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

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Article 14

I. Reproductions of works of visual art in the public domain

Article 14 obliges Member States to "provide that, 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."

The wording of Article 14 appears, of course, somewhat clumsy in stating that the resulting reproduction "is not subject to copyright …, unless [it] is original in the sense that it is the author's own intellectual creation" because, on the one hand, in strict copyright terms, a mere reproduction is not an author's own intellectual creation, and, on the other hand, once an author's own intellectual creation can be found, copyright protection shall attach according to the very wording of the Article in question.

What is, of course, meant is (1) that once the copyright of a work of visual arts has expired, it may not only be reproduced, communicated or used without the author's consent since it is in the public domain, but that in addition, (2) no exclusive rights shall attach to any copy of a public domain work of art, unless the reproduction constitutes its author's own intellectual creation.

This is a remarkable provision which, for the first time in the EU, grants a positive status to works belonging to the public domain, by prohibiting any regaining of exclusivity therein. As defined by the CJEU, "[i]n order for an intellectual creation to be regarded as an author's own it must reflect the author's personality, which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices" (see, to that effect, judgement of 29 July 2019, *Funke Medien NRW*, C- 469/17, ECLI:EU:C:2019:623, para. 19; judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraphs 87 to 89). In addition, Recital 53 indicates that "faithful reproductions" of works of visual art are not to be considered as their authors' own intellectual creation.

According to Recital 53, the cutting back of exclusive rights of reproduction photographers is justified by two arguments. First, "[i]n 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". Second, "[i]n the digital environment, the protection of such reproductions through copyright or related rights is inconsistent with the expiry of the copyright protection of works".

Article 14 is a direct reaction to a case decided by the German Federal Supreme Court (Bundesgerichtshof, BGH) in a judgement of 20 December 2018 (case I ZR 104/17, *Museumsfotos*), according to which photographs of paintings or other two-dimensional works are regularly ("regelmäßig") subject to protection as simple photographs according to Article 72 of the German Copyright Act, i.e. irrespective of the fact whether the work photographed is still protected by copyright or whether it has already fallen into the public domain. Article 72 of the German Copyright recognises a right related to copyright for non-original "simple" photographs. This related right is not harmonized by EU law but explicitly permitted according to Article 6 sentence 2 of the Term-Directive 2006/116/EC ("Member States may provide for the protection of other photographs").

II. Questions regarding the implementation of Article 14

Although the wording of Article 14 appears to be rather straightforward, it gives rise to a certain number of questions that need to be answered at the stage of implementation.

1. Objects covered by Article 14: "works of visual art"

Article 14 only covers „works of visual art". This gives rise to a question as to the extent to which Article 14 also applies to the reproduction of public domain design works, works of architecture and maps, which are also listed as works of visual arts in some Member States, but are listed in separate categories of copyrighted works in other Member States.

This question cannot easily be answered, since firstly, the EU Directives do not contain a binding, autonomous list of categories to be considered as "works". Secondly, the language and systematic structure of international Conventions – to which the CJEU often refers when interpreting provisions of EU copyright law – does not help much, since rather than using the term "visual art", Article 2 (1) of the Revised Berne Convention lists different objects which fall into this category ("works of drawing, painting, architecture, sculpture, engraving and lithography"). In addition, "photographic works" are listed in the Berne Convention as a separate category of works, as are "works of applied art", "maps", "sketches" and "three-dimensional works relative to … architecture". If anything, the Berne Convention indicates that the term "works of visual art" should not be construed too narrowly.

Moreover, an understanding of "works of visual art" in a narrow sense would exclude copyrighted photographic works, technical drawings, and maps from the application of Article 14. The consequence of such a narrow understanding of the notion of "works of visual art" would be that exclusive related rights under national law could still attach to faithful reproductions of public domain photographs, old maps and the like. However, such a result would not be in line with the purpose of Article 14, as explained in Recital 53, which emphasises access to and promotion of culture, and access to cultural heritage.

Rather than adopting such a narrow understanding of "works of visual art", the ECS supports a broader understanding, which focuses on the "faithfulness" of the reproduction laid down in Recital 53. According to such understanding, Article 14 would also apply to faithful – in other words, non-creative – reproductions of public domain photographic works, design works (works of applied art) and maps. To conclude otherwise would grant greater derivative protection to such works than to works of visual arts.

2. Rights cut back by Article 14 ("copyright or related rights")

Another question is which rights are affected by the operation of Article 14. This question gives rise to two remarks.

First, the reference to "copyright" as a right to which faithful reproductions of works in the public domain shall not be subject, is somewhat misleading, since according to Article 14 copyright does come into existence for reproductions of public domain works which constitute the author's own intellectual creation. Therefore, unless a Member State grants, under its national law, copyright protection to works which are not an intellectual creation of its authors, Article 14 mainly, if not exclusively affects "related rights".

