <http://aedon.mulino.it/archivio/2016/1/modolo.htm>, is well described by F. Minio, *La libera riproducibilità dei beni culturali dopo l'emanazione della Legge 4 agosto 2017, n. 124 (Legge annuale per il mercato e la concorrenza)*, in *BusinessJus,* 2, 76, 2018, available at <https://www.businessjus.com/it/libera-riproducibilita-dei-beni-culturali-dopo-lemanazione-della-legge-4-agosto-2017-n-124-legge-annuale-per-il-mercato-e-la-concorrenza/>.

[74] Constitution of the Italian Republic, Senate of Republic (*Senato della Repubblica*), 2018, Translation supervised by the Senate International Affairs Service, available at <https://www.senato.it/1024>. art. 9 states: «The Republic shall promote the development of culture and scientific and technical research. It shall safeguard natural landscape and the historical and artistic heritage of the Nation»; art. 33, first sentence, states: «Arts and science shall be free and may be freely taught. (...)».

A draft of a European Delegation Law (*Legge di delegazione europea*) for the transposition, inter alia, of the DSM Copyright Directive, was proposed in early 2020. During the informal hearings that followed art. 14 was not as central to the discussion as other norms of the Directive, also given the absence, in the draft art. 9, of a specific provision on the point[75]. However, different stakeholders evidenced how the implementation of art. 14 would necessarily imply to intervene on both the mentioned sets of law. This implies an overlap where the two disciplines meet, in all their divergencies, and most notably in their different aim of protection: the public good – the protection of cultural goods (*beni culturali*) – and the author's right[76]. Also, considering the mandate of art. 14 DSM Copyright Directive, the removal of the obstacles present in the legislation on cultural heritage seems left to the decision of the national legislator, requiring a complex balance.

Furthermore, the implementation of art. 14 DSM Copyright Directive has been linked to the freedom of panorama. The reference is to the non-mandatory exception introduced by art. 5 par. 3 letter h) of the InfoSoc Directive for the reproductions of cultural goods which are visible from public places. At present, in Italy, cultural goods are subject to the described discipline and the reproductions thereof are subject to the relevant constraints, with obvious detrimental effects for their access and circulation, impacting, amongst others, education and tourism[77]. The transposition of art. 14 can be the occasion to put in place coordinate efforts towards this separate but complementary objective.

This approach has been suggested to be in line with the recent resolution proposed by the Cultural Commission, Commission VII, and approved in May 2020 in relation to the difficulties to the Covid-19 pandemic, even though as an outcome of a separate process[78]. The resolution invited the Government to consider the adoption of initiatives aimed at promoting the free reproduction and share of images of public cultural goods, including the one visible from the public space, using Open Access licensing tools and the Creative Common licenses. It also encouraged the recognition to (directors of) institutes of the MIBACT (Ministry for

[75] To an overview on the preparatory works, next to the already mentioned sources, see the beneficial page regarding the implementation of DSM Directive in Italy by COMMUNIA, and maintained by Federico Leva, available at <https://www.notion.so/Italy-ef314e69e7ef42d1893efe5ef0ee39f8>. With regards to the auditions, the main references taken into account for the present article and addressing the transposition of art. 14 DSM Copyright Directive took place at the Senate of Republic the 14th of May 2020. In particular see the auditions of Wikimedia Italia and Creative Commons Italia, whose presented materials are available at <https://zenodo.org/record/3827231#.X9dO1C9aaCQ> and <https://creativecommons.it/chapterIT/index.php/1124/>.

[76] S. Aliprandi, *Vincoli alla riproduzione dei beni culturali, oltre la proprietà intellettuale*, Archeologia e Calcolatori Supplemento 9, 2017, 103, 105-106.

[77] For an overview on images of cultural goods, with considerations on the freedom of panorama, see G. Resta, *Chi è proprietario delle piramidi? L'immagine dei beni tra Property e Commons*, in *Politica del diritto*, Issue n. 4, 2009; A. Tumicelli, *L'immagine del bene culturale*, in *Aedon*, *Rivista d'arti e diritto online*, n. 1, 2014, available at <http://aedon.mulino.it/archivio/2014/1/tumicelli.htm>.

[78] Resolution in final debate Commission n. 8/00073, Measures to support the cultural and entertainment sector in contrast to the effects of the Covid-19 epidemic), the 5th of May 2020, available at <https://aic.camera.it/aic/scheda.html?numero=8-00073&ramo=C&leg=18>.

