ACCESS TO CULTURE IN A DIGITALLY FRAMED EU LAW

Alina Mihaela CONEA*

Abstract

The digital shift is having a significant impact on the relation we have with culture.

Digitisation and online accessibility enable unprecedented forms of engagement. However, new methods of sharing copyright-protected content through the internet raises questions as whether these acts interfere with exclusive copyrights.

Moreover, the right to participate in cultural life implies that individuals have access to cultural heritages and that their freedom to continuously (re)create cultural heritage should be protected. Despite institutional initiatives, there is a growing concern that intellectual property rights can exclude the public from accessing and using digital cultural heritage in the public domain.

Meanwhile, the current debate about open internet has strong implications for fundamental freedoms…and everywhere in the world the courts are searching for balance….

In the search for a fair balance between various conflicting interests, it is essential to trace what values the Court of Justice of European Union protects. The relevance of the Court's judgments is no more limited to the internal market, being significant for the private life of each of us and for the way in which law builds social relations in cyberspace.

The purpose of this paper is to explore the legal base concerning culture in European Union law and in particular the dynamics between digital access to cultural heritage and intellectual property rights.

Keywords: *cultural heritage, open access, copyright, digital data.*

1. Introduction

The purpose of this paper is to explore the legal base concerning culture in European Union law and in particular the dynamics between digital access to cultural heritage and intellectual property rights.

Culture lies at the heart of the European project and is the anchor on which the European Union's "unity in diversity" is founded[1].

The relevance of the topic is multifaceted: economic (the new creativity based economic industries), anthropologic (the artificial intelligence dominance/occurrence) or social (engaging and enjoying social groups/identity).

In various legal documents, the European institutions acknowledge that the *digital shift is having a massive impact* on how cultural and creative goods and services are made, disseminated, accessed, consumed and monetized [2]. The need to seek a new balance between the accessibility of cultural and creative works, fair remuneration of artists and creators and the emergence of new business models is recognized.

Cultural diversity is seen as a source of creativity and innovation. The Council recognize that `cultural activities and creative industries, such as visual and performing arts, heritage, film and video, television and radio, new and emerging media, music, books and press, design, architecture and advertising are also playing a critical role in boosting innovation and technology, and are key engines of sustainable growth in the future`[3].

Meanwhile, the cultural diversity of the peoples of the world has been characterized as a *universal heritage of humankind*. In 1968, a UNESCO Expert Meeting defined culture as 'the essence of being human' which leaves little doubt of its connection with human rights[4]. Article 1 of the UNESCO Declaration of Cultural Diversity (2001) states that, "…as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature".

Moreover, the right to participate in cultural life implies that individuals and communities have access to and enjoy *cultural heritages* that are meaningful to them, and that their freedom to continuously (re)create cultural heritage and transmit it to future generations should be protected.

European Commission observed that old approaches sought to protect heritage by isolating it from daily life. New approaches focus on making it fully part of the local community. Sites are given a second life and meaning that speak to contemporary needs and concerns. Digitisation and online

* Lecturer PhD, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: alina.conea@univnt.ro).

[1] Commission Report to The European Parliament, the Council, the European Economic and Social Committee and the Committee of The Regions on the implementation of the European Agenda for Culture, COM/2010/0390 final.

[2] Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC, Text with EEA relevance JO L 347, 20.12.2013, p. 221-237.

[3] Council Conclusions on the contribution of the cultural and creative sectors to the achievement of the Lisbon objectives 2802nd Education, Youth and Culture Council meeting Brussels, 24-25 May 2007.

[4] Blake, Janet, *International Cultural Heritage Law*, Oxford University Press. 2015, p. 288.

accessibility enable unprecedented forms of engagement and open up new revenue streams[5].

The main questions of this paper are: Is the access to culture protected in EU law? What is the interaction between the protection of copyright in EU law and the access to cultural heritage?

