

Actions and reactions in commodifying cultural heritage hosted in museums

by **Cristiana Sappa***

Abstract: Museums are inclusivity-aimed institutions with a mission of education to knowledge. This mission can be appropriately implemented via the traditional initiatives of preservation and of exhibition, and the less traditional initiatives of sharing information related to cultural heritage via the internet or the metaverse, or yet by elaborating material to be used by visitors in an interactive fashion. It is undeniable that all these initiatives are costly. So, many museums did not resist the temptation of introducing self-funds mechanisms via the use of different legal tools, such as contractual provisions, national rules on cultural heritage and copyright principles. By exploiting these legal measures museums established a control-based approach, that make their focus shift to market dynamics. In the last decade, an open-access approach in this field was initiated by the civil society via bottom-up initiatives, on the top of which the legislator added some regulatory measures more

recently. The latter expressly aims at consolidating access and education to knowledge. However, a closer look to the entire set of relevant regulatory measures in particular reveals that underpinning economic interests are the main priority of such an approach related to making images of cultural heritage collected in museums available for re-use purposes, at a limited cost. These economic interests are only indirectly those of museums, while they are directly those of businesses. Thus, libre open-access practices and policies that encourage wide re-uses, should they be bottom-up or derive from a regulatory framework, would certainly bring two advantages. The first would be to let museums focusing on educational purposes in a fashion that is in line with the digital technology facilities; the second one would be to encourage market operators of any size to conduct business.

Keywords: commodification; museums; digitization of cultural heritage; digitalized cultural heritage; works of visual art; control; access to culture; education to knowledge

© 2023 Cristiana Sappa

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Cristiana Sappa, Actions and reactions in commodifying cultural heritage hosted in museums, 14 (2023) JIPITEC 161 para 1.

A. Introductory remarks on the subject matter of the research

1 Cultural heritage is an umbrella notion covering both intangible and tangibles assets.¹ These assets

* Cristiana Sappa is Associate Professor at IÉSEG School of Management, 3, rue de la Digue, Lille. She is also affiliate researcher at Centre d'Etudes et de Recherche sur le Droit de l'Immateriel (C.E.R.D.I.).

1 For a discussion on the different facets of the term in the international legal instruments see: Blake, *On defining the cultural heritage*, in *International & Comparative Law Quarterly*

have a scientific, cultural, historical or demethno-anthropological interest. More broadly, it can be stated that these assets have a civilization-related interest. Thus, it is important to preserve them and enable current and future generations to access them directly or at least any information on

2000, 61 f.; Lixinski (ed.), *International Heritage Law for Communities: Exclusion and Re-Imagination*, OUP, 2019; Ferrazzi, *The notion of "cultural heritage" in the international field: behind origin and evolution of a concept*, in *Int. J. Semiotics of Law* 2021, 743 ff.; Stamatoudi, *The notions of Intellectual Property and Cultural Heritage: overlaps and clashes*, in Id. (ed.), *Research Handbook on Intellectual Property and Cultural Heritage*, EE, Cheltenham, 2022, 8 ff..

them for developing an individual or a community-based identity.² Researching tangible and intangible cultural heritage requires answering different sets of questions and an excessively long study, that cannot be done with a decent level of analysis given the limited space provided for a single article. Then, this work merely analyses tangible cultural heritage.

- 2 A substantial part of tangible cultural heritage is hosted by cultural heritage institutions (CHIs), such as museums, libraries and archives in particular. This comprehensive term was introduced for the first time in the Directive on copyright and related rights in the Digital Single Market³ to address bodies that were conceived and introduced to facilitate preservation and subsequent access to tangible cultural heritage. Before this definition, those bodies were addressed in a more direct way, and often the acronym GLAMs, i.e. galleries, archives and museums, was used to point out to their practices and policies. CHIs is a broader term than GLAMs because other bodies, such as those collecting audiovisual material are also covered by the definition.⁴ In any case, the use of CHI probably embeds the suggestion of leading a legal analysis extended to all the bodies covered by it. However, for reasons that are mainly related to the different peculiarities of each of the above-mentioned CHIs, for the societal evolution that is showing an increasingly massive consumption of images, as well as for some specific market dynamics in the image-related sector, the focus of this work is

not as comprehensive. More precisely, the selection made is at two different levels.