Cultural Goods and Activities and Tourism, *Ministero per i Beni e le Attività Culturali e il Turismo*), both central and peripheric, of the faculty to license images online within Creative Common licenses for the free re-use. Noteworthy, at the time of the writing other resolutions have been proposed by the Cultural Commission to further addressed the topic of freedom of panorama and of reproductions of works of visual art in the public domain, with primary consideration for cultural goods, and also in reference to the DSM Copyright Directive[79].

Finally, the definition of works of visual arts was also addressed in the auditions. Art. 69-*septies* of the Lda transposes the notion of visual arts (*opere visive*) of the mentioned Directive 2012/28/EU, Annex, n. 3, referring to the sources which can be accessed to verify the status of a work as orphan. As mentioned, this points out to an open list; moreover, this notion coexists with several references to works of figurative art (*opere d'arte figurativa*) in the Lda. Commentators have pledged for the adoption of a broad notion of works of visual arts able to fit in the existing framework, with peculiar regards to the Code of cultural heritage and landscape.

The text of the European Delegation Law 2019-2020 was approved by the Senate on the 29th of October 2020, and it was transmitted to the Assembly, 14ª Permanent Commission in charge of European Union Policy (*Commissione permanente Politiche dell'Unione europea*), on the 2nd of November 2020[80]. In its most recent available version no specific provision explicitly addresses the transposition of art. 14 despite a clear need for revision. However, a few issues of importance in the transposition of art. 14, even if not approved in form of amendments to the text, merged in a few accepted non-binding resolutions (*Ordini del giorno*)[81]. Amongst others, these regard the framing of the notion of *works of visual art* in accordance with the existing provisions and especially with Art. 10 and 13 of the Code of cultural heritage and landscape[82], and the adaptation of potentially incompatible norms in Lda. One resolution also covers the need to recognise the opportunities related to art. 14 DSM Copyright Directive for the cultural sector globally, especially considering the effects of the recent Covid-19 pandemic. As part of the steps to take in the transposition of DSM Copyright Directive, a specific non-binding resolution addressing the need to fully implement

[79] Resolution in Commission n. 7/00423, Resolution n. 7/00550, Resolution n. 7/00552, Resolution n. 7/00553, Resolution n. 7/00557, Resolution n. 7/00558, have been jointly discussed by the Commission VII in November 2020, as described in the Commission convocation overview available at <https://www.camera.it/leg18/1099?slAnnoMese=202011&slGiorno=18&shadow_organo_parlamentare=2807&primaConvUtile=ok>.

[80] Draft Law (*Disegno di legge*) n. 1721, Delegation to the Government for the transposition of European Directives and the implementation of other European Union acts - European Delegation Law (*Legge di delegazione europea*) 2019-2020, as approved on the 29th of October 2020 and transmitted to the Chamber on the 2nd of November 2020, available at <http://www.senato.it/service/PDF/PDFServer/BGT/01179126.pdf. See in particular art. 9 for the transposition of Directive (EU) 2019/790>.

[81] See, inter alia, the following resolutions (*Ordini del giorno*): n. G/1721/46/14 (already amendment n. 9.1), n. G/1721/53/14 (already amendment n. 9.14), n. G/1721/55/14 (already amendment n. 9.50), available at <http://www.senato.it/leg/18/BGT/Schede/Ddliter/testi/52774_testi.htm>. A complete overview can be found at <http://www.senato.it/leg/18/BGT/Schede/Ddliter/testi/52774_testi.htm>.

[82] See note 69.

art. 5 InfoSoc Directive[83], including the set of exceptions and limitations and comprising the freedom of panorama, was instead approved[84]. No further information, except from the fact that the text is currently in pending review, is available at the time of the writing.