In order to address this questions the paper is divided into three parts. The first part is dedicated to the concept and legal framework of EU regarding culture. The access to culture and to cultural heritage is considered in the second part. The third part of the paper investigates the dynamics between intellectual property rights and the open access to internet, focusing on Court of Justice of European Union (CJEU) case-law.

2. Culture in EU Law

2.1. Concept of *culture*

The concept of culture remains irreducible to any form of definition, especially when it is envisaged in the wide variability that is its meaning at the European level[6]. In the same fashion, the notion of '*cultural diversity*,' which is at the heart of European integration and European law, has never been explicitly defined by Community institutions[7].

The Court of Justice of European Union concede to this indefinite concept and, consequently, stated in *Fachverband der Buch* that Article 167 TFEU cannot be `invoked as a justification for any national measure in the field liable to hinder intra-Community trade`[8]. `However, the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve it`[9].

In fact, the different forms of action and cultural policies is based on multiple dimensions of the notion of culture. The culture is conceptualized in a polymorphic[10] way and several dimensions can be pictured.

Culture is a way of understanding the *identity* of individuals and of distinctive national community. `The diversity of cultures within the framework of a common European civilization (…) all give the *European Identity* its originality and its own dynamism`[11].

Although, culture is seen in relation to *aesthetic*, as a set of artistic expressions and elements of heritage. The identification of what artistic dimensions culture covers is controversial[12].

Another dimension points to the belonging to a certain *social* class, which define cultural practices, archetype of a social group, or inclusion.

Perhaps the most evident understanding in EU documents is the *economic* outcome of culture. The cultural and creative sectors are increasingly viewed as being drivers of economic growth. In 2017, there were more than 1.1 million cultural enterprises in the EU-27. Together, they represented approximately 5 % of all enterprises within the non-financial business economy. The value added at factor cost of cultural enterprises was equivalent to 2.3 % of the non-financial business economy total . For comparison, the value added of the cultural sector within the EU-27 was slightly higher than that for the motor trades sector. The cultural sector's turnover (the total value of market sales of goods and services) was EUR 375 billion, which represented 1.5 % of the total turnover generated within the EU-27's non-financial business economy[13].

Under the heading cultural sector, the European Union performs different *economic activities* such: printing and reproduction of recorded media; manufacture of musical instruments and jewellery (industry-related cultural activities); retail sale in specialised stores (books; newspapers and stationery; music and video recordings); publishing (books; newspapers; journals and periodicals; computer games); motion picture and television, music; renting of video tapes and disks; programming and broadcasting; news agency activities; architecture; design; photography; translation and interpretation[14].

Cultural goods are products of artistic creativity that convey artistic, symbolic and aesthetic values. Examples include antiques, works of art, jewellery, books, newspapers, photos, films, music or video

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -*Towards an integrated approach to cultural heritage for Europe*, COM/2014/0477 final.

[6] Romainville, Céline. *The Multidimensionnality of Cultural Policies Tested By EU Law*, in: C. Romainville, *European Law and Cultural Policies/ Droit européen et politiques culturelles*, Peter Lang: Oxford Bern Berlin Bruxelles Frankfurt am Main, New York, Wien 2015, p. 19-36

[7] Idem, p. 20.

[8] CJEU, Judgment of the Court (Second Chamber) of 30 April 2009, *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH*, Case C-531/07, EU:C:2009:276, parag. 33.

[9] Idem, parag. 34.

[10] Romainville, Céline. *The Multidimensionnality of Cultural Policies Tested By EU Law*, p. 21.

[11] Declaration on European Identity (Copenhagen, 14 December 1973), Bulletin of the European Communities. December 1973, No 12. Luxembourg: Office for official publications of the European Communities., p. 118-122, https://www.cvce.eu/obj/declaration_sur_l_identite_europeenne_copenhague_https:/www.cvce.eu/obj/declaration_on_european_identity_copenhagen_14_december_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html.

[12] Romainville, Céline. *The Multidimensionnality of Cultural Policies Tested By EU Law*, p. 23.