- 3 On the one hand, this work studies museums only. Museums host cultural heritage collections that are composed of pieces that qualify as cultural goods, should they belong to arts or sciences. Three remarks are necessary here. First, the entire museum collection qualifies as cultural good, exactly like libraries or archives collections; also, each piece collected in a museum often qualifies as cultural good. The exploitation of cultural goods, whose definition is not univocal,⁵ may be strictly framed by special rules that vary from one country to another and pay particular attention to preservation, for example in some European countries such as Italy, Greece, but also France and Germany. These rules apply on top of copyright (if any), contractual provisions and personal property⁶ or real estate principles.⁷ Secondly, the term museum is broad and covers collections of items of a different nature, and this implies various sets of challenges: as an example, the digitization of animal species presents technical complexities that artworks do not, while the latter may present concerns on preservation related to the age of the (often) unique tangible copy that the first ones do not have. Thirdly, when hearing the word “museum”, we tend to think about very well established and renown art museums, such as the Pompidou Centre in Paris, the Pergamon Museum in Berlin, the Uffizi in Florence; however, museums may host collections with a very different focus (e.g., contemporary art or ancient Greece collections; museums of photographs on the history of mountains or on history of furniture design, etc.), they may be private or public (see the Egyptian museum in Turin

2 This is also the result of an empirical research funded by an ICOM special grant, according to which European museums, primarily in Central and Southeast Europe, “are seen as leverage for reinforcing national identity” INTERCOM – CIMAM, *Museum Watch Governance Management Project*, Report, 2022, 34, available at https://cimam.org/documents/192/Museum_Watch_Governance_Management_Project_INTERCOM-CIMAM.April2022.pdf. On cultural goods as essential elements of identity and belonging of individuals to a national sovereignty see Leone - Tarasco, *sub arts*. 1 - 2, in I. (eds.), *Commentario al codice dei beni culturali e del paesaggio*, CEDAM, Padoue, 2006, 33 ff.

3 Directive 2019/790/EU of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, herein after the DSM Directive.

4 An example is the French Institut National de l'Audiovisuel (INA). See the EUCJ, 14 November 2019, C-484/18, *Spedidam v. INA*. For an interesting copyright-related discussion around the mechanism on evidence introduced for facilitating the exploitation of its collections see Debarnot, *La triple validation jurisprudentielle du régime d'exploitation par l'INA des programmes de son fonds intégrant des prestations d'artistes-interprètes*, in CCE 2020, n. 3, 1 ff.

5 The notion of cultural good is provided by a multiple set of international and national legal instruments, so there is no one-size-fits-all notion. See Servanzi, *Il patrimonio culturale e le opere fuori commercio nella direttiva digital copyright*, in *Il nuovo diritto delle società* 2019, 657 ff.

6 On the extension of the scope of property rights to the images of the owned goods see Mercier, *L'image des biens, ou la difficile conciliation de droits concurrents*, in *Les petites affiches* 2006, 10 ff.; Fusi, *Sulla riproduzione non autorizzata di cose altrui nella pubblicità*, in *Riv. Dir. Ind.* 2006, 98 ff.

7 On the ability of the property right owner to forbid access to premises see in Germany Beater, *Des Schutz von Eigentum und Gewerbebetrieb von Fotografien*, in *Juristenzeitung* 1998, 1101 ff.; in Italy: Court of Rome (Pretura), 3 July 1987, in *IDA* 1989, commented by Carosone, *Prospettive del diritto all'immagine*, 468 ff.; Id. (Tribunale), 27 May 1987, unpublished; Court of Milan, 4 October 1982, in *IDA* 1983, commented by Fabiani, *Proprietà dell'opera d'arte figurative*, 41 ff.; Court of Rome, 23 June 1980, *ivi* 1980, 470 f.; in France Marie Cornu, *L'image des biens culturels: les limites de l'appropriable*, in Bloch (ed.), *Image et droit*, L'Harmattan, Paris, 2002, 611 ff.

managed by a Foundation), of differing sizes (such as the Louvre in Paris and the Cyprus museum in Nicosia), under different cultural heritage regimes, with more or less facilities for going digital, and with more or less awareness about the breadth of their public task.

- 4 On the other hand, this works focuses on art museums only, not only for the different technicalities related to the digitization of these specific collections compared to those connected to the science collections, but mainly because of the peculiarities related to the legal instruments governing the exploitation of works of visual art, which are at the core of market interests in specific sectors crossing the boundaries with the metaverse, such as virtual reality or video-games. Works of visual arts are referred at point 3 of the Annex of the Directive 2012/28/EU on Orphan Works,⁸ which refers to them as including fine art, photography, illustrations, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works. Therefore, they can be assimilated into the artistic works, as referred to by Article 2 of the Berne convention, i.e. “works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science”. This list suggests the variety of techniques for creating works of visual art, as well as the content that they may reproduce. This suggests that individual pieces hosted in a museum may embed a work of visual art that may or may not have enjoyed copyright protection.⁹ For instance, sculptures exhibited at the Rodin Museum are works of art that have been protected by copyright. Copyright may have never been there, like it is the case for most of the Greek, Italian, French museums, or may have already expired, like in the case of Van Gogh Museum in Amsterdam or the Chagall Museum in Nice. In other cases, copyright may still cover the exhibited works; for example, the Picasso Museum, the George Pompidou Centre, and the Tate Modern Gallery are hosting works that are still protectable. The point made here is that on a case-by-case analysis, it is possible to understand how many layers of

legal protection cover individual pieces collected in a museum and, that copyright may be one of them.

