Kluwer Copyright Blog

The New Copyright Directive: Article 14 or when the Public Domain Enters the New Copyright Directive

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According to Article 14 of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive), "when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation". This article constitutes a welcome addition to the otherwise heavily criticised text of the new Directive. In fact, it prevents the expansion of copyright to "faithful" reproductions of works that are already part of the public domain (See Recital 53). In that sense, it supports "access to and promotion of culture" and it ensures access to European cultural heritage as well as its enrichment.

Article 14 was introduced as part of an amendments package put forward by the European Parliament during the legislative process. The original wording of the amendment suggested the modification of Article 5 of the proposed Directive in order to include a reference to the public domain. The goal of the amendment was to place the legal concept of the public domain within the broader context of the issue of the preservation of cultural heritage. The final version of the provision – recodified and conceptually separated from Article 5 – constitutes the first mention of the public domain in the European *acquis*. In its current form, Article 14 leaves room for the attribution of copyright protection to reproductions of public domain works of visual art when they fulfil the originality threshold. While the text initially proposed by the Parliament referred to reproductions of all "material" that is within the public domain, the scope of the final provision was restricted to focus solely on works of *visual art*, as prominently figures in the title of article 14. Acknowledging that "the protection of such reproductions through copyright or related rights is

inconsistent with the expiry of the copyright protection of works" (See Recital 53), Article 14 refutes the a priori automatic protection of the works of visual art in question unless they demonstrate the necessary originality "in the sense that it is the author's own intellectual creation". The creation of this normative framework surrounding the preservation of works of visual art in the public domain raises interesting questions.

Repeat after me: no originality, no copyright

Is it truism to declare the absence of copyright protection for works (of visual art) that do not fulfill the originality threshold? At first glance, it seems like the formalization of an existing rule. As a matter of fact, this late amendment to the Directive was born out of a need to clarify the legal status of the reproductions of works of visual art belonging in the public domain; its purpose is to ensure that "nobody can claim copyright protection on works in the field of the visual arts which have already fallen into the public domain" unless they are demonstrably original. The uncertainty surrounding the different rights' regime applicable to these types of works has been highlighted by national case law (see here and here) and accentuated by the diverse legislative landscape found in Member States (see for example the laws in Germany, Spain, and Italy recognizing related rights protection for suboriginal photographs). In fact, the existing normative framework paints a fragmented picture of the copyright status of reproductions of works of visual art that already belong to the public domain within the EU. In that sense, the formalization of rules in Article 14 appears both justified and necessary. According to the European Commission's press release in February 2019, users "will be completely free to share copies of paintings, sculptures and other works of art in the public domain with full legal certainty". Ultimately, the text of the article in question creates a legal barrier preventing the creation of copyright and related rights protection over works of visual art that are in the public domain.

The wording of the provision follows established CJEU case law in its standardization of the originality threshold which is referred to as the "expression of the author's own intellectual creation". In fact, national courts have previously held that a priori faithful reproductions of works of visual art do not constitute their author's own intellectual creation. Similarly, the UK Intellectual Property Office clarified in 2014 that copyright protection cannot be granted for these works because of the lack of creative choice freedom. Even if the fate of adaptations of works belonging to the public domain is not unequivocally determined for all the different types and genres of artistic expression, the Directive seeks to create a harmonized regime advancing the preservation of public domain works. During that process, Article 14 also achieves the establishment of de facto criteria for the originality threshold towards all material that constitutes "the author's own intellectual creation", per the established European case law. Most importantly, it creates the presumption that faithful reproductions of works of visual arts in the public domain will also be part of the public domain unless the originality threshold is provably met. Enforcing this presumption implies that the a priori legal status of these reproductions is set to be the public domain.

What does this change for photographs?

The creation of this presumption for "digital reproductions of works of visual art" also raises the question of the compatibility of the newly created norm with the existing legal regime applicable to photographs. According to the European Commission's press release in March 2019, "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". Since the scope of Article 14 includes photographs, it is unclear how existing protection for related rights implemented by some Member States (see Recital 16 and Article 6 of the Term Directive) will be affected for photos that fall under the scope of Article 14. The *raison d'être* of the article and its wording both point towards the exclusion of related rights protection for works falling within its scope (as noted elsewhere). In fact, Article 14 aims to bring legal clarity and to prevent efforts of re-appropriation of works of visual art belonging to the public domain through digitisation processes. There are a few examples of such practices that led to the fragmentation of the European cultural heritage availability, use, and valorisation. The implementation of these rules contributes to legal clarity and it prevents institutions from imposing additional rights regimes on digital reproductions of public domain collections, even if the same article does not restrict institutions from collecting revenues through the commercial exploitation of such collections. In that line, recital 53 states that this regime "should not prevent cultural heritage institutions from selling reproductions, such as postcards". In the true spirit of public domain – which is not inherently incompatible with commercial uses – the new provision brings legal clarity to a progressively fragmented regime that regulates access to European cultural heritage by creating a balance between the economic interests of "cultural heritage institutions" and the public interest in the preservation of access to public domain works.

Article 14 can be celebrated both as the first codified mention of the concept of public domain in the copyright *acquis* and as the official harmonization of the originality threshold embracing the established CJEU definition. However, its context remains purely descriptive: it does not introduce enforcement measures, which would prevent claims of exclusive rights over works belonging to the public domain, namely acts of "copyfraud" – and the chilling effects these claims have. In fact, the Directive does not refer to prevention mechanisms against fraudulent copyright ownership claims over public domain materials. Seen in a broader context, and besides the innovative (albeit relatively late) addition to the text of the Directive, Article 14 is a first step towards the creation of a normative regime that will effectively ensure the preservation of the European public domain.

This post is part of a series on the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive):

The New Copyright Directive: A *tour d'horizon* – Part I by João Pedro Quintais

The New Copyright Directive: A tour d'horizon – Part II (of press publishers, upload filters and the real value gap) by João Pedro Quintais

The New Copyright Directive: Digital and Cross-border Teaching Exception (Article 5) by Bernd Justin Jütte

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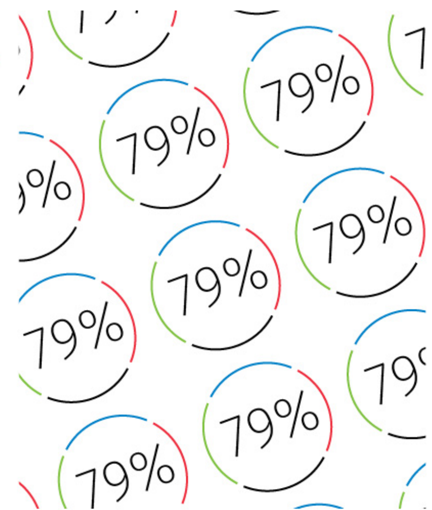

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