[13] Eurostat (Guide to Eurostat culture statistics — 2018 edition), https://ec.europa.eu/eurostat/en/web/products-manuals-and-guidelines/-/KS-GQ-18-011.

[14] Eurostat, "Culture Statistics- International Trade in Cultural Goods - Statistics Explained, Accessed Aprilie 2021. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Culture_statistics_-_international_trade_in_cultural_goods&oldid=428457.

games. The cultural goods heading is very heterogeneous: while some of these goods are products of mass consumption, others are much-specialised items where demand or supply may be small.[15]

The UN Former Special Rapporteur in the field of cultural rights expressed the view that `Cultural rights have three essential and interdependent dimensions: the first relates to free creativity, including promoting and protecting the freedom indispensable for artistic creativity and scientific inquiry; the second to people's right to access cultural heritage along with new thinking and developments; the third is diversity. All three are vital to developing sustainable and inclusive policies`[16].

2.2. Culture in EU legal framework

In the EU Law the concept of *culture* underlies, more specifically, *the diversity of cultures* of the member states.

The preamble of the Treaty on European Union states that one of the reasons the Union was created was `to deepen the *solidarity* between their peoples *while respecting* their history, *their culture* and their traditions`. One of the objectives of the European Union, recognized in Art. 3 TEU is to `respect its *rich cultural* and linguistic *diversity*, and ensure that Europe's cultural heritage is safeguarded and enhanced`[17].

Consequently, the *diversity* of culture in the European Union law has a constitutional significance.

Article 167(1) TFEU states that `the Union shall contribute to the *flowering of the cultures* of the Member States, while respecting their national and regional *diversity* and at the same time bringing the *common cultural* heritage to the fore`.

Therefore, the European Union competencies in the field of culture are articulated in the treaty with a substantial accent on their *subsidiary* nature. According to Article 6 TFEU, in the area of culture, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas[18]. The Treaty states that legally binding acts of the Union adopted relating to these kind of areas shall not entail harmonisation of Member States' laws or regulations[19]. This provision is reaffirmed in Art. 167 (5)TFEU. In order to contribute to the achievement of the cultural objectives, `the European Parliament and the Council acting in accordance with the ordinary legislative procedure, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States`.

A legal area for actions regarding culture at Community level was absent from the wording of the initial treaties. Moreover, culture was mentioned in the former art. 30 EC Treaty as *an exception admissible* from the free movement of goods, based on the need "to protect *national treasures* possessing artistic, historic or archaeological value".

It is widely accepted that, as early as *Commission v Italian Republic*[20], CJEU included cultural goods under the internal market rules. Recently, The CJEU stated in *Fachverband der Buch* that `the protection of books as cultural objects, cannot constitute a justification for measures restricting imports within the meaning of Article 30 EC`. The protection of cultural diversity in general cannot be considered to come within the 'protection of national treasures possessing artistic, historic or archaeological value' within the meaning of Article 30 EC`[21].

`*Culture*` was a later comer in the European Community discourse. At the Copenhagen European Summit of 14 and 15 December 1973, the Heads of State or Government of the nine Member States of the enlarged European Community affirm their determination to introduce the concept of *European identity* into their common foreign relations. The Declaration on European Identity (Copenhagen, 14 December 1973) focused on `common heritage` and on the will `to preserve the rich variety of their national cultures`[22].

Culture was expressly included in the EC Treaty by the amendments of Maastricht Treaty. Thus, the activities of the Community included the contribution to „the flowering of the cultures of the Member States" (art. 3 EC Treaty). Regarding the common rules on competition, it was inserted the `aid to promote culture and heritage conservation`(Article 92(3) EC Treaty). Art. 107 (3) TFEU uphold that it may be considered to be compatible with the internal market `the aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest`.

The Maastricht Treaty inserted Title IX- Culture, Article 128 EC Treaty. The wording of that article it is almost unchanged in the present art. 167 TFEU.