B. Museums across centuries between changing facilities and a stable mission.

- 5 In ancient times, museums were a place where intellectual and wise men could exchange and debate.¹⁰ In Europe, museums as we know them today were inherited by the enlightenment centuries. The first examples of museums come from the very late 17th Century and the following one. In 1677, the private collection of Sir John Trascendant in Lambeth became property of Sir Elias Ashmole and was moved to the University of Oxford to a building specially built for it. This building was opened to the public in 1683 and was named the Ashmolean Museum; this is considered the Great Britain’s first museum. In 1734, Pope Sixtus IV donated more than thousand bronzes to the people of Rome, and this enabled the establishment and the opening to the public of the Capitoline Museums. In 1792, thanks to the French Minister Roland, exhibition premises opened to the public, without any social class-based distinction. Two years later, for the first time the notion of collective ownership of artworks was introduced in France, implying that such works belonged to the national community, who from that moment should take the lead in protecting them, as well as in valorizing them. It is within this framework that the first national museum, the “grand musée de la République”, now known as the Louvre, was opened in Paris. Catherine the Great founded the Hermitage Museum in 1764 and it was opened for public viewing

8 Directive 2012/28/EU of 25 October 2012 on certain permitted uses of Orphan Works, herein after the Orphan Work Directive.

9 Collection as a whole can also qualify as works of art and therefore enjoy some copyright protection. More precisely museums can qualify as database. On this see already P. Galli, *Museums and databases*, in *IIC* 2006, 452ff..

10 Some sources referred to Ennigaldi-Nanna’s museum, collected by Princess Ennigaldi as the oldest known museum. It dated from 530 BC and was located in the state of Ur and it held Mesopotamian antiquities; apparently it was visited enough to have clay labels in three languages. According to other sources the first museum was the one built in Alexandria, Egypt, in the fourth century before Christ, hosting a library, an astronomic observatory, research tools and material for studying or for artistic purposes. Before this, collection of more or less precious goods could be found in temples or graves, but their aim was related to religion or to recognition of passed away persons, and therefore different from the one of museums. During the Roman times, the practice of collecting objects to enjoy their beauty became more and more regular. Little by little the activity of gathering artwork collected during wars and military campaigns for enjoyment purposes increased. Later, in the Middle Age, Churches plaid the role of museums enabling enjoyment of beauty for the population. Lorenzo De Medici’s collection was close to the current idea of a public gallery, but still the aspect of accessibility from the largest public was missing.

in 1852. Under the enlightenment approach, the common aim of museums in different countries is to underline the symbolic values of prestige and glory of the fatherland represented by works hosted in their premises and exhibited to the population, but also to ensure the preservation of historical and artistic values, as well as to introduce the notion of education to knowledge and enjoyment. Thus, since that time, museums can be considered as inclusion-aimed tools, exactly like other CHIs, because they were created and designed for facilitating the access to knowledge of cultural material to the largest public, without any discrimination. This approach is in line with the recent definition provided for the term museum by ICOM, according to which: “[a] museum is a not-for-profit, permanent institution in the service of society that researches, collects, conserves, interprets and exhibits tangible and intangible heritage. Open to the public, accessible and inclusive, museums foster diversity and sustainability. They operate and communicate ethically, professionally and with the participation of communities, offering varied experiences for education, enjoyment, reflection and knowledge sharing.”¹¹ Definitions of national laws often contain most of the key term embedded into the ICOM notion, such as the permanent character of the collection, the preservation task, the aim of education¹² and enjoyment.¹³

- 6 Museums aim at preserving cultural heritage, for enabling the access to cultural heritage,¹⁴ or at least to the information related to cultural heritage, i.e., its reproductions, complemented by any information,

11 See the ICOM Extraordinary General Assembly approving the new definition on August 24th 2022, in the framework of the 26th ICOM General Conference held in Prague. The vote is the culmination of an 18-month participatory process that involved hundreds of museum professionals from 126 National Committees from all over the world.

12 Art. 101 of the Italian Code on Cultural Goods and Landscape (codice dei beni culturali e del paesaggio) and L 410-1 of the French cultural heritage code (code du patrimoine).

13 L 410-1 of the French cultural heritage code (code du patrimoine).

14 See for instance art. 2.11 of the KulturgutshutzGesetz stating that: “institution preserving cultural property”, in particular museum (libraries and archives) shall mean any institution in the federal territory whose main purpose is to preserve and maintain cultural property and to ensure public access to this cultural property”. See also Belder, ‘Museums Revisited: The Position of the Museum in the New Governance of the Protection of Cultural Heritage and Cultural Diversity’ in Porsdam (ed.), *Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property*, Routledge, 2015, 37 ff..

i.e. metadata. Preservation and access are essential means to education to knowledge, which is the essential mission of museums.¹⁵ Thanks to education, better implementation of the rights of participation to the cultural life¹⁶ and enjoyment of the benefits of scientific progress and its applications are possible.¹⁷ Traditionally, the educational mission has been implemented via two main activities: preservation initiatives, including indexing and restoration tasks, and exhibition of works within the premises hosting a collection in a permanent or temporary fashion.¹⁸ These activities, together with more or less interactive visits taking place within the premises,¹⁹ have always been covered by the so called public task of museums.