3. Preliminary analysis

This final part shortly summarizes the key-insights provided by the analysis of art. 14 DSM Copyright Directive and the transposition examples, and tries to draw some remarks on the main challenges in the transposition by Member States.
In this scrutiny, while emphasis shall go to the room for potential discrepancies within Member State law, the most crucial perspective is the one of how to reach a harmonized transposition. Art. 14 is primarily oriented to the harmonization of the Digital Single Market, where, as explicitly affirmed by recital 53, differences between national copyright laws governing the protection of reproductions of works of visual art in the public domain give rise to legal uncertainty and affect their cross-border dissemination.
While the desired legal certainty would require a substantial degree of harmonization, this seems to heavily rely on how Member States will act in the transposition of the norm. The risk of a fragmented transposition is consistent with the ambiguities in the text of art. 14, but it remains especially true with regards to the complex context in which art. 14 intervenes, at the interplay of different rights in national law, primarily copyright law. Here further research is needed, and an accurate case-by-case analysis may prove beneficial.
With this in mind, the section firstly explores different suggestions towards a harmonized transposition, and then turns to the complex issues at the interplay of art. 14 and national law, on which, if not immediate solutions, offers suggestions for future research, including the very important one about the role of GLAM and incoming changes for the cultural sector.

3.1. Ambiguities

The ambiguity of art. 14 has been invoked in many instances and inherently represents a challenge in the transposition by Member States, as a risk to further harmonization.
The most remarkable issue regards the notion of works of visual art, of which no definition is attached in the Directive. As shown by the legislative process, which only in a second time eliminated the reference to *all* works in the public domain, this element is crucial for defining the scope of art. 14 and thus can be decisive for a more or less fragmented transposition.

[83] Resolution (*Ordine del giorno*) n. G/1721/8/14, approved as Resolution (*Ordine del giorno)* G9.100. See Draft for print n. 4 of the 26th of October 2020 of the Draft Law (*Disegno di legge*) n. 1721, Delegation to the Government for the transposition of European Directives and the implementation of other European Union acts – European Delegation Law (*Legge di delegazione europea*) 2019-2020, pp. 35-36, available at <http://www.senato.it/service/PDF/PDFServer/BGT/01178813.pdf>.

[84] The reference is to the difference between the approval and acceptance of non-binding resolutions (*Ordini del giorno*) within the legislative process, respectively indicating a strong and not as strong degrees of commitment of the Government.

It seems realistic that Member States could refer to their nomenclatures for copyright subject matter. As consequence, the existing fragmentation in that nomenclature and the absence of a definition in the Directive may result in a narrower, not well-founded and heterogeneous transposition by Member States, affecting the core of cross-border dissemination of works[85]. That is why several authors have urged the need to focus on the faithfulness of the reproduction of the public domain work instead[86] or go *beyond* the contours of works of visual art, extending the material scope of the reproduction[87].

Importantly, the German example has paved the way for the possibility to lean on an existing notion in the EU Copyright law described by Directive 2012/28/EU, Annex n. 3, regarding orphan works. Being an open list, this definition offers the advantage, if not to clarify what is deemed to be a work of visual art, at least to confirm the protection of a few categories of works, including, amongst others, photographs, sculpture, fine art, design and architecture. This led the German legislator to the understanding of the work of visual art centred on its visual fruition, suggesting a broad spectrum of works may fall under the material scope of art. 14. This shall be considered a potential place of departure for harmonization.

Similarly, Member States may react differently to the addition of the characterization of the reproductions as *faithful* by recital 53, at the interplay with the originality standard. It is poorly understood how these two requirements may interact in the next future. Nonetheless, the strengthening of the originality standard as author's own intellectual creations that is enshrined, and in a certain sense eventually "codified", in art. 14, might make this issue of secondary relevance in the transposition by Member States.

In addition, considering «any material resulting from an act of reproduction», the openness of this formulation was underlined: its vagueness may prove beneficial to the future evolution of technology. This potentially unlimited definition, when transposed by Member States, would assure that the clause of what may consist of an act of reproduction remains open for all of them. However, to increase the possibility of harmonization and cross-border circulation of contents, authors proposed to introduce further specifications. The inclusion of 3D reproductions, next to 2D reproductions of 3D reproductions, seems particularly delicate, as these works are likely to attract copyright as original[88]. Supplementary remarks regard the inclusion of both digital and analogue reproductions, as the latter shall not be excluded by the special interest of art. 14 for the digital environment[89].

[85] COMMUNIA Guide on the implementation to art. 14, available at <https://www.notion.so/Article-14-Works-of-visual-art-in-the-public-domain-eb1d5900a10e4bf4b99d7e91b4649c86>; A. Wallace, E. Euler, *cit.*, pp. 838-839.

[86] European Copyright Society (ECS), *cit.*, 2.