The relevance of culture in EU law must be seen in interaction with other areas of EU competence.

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[15] Vadi, V. and Brunno de Witte (Eds.), (2015). Culture and International Economic Law, Routledge. https://doi.org/10.4324/9781315849737.

[16] Shaheed, Farida, "Reflections on Culture, Sustainable Development and Cultural Rights, 2014, http://agenda21culture.net/sites/default/files/files/pages/award-pages/art_FS2_ENG.pdf.

[17] Fuerea, Augustin, *Dreptul Uniunii Europene- principii, acțiuni, libertăți*, Universul Juridic, 2016, pp. 23-37.

[18] Conea, Alina Mihaela, Politicile Uniunii Europene. Curs universitar, Editura Universul Juridic, București, 2019.

[19] Art. 2 (5), Treaty on the Functioning of the European Union (Consolidated version 2016), OJ C 202, 7.6.2016.

[20] CJEU, Judgment of the Court of 10 December 1968, *Commission of the European Communities v Italian Republic*, Case 7-68, EU:C:1968:51.

[21] CJEU, Judgment of the Court (Second Chamber) of 30 April 2009, *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH*, Case C-531/07, EU:C:2009:276, p. 32.

[22] Declaration on European Identity (Copenhagen, 14 December 1973).

According to Article 167(4) TFEU, `the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote *the diversity of its cultures*`. As such, the culture is influenced by the legal provision adopted, for example, on the internal market, completion, agriculture, information society, audio-visual services, intellectual property or common commercial policy.

The Charter of Fundamental Rights of the European Union states that `the Union contributes to the preservation and to the development of these common values while respecting *the diversity of the cultures* and traditions of the peoples of Europe as well as the national identities of the Member States`[23].

Article 22 (Cultural, religious and linguistic diversity) of the Charter indicates that `The Union shall respect *cultural, religious and linguistic diversity*`. Article 25 (The rights of the elderly) defines that `The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to *participate in social and cultural life*`. Freedom of the arts and sciences is stated in Article 13: `The arts and scientific research shall be free of constraint. Academic freedom shall be respected`.

The CJEU endorses in *Pelham* [24] that `freedom of the arts, enshrined in Article 13 of the Charter, falls within the scope of freedom of expression, enshrined in Article 11 of the Charter`.

At the international level, the creative economy is specifically addressed through two of UNESCO's normative instruments, the *Universal Declaration on Cultural Diversity* (2001) and the *Convention for the Protection and Promotion of the Diversity of Cultural Expressions* (2005)[25]. The latter was the only international legal instrument to be adopted unanimously by the European Union[26].

The right to participate in cultural life has obtained recognition under international human rights law, initially through Article 27 of the *Universal Declaration of Human Rights*. The *Covenant on Economic, Social and Cultural Rights* drawn up by the United Nations and opened for signature in New York on 10 December 1996 stated in Article 15:`the States parties to the present Covenant recognise the right of everyone (a) *to take part* in cultural life; (b) to *enjoy* the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'

Council of Europe *Framework Convention on the Value of Cultural Heritage for Society* (Faro Convention) of 27 October 2005, a "framework convention" which defines general objectives and possible fields of intervention for member State, introduces a key idea: rights to cultural heritage.

3. Access to culture/cultural heritage

Not explicitly stated in primary law of EU, the *access*[27] to culture is mentioned in the secondary legislation (for example: access to culture for all[28] , access to electronic communications networks[29], access to culture as a means of combating social exclusion[30], access to and promotion of culture, and the access to cultural heritage[31], access to the cultural heritage[32]) and in (limited) acts of CJEU (`popular support for the idea of free access to culture`[33], `promotion of linguistic diversity as access to culture`[34]).