- 7 However, since education is an ambitious aim, it needs to be interpreted according to the available technology and the social facilities evolving in times. So, digital technology came as an opportunity for educational purposes. Some of the major museums have therefore tried to reach visitors beyond their premises since the early 2000s, for instance via making reproductions of the hosted collections available on their websites. For lack of appropriate technological infrastructures, sometimes lack of awareness, or control-purposed reasons, such making available was not intended to enable subsequent re-uses, at least in an early phase.²⁰

15 See supra footnote 12 and 13.

16 Sappa, *Participating in cultural life via augmented reality on cultural goods: what role for copyright?*, in *GRUR Int.* 2022, 618 ff.

17 Yu, *Intellectual property, cultural heritage and human rights*, in Stamatoudi (ed.), *Research Handbook on Intellectual Property and Cultural Heritage*, EE, Celthenham, 2022, 294 ff., also adds that to the extent that they help current and future creators, these institutions also promote the right to the protection of interests resulting from intellectual productions.

18 Cuno, *The Object of Art Museums*, in Cuno (ed.), *Whose Muse? Art Museums and the Public Trust*, Princeton University Press, 2006, 49 ff., spec. at 52 where the author explains that “[N]othing museums do is more important than adding to our nation’s cultural legacy and providing visitors access to it.”

19 CHIs can use information and communication technologies as efficient tools for making the visiting experience more intense, developing pedagogical contents, creating documentaries, touristic applications and games according to Commission, *Towards an Integrated Approach to cultural heritage for Europe*, Communication COM(2014) 477, of 22 July 2014.

20 The evidence of this is that some museums used the copyright symbol for discouraging any reuse of available reproductions, without appropriately checking whether there was any on the reproduced good or on the reproduction.

That has been, for instance, the case of the Louvre. Meanwhile, the digital has become more and more invasive in everyone's daily life. At this stage, the question raised by museums started to be whether spreading the information about the hosted cultural heritage *extra muros* as well, for instance via their websites, was part of their public task. In the recent years, institutional initiatives and public policies in different countries might suggest a positive answer to this question.²¹ This means that museums are supposed to educate not only via exhibitions, but also via making information on the cultural heritage they collect digitally available, or by disseminating such information in any suitable fashion. This impacts the interpretation of the term "access" to cultural heritage. According to this approach, the notion of access shall be interpreted as a dynamic one, as opposed to a static one. Dynamic access implies that museums aiming at implementing their educational mission should ensure access to the real world premises and tangible goods, as well as access to reproductions and elaborations of digital realm goods, no matter whether they circulate on terminals or devices in the museum premises or beyond. Also, while traditional static access refers to the tangible cultural heritage, as exhibited in

museums, the notion of dynamic access covers both tangible cultural heritage and the information related to it, namely reproductions and other complementary metadata. Information on cultural heritage, i.e. typically 2D or 3D digitized versions of cultural goods, with one or a few exceptions, can be more easily replaced than tangible pieces of cultural heritage collections in museums. In other words, to quote Walter Benjamin, goods exhibited in museums present an "aura",²² and are therefore valued due to their presence in time and space.²³ They are scarce resources,²⁴ since they are often unique or in limited series. This creates attractiveness for such tangibles that their reproductions do not have.²⁵ As a consequence, the scarce nature of these goods and the related rivalrous exploitations in the real realm on the one hand, and the abundance of their reproduction, together with the connected non rivalrous exploitation, have an impact on market dynamics, as some of the practices described in the next paragraphs try to show.

C. The control-based and money-oriented approach

- 8 A traditional way to manage scarce resources, such as cultural goods hosted in museums, is to introduce a control-based approach.
- 9 Because of the very substantial financial and transaction costs of maintenance related to preservation, restoration, exhibition activities,²⁶ as well as digitization processes, for making material available, and for elaborating interactive digital, virtual and now even metaverse-based material to be used by visi-

Such a mispractice has been qualified "copyfraud" by Mazzone, *Copyfraud*, NYU LR 2006, 1026 ff., spec. note 78. It is also used by Japiot - Lignereux, *L'impression 3D et le droit d'auteur: des menaces à prévenir, des opportunités à saisir*, report of the Commission on the 3D printing for the Conseil supérieur de la propriété littéraire et artistique, 2016; and by Farchy - De La Taille, *Les licences libres dans le secteur culturel*, report for CSPLA, 2017. According to Kirkpatrick, *Rights and Reproductions in Art Museums*, *Museum News* 1986, n. 2, 45 ff., curators suggested to museums to enhance this practice; according to Berkowitz - Leaffer, *Copyright and the Art Museum*, *Col-VLA* 1984, 249ff., spec. 265 and 266 legal advisors suggested to follow it. And more recently see also Weinberg, *Cultural Institutions Behaving Badly: Stupid Reactions to 3D Scanning*, available at <https://www.publicknowledge.org/news-blog/blogs/cultural-institutions-behaving-badly-stupid-reactions-to-3d-scanning-and-co>, 22 January 2015.