[87] COMMUNIA Guide on the implementation to art. 14, *cit.*

[88] European Copyright Society (ECS), *cit.*, 3; A. Wallace, E. Euler, *cit.*, p. 839.

[89] European Copyright Society (ECS), *cit.*, 4; P. Keller, *Implementing the Copyright Directive: Protecting the Public Domain with Article 14*, *cit.*

As it refers to the expiration of copyright, and namely the "entering" of the work in the public domain, art. 14 is in principle clear, and it has been argued to confirm the notion of public domain. Against the mentioned doubts whether all reproductions would be protected independently from the moment of creation, it is possible to agree that only a broad understanding of the norm, covering every reproduction of public domain works and irrespective of the time of execution, may be in line with the aim of the provision[90], and with general principles of Copyright law[91]. A further specification by the national legislator on the temporal scope may still prove supportive to legal certainty and is recommended by the literature[92]. The German example, including a specific notation in the explanatory works, is an example of this. Accordingly, it is evident that a different understanding of this point, in the opposite sense that not all reproductions may be protected based on the date of creation, would not only contrast with the aim of the norm but also require extensive right clearance and undermine legal certainty.

3.2. Challenges at the interplay of other rights and future research

The most prominent challenges of the transposition are posed by the interplay of different rights and the context in which art. 14 is framed, given its manifold impact. It must be underlined that a comprehensive understanding on this point could only follow a detailed account on each Member State case. This paper especially focused on related rights in photographs as a use case of art. 14, but the findings may suggest other key issues for the transposition and directions for future research.

Member State Copyright law shall be impacted by art. 14. Considering related rights, the discipline of non-original photographs is one prominent example thereof. This was confirmed in the analysis of the German and Italian examples, both conferring protection to non-original photographs by neighbouring rights. In particular, the first illustrates that the introduction of an ad hoc provision renders the modification of the existing rules about photograph superfluous. A corollary is to consider that other Member States, where such protection is not granted, have claimed the application of general rules on originality, and have not adopted specific laws to transpose the content of art. 14.

Hopefully, the analysis was also able to explain how the new rule of art. 14 may be relevant to other works as well. Particular interest is raised by collections, possibly considered as databases protected by the *sui generis right* in the EU Copyright acquis. In this respect, there are multiple questions that shall be addressed by future studies, for instance how

[90] European Copyright Society (ECS), *cit.,* 3-4.

[91] See, inter alia, art. 18 of the Berne Convention, paragraphs 1 and 2: «This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection. If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew».

[92] European Copyright Society (ECS), *cit.*, 3-4.

the protection of single parts of the work versus the protection of the overall work may fit into the scope of art. 14, and whether such an issue would require specific adaptation by Member States. Plus, this problem remains partly consistent with the blurred definition of works of visual art above mentioned.

From a more general perspective, the variety of uses of reproductions allowed by art. 14 also crosses the exceptions and limitations of the EU Copyright acquis. These also include the ones introduced by the DSM Copyright Directive requiring transposition in the next future, such as art. 3 for text and data mining, art. 5 regarding education, art. 6 on preservation of cultural heritage and others.

Art. 14 has raised the question of the implementation of the freedom of panorama in Italy, whose exception appeared in the art. 5.3 letter h) of the InfoSoc Directive. In the German example, the possibility to re-use a content for illustration was linked to art. 14 DSM Copyright Directive, indicating this may be, in the practice, overlapping with the copyright exceptions of quotation for purposes of criticism and review as well as parody, caricature and pastiche. These exceptions, so important in the culture of remix[93], have been introduced as non-mandatory by art. 5.3 letter d) and k) of the InfoSoc Directive, and at the current state they are differently transposed by Member States. Going further, what is of major interest is that these exceptions are incorporated as mandatory by art. 17 of DSM Copyright Directive, in respect to user-generated contents[94]. The possibility to upload/making available copyrighted contents for caricature, parody or pastiche (Art. 17.7 letter a) and criticism, quote or review (Art. 17.7 letter b) will play a critical role in the scrutiny required by art. 14 on the originality of reproductions of works of visual art in the public domain. This is due to the existing fragmentation in Member State law and the doubts surrounding a notion of derivative works in the EU Copyright acquis[95], as opposed to the expected incoming efforts towards a further harmonization with the DSM Copyright Directive. It also seems relevant that the same art. 17 of the DSM Copyright Directive introduces a new liability regime and obligations for user-generated contents platforms[96].