The CJEU states that` freedom of the arts, enshrined in Article 13 of the Charter, which, in so far as it falls within the scope of freedom of expression, enshrined in Article 11 of the Charter and in Article 10(1) of the European Convention for the Protection of

[23] Salomia, Oana-Mihaela. Instrumente juridice de protecție a drepturilor fundamentale la nivelul Uniunii Europene. București: C.H. Beck, 2019.

[24] Judgment of the Court (Grand Chamber) of 29 July 2019, Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben, Case C-476/17, EU:C:2019:624, parg. 34.

[25] https://en.unesco.org/news/cutting-edge-creative-economy-moving-sidelines.

[26] Popescu, Roxana-Mariana, `Place of International Agreements to Which the European Union is Part within the EU Legal Order`, Challenges of the Knowledge Society; Bucharest (2015): 489-494.

[27] The concept of access has been specifically developed by the Human Rights Council, Committee on Economic, Social and Cultural Rights. `Applied to cultural heritage, the following must be ensured: (a) physical access to cultural heritage, which may be complemented by access through information technologies; (b) economic access, which means that access should be affordable to all; (c). information access, which refers to the right to seek, receive and impart information on cultural heritage, without borders; and (d) access to decision making and monitoring procedures, including administrative and judicial procedures and remedies, Human Rights Council, Report of the independent expert in the field of cultural rights, Farida Shaheed "The right to access and enjoy cultural heritage (2011)" https://doi.org/10.1163/2210-7975_HRD-9970-2016149.

[28] Council Resolution of 25 July 1996 on access to culture for all, OJ C 242, 21.8.1996.

[29] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Text with EEA relevance) OJ L 337, 18.12.2009, pp. 37–69.

[30] Decision No 1903/2006/EC of the European Parliament and of the Council of 12 December 2006 establishing the Culture Programme (2007-2013), OJ L 378, 27.12.2006.

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

[32] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, PE/28/2019/REV/1, OJ L 172, 26.6.2019, pp. 56–83.

[33] Opinion of Advocate General Szpunar delivered on 17 December 2020, EU:C:2020:1063.

[34] Judgment of the Court of 23 February 1999, *European Parliament v Council of the European Union*, Case C-42/97, EU:C:1999:81.

Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, affords *the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds*`[35].

The term '*heritage*' is generally defined as all cultural goods associated with a 'heritage value', meaning that it is believed that they must be transmitted to future generations[36]. According to Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State, [37] the scope of the term '*national treasure*' should be determined, in the framework of Article 36 TFEU[38].

`Facing challenges…The heritage sector is at a crossroads. Digitisation and online accessibility of cultural content shake up traditional models, transform value chains and call for new approaches to our cultural and artistic heritage`[39].

The Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU) , is the Commission's main policy tool for digital cultural heritage. The launch of *Europeana* in 2008, Europe's digital platform for cultural heritage, was one of the most important stepping stones for digital cultural heritage[40].

The European Commission upholds that digitisation is an important means of ensuring greater *access to cultural* material[41]. Digitisation multiplies opportunities to *access* heritage and *engage* audiences[42].

The most invoked reason for making it accessible is economic. `Those cultural heritage collections and related metadata are a potential base for digital content products and services and have a huge potential for innovative re-use in sectors such as learning and tourism`[43]. Digitised cultural heritage resources are long-term economic assets.

It is also believed that the development of digital technologies such as artificial intelligence (AI), computer vision, deep learning, machine learning, cloud computing, Big Data has brought unprecedented opportunities for digitisation, online access and preservation. Digital technologies can empower and encourage people to participate in culture in a more active and creative way[44]. Digitisation of cultural heritage and the reuse of such content can generate new jobs not only in the cultural heritage sector, but also in other key areas such as the creative industries.

Moreover, due to a rapidly evolving technology, *born-digital cultural heritage* needs to be properly collected, managed and preserved to be accessible and usable in the long run[45].

A key legal document addressing the open access to heritage is Directive 2019/1024 on open data and the re-use of public sector information. `Libraries, including university libraries, museums and archives hold a significant amount of valuable public sector information resources, in particular since digitisation projects have multiplied the amount of digital public domain material. Those cultural heritage collections and related metadata are a potential base for digital content products and services and have a huge potential for innovative re-use in sectors such as learning and tourism`[46].