- 21 The recent Italian Guidelines to the digitization of cultural heritage, issued by the Authority for Digital Italy (AGID) in June 2022, indicate that among the aims of digitization is access and enjoyment of the digital information on cultural heritage, thus implying that bodies managing cultural heritage – including museums – are supposed to go digital for enabling access, next to their exhibition activities. There might be some tips but in this sense also in the Guidance on Public Task Statements, published by the National Archives in UK, in 2015, p. 17 and 18, that refers to Re-Use of Public Sector Information Regulations of 2015. In Germany, museums consider the fact of making images of collected goods available on line as part of their public task, however they do not have a general budget for it.

-
- 22 Benjamin, *Das Kunstwerk im Zeitalter seine technischen Reproduzierbarkeit*, Ursprünglich auf Französisch erschienen in *Zeitschrift für Sozialforschung*, Jg.5, 1936, re-edited by Suhrkamp Verlag, Frankfurt am Main AG, 2012.
 - 23 As also referred in Oruç, *Rethinking Who "Keeps" Heritage: 3D Technology, Repatriation and Copyright*, in *GRUR Int.* 2022, 1 ff.
 - 24 Comments on the current world of abundance and of the rules of IP designed around scarcity are developed by Lemley, *IP in a World Without Scarcity*, in *NYU Law Review* 2015, 460 ff..
 - 25 Non-Fungible-Tokens (NFTs) however, are able to re-establish such scarcity. See Nadini – Alessandretti – Di Giacinto – Martino – Aiello – Baronchelli, *Mapping the NFTs revolution: Market Trends, Trade Networks and Visual Features*, in *11 Sci Rep* 2021, 20902.
 - 26 Tam, *In Museum We Trust: Analysing the Mission of Museums, Deaccessioning Policies and the Public Trust*, in *Fordham Urb. L. J.* 2012, 849 ff.

tors, museums are constantly seeking for funds. In addition, fewer and fewer (public) funds received may discourage them, or at least those less equipped, to take initiatives that would help enhance real dynamic access to information on cultural heritage in an efficient fashion. The fact that their public task traditionally covered preservation and access to on-premise initiatives only makes the museums perceive this as a missed opportunity, but not necessarily as a lack of performance of their public task. However, in order to limit the excessive inertia which that discouragement may create, museums have been—and often still are—strongly tempted to introduce self-funding mechanisms. Different sets of activities can be organized for enabling this fundraising. Concretely, museums may decide to impose authorization and a subsequent fee to access their premises, and to exploit the material they host or they digitized. This authorization-based mechanism works when there is an interest in exploiting such a content, either for digitizing and distributing it, or for digitizing and elaborating it, or also for disseminating exact or elaborated reproductions of tangibles after having acquired them directly. In other words, an authorization-based mechanism for reproducing and re-using cultural goods hosted in museums is viable in presence of a market at the downstream level. As for the works of visual art, such a market is there, and it is flourishing: e.g., for a long time history of art printed editions have been circulated in markets of countries where the subject is taught in schools, and are still largely present in museums shops, as well as in other bookshops. In these literary works typically faithful reproductions of visual works are embedded, as well as in elaborations like advertisement, extended reality experiences, video-games, or NFTs of masterpieces. To manage such authorisations and control the downstream market, different legal instruments have been used by museums. More precisely, these legal grounds span from the most traditional contractual provisions, to national rules on cultural heritage or intellectual property rights (IPRs) (particularly through copyright regimes).