Second, the most important of such related rights, at least as regards visual reproductions of copyright-protected works, is the related right in non-original photographs – and eventually non-original film stills – provided for by some Member States' national laws (such as, e.g., in § 72 of the German Copyright Act). Moreover, copies protected by related rights for previously unpublished works as well as critical and scientific publications (Articles 4 and 5 of Directive 2006/116) are also affected by Article 14 of the DSM-Directive. In addition, according to its wording, Article 14 might also apply to other related rights granted by national laws, even if these rights are not (yet) harmonized by EU law, such as, e.g., the rights to non-original audiovisual recordings. Therefore, such rights, when they exist in national law, should likewise not apply to faithful reproductions.

3. "Reproductions" which are not "the author's own intellectual creation"

A question of prime importance is to know what is to be understood by "reproductions" which are not "the author's own intellectual creation", since it is only those non-original reproductions to which, according to Article 14, no new rights shall apply.

In the literature, it is often suggested that a line should be drawn between reproductions of 2D-works and reproductions of 3D-works (i.e., the reproductions which are supposed to be the author's own intellectual creation). However, whereas it is true that reprographic photography of 2D-works is in most, if not all cases non-original, reproductions of 3D-works may or may not be the result of their authors' own intellectual creation.

The ECS therefore supports an understanding of the term "reproduction" deriving from Recital 53's reference to "faithful" reproduction. In other words, Article 14 should also cover faithful reproductions of 3D objects (e.g. by plaster casts, 3D-reproductions and prints) which are in the public domain, provided their purpose is merely to reproduce the original object in question faithfully and not to transform it in any creative way.

4. „…when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work …"

The formulation „…when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work …" may give rise to two conflicting readings.

According to one reading, "when" would 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. Such an understanding would have the practical consequence that, even after the expiry of the term of

protection of the work reproduced, users would have to inquire whether or not the reproduction was made before that date or thereafter.

According to another reading, however, the "when" marks the point in time after which *any* reproductions covered by Article 14 shall not be subject to exclusive rights, irrespective of the fact whether they have been made before or after the expiry of the term of protection of the work that has been reproduced. In other words, according to this understanding, the "when" refers to the time when the reproduction is being used rather than when it was made. This understanding appears to be more in line with the contribution to the access to and promotion of culture, and the access to cultural heritage described as the aim of Article 14 in Recital 53, even if it might involve a cutting back of already vested rights.

Consequently, ECS supports a reading of Article 14 which exempts all use acts undertaken regarding faithful, non-original reproductions after the term of the work reproduced has expired, irrespective of the date on which the reproduction in question was made.

5. Transitional provision

Because, if understood as just explained in point 4, Article 14 cuts back on already existing rights from the DSM-Directive's implementation deadline, any implementation should contain a corresponding transitional provision.

This provision should make clear that beginning with the implementation date, Article 14 also applies to the use of reproductions which were made before the implementation date.

6. No additional restrictions

It shall only briefly be mentioned that it may be reasonable to understand the reference to "digital environment" in Recital 53 as not limiting the application of Article 14 to digital use acts. The need to use reproductions in order to promote access to works and to cultural heritage exists, and can be satisfied, not only by digital but also by analogue reproductions.

7. Additional considerations

Finally, in the view of ECS, it might be advisable for national legislatures implementing Article 14 to ensure that the "access to and promotion of culture, and the access to cultural heritage" aimed at according to Recital 53 is not unduly undermined.

Firstly, given that no rights can attach to faithful reproductions of once copyright-protected works that have fallen into the public domain, the same result should also, a fortiori, apply where the objects reproduced were never protected by copyright at all, such as works of visual art created before copyright could apply to them or even before the modern copyright laws were enacted (e.g., antique artefacts).

Secondly, from the point of view of access to material in the public domain, it might seem appropriate to extend the application of Article 14 DSM-Directive to other works than works of visual arts, such as documents, manuscripts and sheet music. Of course, courts might still find that faithful reproductions of such works are not original in the sense of being their authors' own intellectual creations. However, it would seem justified and advisable to include these works in the course of national implementation of Article 14 DSM-Directive, in order to avoid

the misleading information given by a ©-notice which is often affixed to such faithful – and hence not protected – reproductions of public domain works that are not visual.

Thirdly, when implementing Article 14, the national legislature might be well advised to adopt language to the effect that the freedom provided for by Article 14 cannot be eliminated by reference to a property right unlimited in time in the object that has faithfully been reproduced. The effect of such regulation would, of course, only affect the use of reproductions which are already freely available and would not give the person making the reproduction a right of access to the physical object to be reproduced vis-à-vis the owner of the respective object.

At any rate, national provisions that would curtail the freedom recognized in Article 14 endanger the effectiveness of harmonized EU law and are impermissible in light of the obligation to safeguard the *effet utile* of Union law.

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