`Despite recent EU developments, the risk remains that a combination of property, contract, and (improper) Intellectual property claims can be used to exclude the public from accessing and using both material and digital cultural heritage in the public domain`[47]. Herein lies the long-standing international legal and ethical debate: are heritage institutions justified in claiming copyright in reproductions of public domain works to generate much needed revenue, or do such restrictive measures conflict with

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[35] Judgment of the Court (Grand Chamber) of 29 July 2019, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, Case C-476/17, EU:C:2019:624, parag. 34.

[36] Jakubowski, Andrzej, Kristin Hausler, and Francesca Fiorentini, eds. Cultural Heritage in the European Union, (Leiden, The Netherlands: Brill | Nijhoff, 15 May. 2019) doi: https://doi.org/10.1163/9789004365346.

[37] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast), OJ L 159, 28.5.2014.

[38] Ferrazzi, Sabrina. "EU National Treasures and the Quest for a Definition." *Santander Art and Culture Law Review* 5, no. 2 (2019): 57–76.

[39] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *Towards an integrated approach to cultural heritage for Europe*, COM/2014/0477 final.

[40] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *2030 Digital Compass: the European way for the Digital Decade*, COM/2021/118 final/2.

[41] Commission *Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation*, OJ L 236, 31.8.2006, p. 28–30.

[42] Communication from the Commission - *Towards an integrated approach to cultural heritage for Europe*, COM/2014/0477 final.

[43] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, PE/28/2019/REV/1, OJ L 172, 26.6.2019, p. 56–83, recital 65.

[44] Commission staff working document evaluation of the Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, SWD/2021/0015 final, 29/01/2021.

[45] Idem.

[46] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, PE/28/2019/REV/1, OJ L 172, 26.6.2019, p. 56–83, recital 69.

[47] Wallace, Andrea, and Ellen Euler. "*Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments*." IIC - International Review of Intellectual Property and Competition Law 51, no. 7 (September 1, 2020): 823–55. https://doi.org/10.1007/s40319-020-00961-8.

educational missions and the rationale supporting a robust public domain?[48]

The national reports pointed to a positive trend among Member States[49] to ensure that *public domain status is maintained after digitisation.*

Important challenges related to copyright are expected to be addressed by the transposition and implementation of the Directive on copyright and related rights in the Digital Single Market (2019/790/EU)

4. (Open) access and (too much ?) IP rights

`We are not entering a time when copyright is more threatened than it is in real space. We are instead entering a time when copyright is more effectively protected than at any time since Gutenberg. The power to regulate access to and use of copyrighted material is about to be perfected. Whatever the mavens of the mid-1990s may have thought, cyberspace is about to give holders of copyrighted property the biggest gift of protection they have ever known. But the lesson in the future will be that copyright is protected far too well. The problem will center not on copy-right but on copy-duty—the duty of owners of protected property to make that property accessible`[50].

The Court is thus one of the promoters and creators[51] of the system of protection of intellectual property rights in the European Union.

Despite the apparent lack of EU competence, through a constitutional approach, the Court of Justice of the European Union has opened up the possibility of the emergence of a European intellectual property system. The case law of the Court of Justice has provided the basis for bringing intellectual property rights into the sphere of legislation at the level of the European Union. It was possible the harmonization of national legislation on intellectual property rights, and more, creating unitary[52] protected intellectual property rights at European level.

In the recent case-law, the Court consider that, in particular in the electronic environment, a fair balance must be found between, `on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights now guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of the public interest`[53].

In the search for a fair balance between various conflicting interests, it is essential to observe what values the Court protects. The relevance of the Court's judgments is no more limited to the internal market, being significant for the private life of each of us and for the way in which law builds social relations in cyberspace.