- 10 Contractual provisions are used to govern the access to the museum premises and impose limits to the enjoyment of works once in the premises too. In particular, contractual provisions may limit the reproduction of works for commercial purposes. This means that, initially, contractual provisions framed rivalrous exploitations, such as the ability to enter into the museum premises, install equipment and reproduce the goods.²⁷ This already applied with the elaboration of printed copies of the masterpiece signed by the artist or with authorized reproductions before the massive interference of the digital technol-

ogy in the cultural heritage sector.²⁸ Then, later, this applied again, with particular reference to the creation of digital collections of reproduced works, for making them available to third parties, or for elaborating material from reproductions, such as merchandising products, but also video-games, or other digital-based (and now, probably, metaverse-based) experiences. This characterizes a first phase of market-oriented practices, during which contractual deals were concluded with any professional market operators such as Bridgeman²⁹, Getty Trust, Corbis and a few others. These bodies aimed at digitizing entire museum collections and to combine them with other museums' digitized collections, with the clear plan of creating very comprehensive digital databases of cultural heritage.³⁰ The practice of these private market operators showed their intention to control non-rivalrous exploitations on the market. More recently, in a second and more advanced market-oriented phase, the boom of blockchain-based products shows the same interest of museums to get income from contractual deals with private market operators that may also mint NFTs. In this perspective, agreements have been concluded between national museums and private businesses in different countries.³¹ Here, it is possible to compare and con-

28 These initiatives showed that the main related issues leading to litigation were (are) concerning moral rights. See First Instance Court of Paris, 23 March 1992, *RIDA* 1993, n° 155, 181 ff., *Rodin* case.

29 See the extension of this first phase to more recent times: Bridgeman Images, *Important Announcement: Bridgeman signs agreement with MiBACT*, <https://www.bridgemanimages.com/en/importantannouncement-mibact-italian-ministry-of-culture/12638>. This is connected to infra note 120. Also, the ability of Bridgeman to distribute and license images in a digital world full of digital copies of cultural goods raises the issue on who could be addressed a legal action in case of infringement. See on this M.C. Janssen – Gorbatyuk – Pajares Rivas, *Copyright issues on the use of images on the Internet*, in Stamatoudi, *Research Handbook on Intellectual Property and Cultural Heritage*, cit., 191 ff..

30 See Sappa, *Museums as education facilitators: how copyright affects access and dissemination of cultural heritage*, in Bonadio – Sappa, *The subjects of literary and artistic copyright*, Elgar, Cheltenham, 2022, 233 ff..

31 Tommasi, *Art. 14 of the Copyright Directive and its Italian transposition: has Italy missed an opportunity to fully enhance its cultural heritage in the digital era?*, Final Paper for the Master in Intellectual Property of the University of Turin and the WIPO Academy, 2022, refers to the example of the Tondo Doni, that was digitally reproduced in nine unique copies in 1:1 scale, and then certified on Blockchain; one of these copies was sold in May 2021 for Euro 240,000.00, of which 50% of the net proceeds went to the Uffizi museum. The main aspect that attracted the attention of the Media in

27 Provisions on cultural goods often refer to this kind of activities as well. See infra note 47.

trast different national approaches. In some countries, such as UK, national museums are intensively exploiting this chance to create revenues³² that may enable them to recover several kinds of costs and to avoid any risk of deaccessioning.³³ Other countries, such as Italy, were already into a control-based approach during the early stage of the first phase of market-oriented practices; in these countries a renewed attention to such a well rooted phenomenon broke out, and it concerned the control and the sale (also through NFTs) of digital reproductions of works in high definition.³⁴

- 11 Aligned with the authorization-based approach, as well as with the commodification of museums' tasks, national rules on cultural heritage in some countries have been designed around "control". The reference immediately goes to some sets of Italian and Greek rules. Back in 1993 the Italian legislator introduced legal rules to limit any exploitation of cultural goods, except for private purposes.³⁵ This Act was then issued in the very embryonic phase of the digital advent, and therefore designed with minds that were cast back before the digital existed. The same con-

particular is the (lack of) contractual balance and the high return of investment that the company was able to keep. On NFTs and copyright aspects see Mezei – Lapatoura, *All roads lead to tokens – The impact of NFTs on galleries and museums*, in Bonadio – Sganga, *NFTs, Blockchain and copyright*, Routledge, forthcoming.

- 32 See the examples of the British Museum that accepted the minting of NFTs on some works of Turner, so that they could become accessible; od the Wave of Hokusai. See also the initiative taken by the Belvedere on the work by Gustav Klimt, *The Kiss*: a high-resolution digital copy was divided into a 100 x 100 grid, resulting in ten thousand unique individual pieces, offered as a NFTs.
- 33 Tam, *In Museum We Trust: Analysing the Mission of Museums, Deaccessioning Policies and the Public Trust*, cit.
- 34 Again, Tommasi, *Art. 14 of the Copyright Directive and its Italian transposition: has Italy missed an opportunity to fully enhance its cultural heritage in the digital era?*, cit., refers about the action taken by the Italian Directorate General of Museums, affiliated to the Ministry of Culture. This body has recently issued a circular to suspend the ability of museums and private businesses to conclude contracts on the creation and sale of NFTs linked to digital copies of collected works of art. The DG justified this position by indicating the concern of the Ministry to lose "the management, control and exploitation" of digital images of works of national heritage. See also Sappa, *From the Past to the future: NFTs meet cultural heritage rules*, in Bonadio – Sganga, *NFTs, Blockchain and copyright*, Routledge, forthcoming.
- 35 See Legge Ronchey 4/1993 (i.e. the Ronchey Act, from the name of the political representative that chaired the works).