[93] The reference is to the concept promoted, inter alia, by L. Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, London, 2008.

[94] G.F. Frosio, *Reforming the C-Dsm Reform: a User-Based Copyright Theory for Commonplace Creativity*, Centre for International Intellectual Property Studies (CEIPI) Research Paper n. 12, 2019, 27, available at <https://ssrn.com/abstract=3500722>. See also recital 70 of the DSM Copyright Directive. For a study on copyright exceptions and user-generated-content, see M. Senftleben, *User-Generated Content – Towards a New Use Privilege in EU Copyright Law*, Forthcoming, in T. Aplin (ed.), *Research Handbook on Intellectual Property and Digital Technologies*, Edward Elgar Publishing, Cheltenham, 2020, pp. 136-162 (also available at: https://ssrn.com/abstract=3325017).

[95] For an overview, see M. Van Eechoud, *Adapting the work*, in M. Van Eechoud (ed.), *The Work of Authorship*, Amsterdam University Press, Amsterdam, 2014, pp. 145-173, (also available at <http://ssrn.com/ abstract=2538509>).

[96] The reference is on how the transposition of DSM Copyright Directive will impact the liability regime of ISP, particularly as defined by art. 15 («No general obligation to monitor») of the Directive on electronic commerce, also e-Commerce Directive, Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 8 June 2000, available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000L0031>.

Overall, moving the conversation away from Copyright law, another fundamental question remains open in the transposition of art. 14. Depending on the peculiarities of each Member State, different laws, also belonging to diverse domains, could limit or pose obstacles to the access and circulation of public domain works and ultimately frustrate the objective of art. 14. Given the mandate of art. 14 in Copyright Law, the possibility to intervene on such obstacles seems less clear and left to the evaluation of the national legislator.
In Italy, in particular, different stakeholders have explained that the norms on cultural heritage limit the access and reproductions of works of visual art in the public domain when they represent cultural goods. Crucially, this indicates GLAM as key protagonists of this challenge. These actors are often not only the material owners of works in the public domain, but also committed to their preservation and access, for instance by the digitisation initiatives addressed in art. 6 DSM Copyright Directive, a norm which seems complementary to art. 14.
This brings to one last point, arguably not only of juridical nature, and moving beyond the transposition of art. 14, as a way of conclusion of the paper. It regards how art. 14 poses its ultimate challenge to the cultural institutions and GLAM in many instances, as shown by the case-law reported and considering the room for the commercial purposes of reproductions opened by art. 14. What seems better understood – despite deserving further, multidisciplinary research – is the opportunity to develop new business models and sharing practices for the cultural sector. This has been a reality and necessity in the shift from analogue towards digital practices of fruition of cultural contents, but it became an emergency in the recent pandemic[97]. In this respect, art. 14 is aimed at enhancing legal certainty, from which not only users but also actors from the cultural sector could benefit in the design of new practices of creation and fruition of contents online.

Conclusions

Art. 14 DSM Copyright Directive affects the very presence of cultural contents online, promoting the wider access and circulation of non-original reproductions of works of visual art in the public domain.
Realizing this objective in the digital and cross-border dimension seems to be very ambitious, as it requires extensive harmonization. This proves difficult not only because of some ambiguities that characterize the text of art. 14 and primarily, amongst those, the absence of a definition of works of visual art, but most of all for the complex context in

[97] As a global phenomenon, numerous initiatives developed around the use of the hashtag *#culturedoesnotstop*. With regards to the museal initiatives in Italy, see for instance G. Giardini, *Coronavirus, i musei italiani che resistono e vanno online*, in *Il Sole24Ore*, 14 March 2020, available at <https://www.ilsole24ore.com/art/la-resistenza-culturale-musei-italiani-ADSSXKD>.

which it intervenes. The transposition of art. 14 requires the national legislator to act at the interplay of the Copyright law and, possibly, other norms belonging to different domains, depending on the peculiarities of each Member State.
Especially thanks to the analysis of the two selected examples on transposition, it was suggested that to reach the desired objective of further harmonization seems to heavily rely on how Member States will act to implement the norm. Despite these relevant challenges, art. 14 still represents a firm assertion for Member States to create a new room for the public domain. It shall be welcomed as a needed, if not definitive, passage towards further legal certainty in the digital environment, to unlock the public domain potential.