The (strict) protection of intellectual property rights in the online environment can bring significant risks to the protection of private life as well to the open features of the Internet. The Court thus seems inclined to tip the balance in favour of the protection of other fundamental rights.

Moreover, the CJEU has consistently recalled that `the protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union. There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected`[54]

One of the rights considered by the Court is the right to freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union.

In Scarlet Extended v. SABAM (C-70/10) [55], the Court concluded that the establishment of a filtering system did not ensure a fair balance between, on the one hand, the protection of intellectual property rights and, on the other, the protection of freedom to carry out a commercial activity and the protection of personal data, as well as their freedom to receive and transmit information. The Court noted that a filtering system `could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications`.

By its judgment of 29 July 2019, Pelham and Others (C-476/17), CJEU recalled that a balance must be struck between intellectual property rights, enshrined in the Charter, and the other fundamental rights also protected by the Charter, including freedom of the arts, which, falls within the scope of freedom of expression. Accordingly, the Court held that `using the sample for the purposes of creating a new work, constitutes a form of artistic expression which is covered by freedom of the arts, as protected in Article 13 of the Charter`.

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[48] Idem.

[49] Ștefan, Elena Emilia. "The Administrative Responsibility in the Light of the New Legislative Changes." *LESIJ - Lex ET Scientia International Journal* XXVII, no. 2 (2020): 135–42.

[50] Lessig, Lawrence, Code: And Other Laws of Cyberspace,Version 2.0, 2006.

[51] Anghel, Elena. "Judicial Precedent, a Law Source." LESIJ - Lex ET Scientia International Journal XXIV, no. 2 (2017): 68–76.

[52] Ros, Viorel, Ciprian Raul Romițan, Andreea Livădariu, Protecția noilor soiuri de plante Plante și hrană umană (I), 2/2020, Revista Română de Dreptul Proprietății Intelectuale, pp.42-86.

[53] Judgment of the Court (Grand Chamber) of 29 July 2019, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, Case C-476/17, EU:C:2019:624.

[54] Judgment of the Court (Third Chamber), 16 February 2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, C-360/10 , EU:C:2012:85, prag.41.

[55] Judgment of the Court (Third Chamber) of 24 November 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10, EU:C:2011:771.

The Pelham decision can be seen in relation with the doctrine of fair use, from the United States system. On 5th April 2021, the Supreme Court of Justice of the United States of America used the `fair use` doctrine in the case Google vs. Oracle. The Court declare that Google use of the code was covered by the doctrine of "fair use". Google purpose was consistent with that `creative progress that is the basic constitutional objective of copyright itself`[56].

In Telenor (C-807/18 and C-39/19) [57] the Court interprets, for the first time, the EU regulation enshrining 'internet neutrality'. The Court held that, where measures blocking or slowing down traffic are based not on objectively different technical quality of service requirements for specific categories of traffic, but on commercial considerations, those measures must in themselves be regarded as incompatible with Regulation 2015/2120[58].

In the judgment in Ulmer (C-117/13), the Court of Justice stretched the provision that allows libraries to make available works on their terminals[59] in order to grant them also the possibility of digitally reproducing their collections when digitisation was necessary to exercise the exception. The European Court of Justice excluded that this possibility could be ruled out by rightholders' offer to conclude licensing agreements on digitised copies, since this would mean subordinating the fulfillment of the purpose of the exception (to promote the public interest in promoting research and private study, through the dissemination of knowledge) to unilateral discretionary action on the part of copyright owners[60].

The Court observes in Vereniging Openbare Bibliotheken (Case C-174/15)[61] the balance between the interests of authors, on the one hand, and cultural promotion — which is an objective of general interest underlying the public lending exception— on the other hand.

CJEU concludes that `lending carried out digitally indisputably forms part of those new forms of exploitation and, accordingly, makes necessary an adaptation of copyright to new economic developments`[62].