trol-aimed rules are still present in Articles 107 and 108 of the Italian Code on Cultural Goods and Landscape (CCGL), issued in 2004.³⁶ On one hand, thanks to some reforms in 2014 and 2017, these rules are currently limiting the exploitations of cultural goods only when they have a lucrative purpose.³⁷ On the other hand, the recent National Cultural Heritage Digitization Plan of June 2022 does not take an entirely opposite direction to the one of control-based approach.³⁸ So far, case law on infringement of Article 108 of the Italian CCGL is very limited³⁹; it is however worth noticing that the two cases currently attracting the attention of scholars are very recent and do not concern digital exploitations, but fashion designs⁴⁰ and entertainment objects, i.e. puzzles.⁴¹ A similar experience can be witnessed in Greece, where back in 2001 some rules were introduced for

36 Code of cultural goods and landscape (Codice dei beni culturali e del paesaggio) issued with Decree 42/2004, of January 2004.

37 For a description on the evolution of these rules see Sbarbaro, *Codice dei beni culturali e diritto d'autore: recenti evoluzioni 2 nella valorizzazione e nella fruizione del patrimonio culturale*, *Riv. Dir. ind.* 2016, II, 63 ss.; Modolo, *Promozione del pubblico dominio e riuso dell'immagine del bene culturale*, in *Archeologia e Calcolatori* 2018, 73 ss.; Ciani, *Il pubblico dominio nella società della conoscenza. L'interesse generale al libero utilizzo del capitale intellettuale commune*, Giappichelli, Turin, 2021, 479 ff..

38 See information on such a soft law instrument at <https://digitallibrary.cultura.gov.it/il-piano/>

39 Court of First Instance of Florence, 14 February 2022, interim order 2992/2021; see also the Pornhub case reproducing the Titian's *Venus of Urbino*, that the Uffizi officially considered as "totally illegal", see Di Liscia, *Uffizi Is Suing Pornhub After It Turns Masterpieces Into Live Porn*, 2021, <http://hyperallergic.com/664137/uffizi-sues-pornhub-after-it-turns-masterpieces-intoporn/>.

40 The Uffizi Museum sent a letter to the French *maison* Jean Paul Gauthier back in April 2022 asking to cease all uses of "the Birth of Venus" in their *Le Musée* collection. The recipient removed the contested items from its online marketplace, but did not reply to the letter. Thus, the Italian museum Uffizi is now suing Jean Paul Gaultier, invoking the violation of the Italian CCGL and requesting the withdrawal of the 'illegitimate' clothes as well as an award for damages. See Riccio – Pezza, *Unrequited love at the time of French Maisons: the Museum v. Le Musée*, 21 November 2022, Kluwer Copyright Blog.

41 First Instance Court of Venice, 23 November 2022, interim order n. 5317/2022, concerning the use on Ravensburger puzzle of the *Vitruvian Man* of Leonardo Da Vinci. The Court issued an injunction of use against the Ravensburger company, as well as a penalty for any day of delay in its execution.

limiting the exploitation of cultural heritage.⁴² A close look at Article 46 on access and use of monuments⁴³ and spaces of the recent reforms of 2021, informs that the legal scheme of control remained the same⁴⁴, with particular reference to the depiction⁴⁵ of goods for commercial purposes.⁴⁶ The common aspect is that the cultural goods collected by museums in both these countries are predominantly ancient. Thus, on the one hand, the concerns around preservation are substantial compared to those of countries in which museums host more recent cultural goods. Worries focusing on preservation are typically reflected in legal rules introducing strict conditions—including financial conditions—under which it is possible to install professional equipment in museums for reproducing the collected goods.⁴⁷ These

rules, however, introduce an additional idea, i.e., the ability of earning some money from the rivalrous exploitation of cultural goods, since it makes sense to pay some fees when impeding any third party to enjoy cultural goods while they are being reproduced by professionals. Next to this, there is more. The ancient age of these goods tells that they are into the public domain because of the absence of copyright. The focus on the financial concerns, related to preservation and the implementation of an adequate public task, encouraged the maintenance of a conservative cultural approach and a subsequent political choice to control not only the rivalrous exploitations in the museum premises (*intra muros*), but also the subsequent non rivalrous ones⁴⁸ that typically take place in the digital realm and nowadays in the metaverse. In lack of copyright, other sets of rules, with a different source, have been introduced with this purpose. In this way, the rules initially aimed at preserving and valuing cultural heritage are killing the copyright limit's purpose of growing the public domain for fostering knowledge and creativity or innovation via re-uses,⁴⁹ thus affecting fundamental freedoms, such as those of expression and of conducting a business.

42 On the initial rules of 2002 see Morando – Tziavos, *Diritti sui beni culturali e licenze libere (ovvero di come un decreto ministeriale può far sparire il pubblico dominio in un paese)*, in ArcheoFLOSS 2011.

