Kluwer Copyright Blog

The EU imperative to a free public domain: The case of Italian cultural heritage

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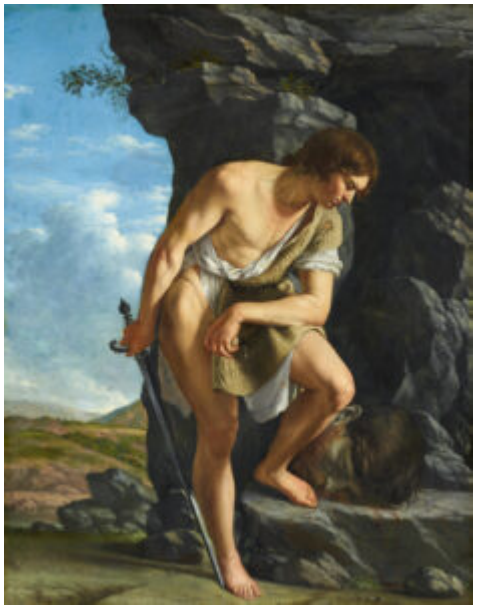

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For more than seven decades, international law has consistently led countries to embrace culture as a global and cross-border value for humanity. The human right to cultural participation has become a pillar of protecting and empowering individuals and communities. At the EU level, the competence to legislate on cultural matters is mostly left to the Member States. However, the protection, enjoyment, and enhancement of Europe's cultural heritage is far from being merely national business. The Charter of Fundamental Rights of the EU and the entire EU cultural policy agenda stand on the obligations to safeguard artistic freedom and promote cultural diversity and inclusivity (see European Commission; see Psychogiopoulou).

In this context of international and EU legal obligations to protect cultural rights, the EU has set a legal imperative to protect the public domain. Introducing Article 14 of the Copyright in Digital Single Market Directive (CDSMD), the EU legislator made it mandatory across the 27 Member States to ensure that faithful reproductions of visual artworks belonging to the public domain remain free to circulate and be used across the Union.

The rationale of Article 14 CDSM Directive is the **prohibition of a 're-fencing off' of a category of free cultural heritage**, namely works of visual art, by granting new exclusive rights to guarantee the necessary space for cultural flourishing in Europe.

Member States can depart from the wording of EU Directives. However, they are bound by an obligation of result, meaning that the national way of transposing a provision must fully enable achieving its specific objectives.

In this vein, Italy signals a highly problematic legal scenario. Even though in its Constitution the commitment to cultural promotion and enjoyment, the Italian legal system exhibits ever more

conservative proprietary tendencies regarding the State's control over the uses of its national cultural heritage.

Italy transposed Article 14 CDSM Directive explicitly indicating that the norm applies with no prejudice to the Italian Code of Cultural Heritage and Landscape (ItCCHL). The Code, besides providing an open-ended definition of what qualifies as cultural heritage, sets up a legal mechanism that obliges anyone willing to copy and use cultural heritage – also when belonging to the public domain – to seek authorisation from the Italian government or responsible cultural institutions, in charge of assessing the compatibility of such uses with the cultural value of the heritage at stake and establishing a fee for each authorised use.

Italian Courts followed suit putting forward creative judicial engineering of **new forms of exclusivity on Italian cultural heritage artworks in the public domain**. In recent first-instance rulings, copies of David by Michelangelo and Vitruvian Man by Leonardo Da Vinci were prevented from being freely used on a board game, a magazine cover page, and an advertising commercial (see also DeAngelis/Giardini here; Dore/Caso here and here). The judicial reasonings ignored copyright legal provisions, applying cultural heritage law and taking a long-arm approach to cherry-picked legal norms (such as personality rights) to give significant leeway to the Italian government and cultural institutions to decide whether and to what extent reproductions of cultural heritage can be used freely.

The Italian transposition of Article 14 CDSM Directive and the Italian Courts' rulings reveal an attempt to impose new forms of exclusivity on cultural heritage that may go even further than copyright restrictions, thus becoming what scholars describe as 'pseudo' or 'surrogate' copyright.

This results in **violating the principle of the numerus clausus of intellectual property** rights and a significant distortion in the implementation of EU law in the country. More specifically, the incompatibility of the Italian legal system with EU law in this regard is grounded on three main arguments.

First, the Italian legal system fails to meet the obligation of result imposed by Article 14 CDSM Directive by hollowing out the subject matter of the provision. Article 14 mainly addresses the collections of cultural institutions, such as museums, galleries, libraries, and archives (see Dusollier). **It does not allow Member States to exclude certain types of visual artworks** from its objective scope of application. Exempting Italian cultural heritage (broadly defined by the ItCCHL as including all public and private cultural collections on national soil) from the scope of the provision fully distorts its pursued intent. Otherwise said: if not cultural institutions collections, which works of visual art would Article 14, in Italy, incentivise EU citizens and institutions to digitise and enjoy?

Second, the Italian legal system fails again to meet the obligation of result as it imposes a manifest **obstacle to the cross-border application** and harmonisation intent of Article 14 CDSM Directive. Building and enhancing the EU Digital Single Market is a quintessential component and the raison d'être of the EU law provision. By tacitly making the ItCCHL prevail over copyright rules, the Italian legal system creates a significant burden for EU citizens from other Member States to comply with national rules and differentiate their behavior in online settings.

Third, the Italian legal system **fails to safeguard the human and fundamental rights of cultural participation and artistic freedom**. By establishing a disproportionate, unnecessary, and hardly

accountable mechanism of centralised control over the use of public domain cultural heritage, Italy fails to take a holistic account of all relevant rights and interests at stake, ignoring the rights to access, use, enjoy, and participate in cultural heritage.

The Italian case is not expected to be peculiar nor isolated in the EU. Several Member States feature specific rules on cultural heritage in their national legal system and their interplay with the transpositions of Article 14 CDSM Directive remains, to date, unclear (see, among others, Markellou).

Clear-cut regulatory clarifications and balanced and systematic legal interpretations are utterly needed to address and prevent all potential legal inconsistencies in the interplay between copyright and cultural heritage. This would be significantly more effective if performed at the EU level through legal reform (not excluding interventions on competence rules), specific clarifications by the EU legislator, or autonomous interpretation by the Court of Justice of the EU.

Our full study inquiring about the compatibility of the Italian legal system with EU law at the intersection of cultural heritage and public domain artworks is available **here**.

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