Advocate General Szpunar consider that `books are not regarded as an ordinary commodity and that literary creation is not a simple economic activity`[63]. `Today, in the digital age, libraries must be able to continue to fulfil the task of cultural preservation and dissemination that they performed when books existed only in paper format. That, however, is not necessarily possible in an environment that is governed solely by the laws of the market`[64].

In a recent judgment, in Case C-392/19 VG Bild-Kunst v Stiftung Preußischer Kulturbesitz, the Court concluded that where the copyright holder has adopted or imposed measures to restrict framing, the embedding of a work in a website page of a third party, by means of that technique, constitutes making available that work to a new public. That communication to the public must, consequently, be authorised by the copyright holder.

The Court makes clear that a copyright holder may not limit his or her consent to framing by means other than effective technological measures. In the absence of such measures, it might prove difficult to ascertain whether that right holder intended to oppose the framing of his or her works.

`But something fundamental has changed: the role that code plays in the protection of intellectual property. Code can, and increasingly will, displace law as the primary defense of intellectual property in cyberspace. Private fences, not public law. (…) Since the intent of the "owner" is so crucial here, and since the fences of cyberspace can be made to reflect that intent cheaply, it is best to put all the incentive on the owner to define access as he wishes. The right to browse should be the norm, and the burden to lock doors should be placed on the owner[65].

5. Conclusions

In the EU law, the concept of *culture* underlies, more precisely, *the diversity of* cultures of the member states. This concept is, actually, at the heart of European integration and European law. Consequently, the diversity of culture in the European Union law has a constitutional significance. Article 167(1) TFEU states that `the Union shall contribute to the *flowering of the cultures* of the Member States, while respecting their national and regional diversity and at the same

[56] Supreme Court of the United States, *Google LLC v. Oracle America*, Inc., 5th April 2021, 18-956, 593 U.S.

[57] Judgment of the Court (Grand Chamber) of 15 September 2020, *Telenor Magyarország Zrt. v Nemzeti Média- és Hírközlési Hatóság Elnöke*. Joined Cases C-807/18 and C-39/19, EU:C:2020:708.

[58] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Text with EEA relevance), OJ L 310, 26.11.2015, p. 1–18.

[59] under Article 5(3)(n) of the InfoSoc Directive.

[60] Sganga, Caterina, *A New Era for EU Copyright Exceptions and Limitations? Judicial Flexibility and Legislative Discretion in the Aftermath of the CDSM Directive and the Trio of the Grand Chamber of the CJEU* (October 1, 2020). ERA Forum, vol.21, 2020, pp.311-339 , Available at SSRN: https://ssrn.com/abstract=3804228, pp.11-12.

[61] CJEU, Judgment of the Court (Third Chamber) of 10 November 2016, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, Case C-174/15, EU:C:2016:856, parag.60.

[62] Idem, parag.45.

[63] Opinion of Advocate General Szpunar delivered on 16 June 2016, EU:C:2016:459.

[64] Idem.

[65] Lessig, Lawrence, Code: And Other Laws of Cyberspace,Version 2.0, 2006.

time bringing the *common cultural heritage* to the fore`.

Digitisation, endorsed by EU institutions, multiplies opportunities to access heritage and *engage* audiences. Although, not *explicitly* stated in primary law of EU, the *access* to culture is mentioned in the secondary legislation and in (limited) acts of CJEU.

Various obstacles when accessing and reusing cultural heritage online, such as a lack of sufficient content, insufficient quality, the copyright and reuse status pose significant legal questions. In recent case-law, CJEU consider that, in particular in the electronic environment, a *fair balance* must be found between, `on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights *now* guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of the public interest`.

Thus, a balance between a high level of intellectual protection and measures to promote learning, culture and knowledge about the European heritage should reconsider the role of museums, archives and libraries in the digital era and propose solutions to ensure that the values they defend (heritage, equity of access) are transposed to networked cultures.

The current debate about open internet has strong implications for fundamental freedoms…and everywhere in the world *the courts* are searching for balance.

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