43 Under art. 4D of the Greek Act 4858/2021 a. “monuments” means immovable items belonging to the Greek State and located in archaeological and historical sites or isolated, as well as movable monuments belonging to the Greek State and located in museums or collections of the Ministry of Culture and Sports or in legal possession of natural or legal entities.

44 Art. 46 par 4 of the Greek Act 4858/2021 requests for fees in case of production, reproduction and dissemination of works. Art. 46 also points out to art. (4A and) 4B, which states that any reproduction or dissemination of monuments for profit purposes is subject to a prior permission.

45 See art. 4D of Act 4858/2021, defining as a depiction of a monument a faithful reproduction of the existing image of the monument as a whole or in parts, in any way and by any means on a material medium (indicatively on forms or objects) or on an immaterial medium or on an intangible medium (indicative audiovisual material, electronic publications, internet, digital applications).

46 Article 15Γ of Act 4858/2021 is about photography fees. It indicates that for photography or filming in the marine, inter-river or in-lake archaeological sites or historical sites and shipwrecks, art. 46§4 shall apply and therefore charges has to be foreseen, unless the photography or filming is for non-commercial purposes.

47 Art. 108.1 b) of the Italian CCGL indicates that the fees to be paid depends (among others) on the tools used for such a reproduction. Art. 46 of the Greek Act 4848/2021 pointing out to art. 4A, under which the production of images and copies of monuments requires prior permission in different hypothesis. 1. When it concerns a monument, whose nature or state of preservation, exhibition, guarding, maintenance or restoration require access under special conditions to be determined by the competent authority service. 2.

When such a reproduction or dissemination is carried out: i. by using an equipment that is bulky or requiring special installation and operating conditions, ii. through laser scanning, with photogrammetric methods or related technologies to create a three-dimensional model, or yet iii. in the context of a process, which requires special production conditions that affect safety, storage, custody, opening hours, public accessibility or other exceptional conditions. In a comparative perspective also have a look at art. 34 of the Turkish Act on Conservation of cultural and natural property 2863/1983 Copying, under which “The Ministry of Culture and Tourism shall have the authority to permit photographing and filming, making the impression and copy of movable and immovable cultural property at archaeological sites and museums affiliated to the Ministry of Culture and Tourism for the purposes of education, training, scientific research and promotion” (emphasis of the author of this piece). In Egypt, an attempt to introduce an approach based on control dates of 2007, when a draft law for limiting the exploitation of pyramids and other pieces of ancient Egyptian art was being discussed, according to McCarthy, *Egypt to copyright the pyramids and antiquities*, in *The Guardian*, 27 December 2007; and Stanek, *Can Egypt copyright the pyramids?*, in *National Geographic News*, 15 January 2008. The author of this paper is not able to report on the current state of art.

48 This is well explained by Modolo, *Riuso dell'immagine digitale del bene culturale pubblico: problem e prospettive*, AIB studi. 61, 1 (lug. 2021), 151 ff..

49 Litman, *The Public Domain*, in Emory Law J. 1990, 965 ff.; Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, in *Law Contemp. Probl.* 2003, 1423 f.

12 Finally, at a first glance museums may consider copyright as a deterrent while digitizing collections, since they very rarely own them.⁵⁰ The recent introduction of Article 6 of the DSM Directive may facilitate the digitization of collections further than the former non mandatory exception of the InfoSoc Directive⁵¹; this provision, was introduced for fostering the cross-border cooperation between museums (and other CHIs),⁵² and it is supposed to do it efficiently, since it is mandatory and cannot be circumvented by contractual provisions. However, it enables museums to reproduce the works they own or permanently hold in their collection for preservation purposes,⁵³ i.e., to maintain the works in their original or, at least, existing state. It reflects the political will to digitize the EU cultural heritage *en masse*, as key actors of a knowledge society, rather than leaving this to economic operators.⁵⁴ It is true that the term preservation is not explained and that there may be ambiguity as to whether the digital reproduction for preservation purposes concerns merely damaged or at a risk of deterioration works or can digitization be organized in a preventive fashion by migrating some works on readable formats, using sustainable format, countering foreseen obsolescence.⁵⁵ Considering the educational mission of museums, taking into account that it affects all the works they collect, and that preservation is a

key goal in such a mission, it seems reasonable to interpret the notion of preservation of Article 6 extensively and state that conservative strategies are covered by it. In any case, the aim of preservation expressed as the only one implies that the digital copies cannot be accessed by the public, nor re-used.⁵⁶ Therefore, while this rule helps museums with the task of preservation, it does not play a major role in the discourse of commodification of the cultural heritage they host.⁵⁷

13 Copyright has also been perceived by museums as an asset enabling some return of money; once the relevant downstream market is identified, copyright can function as a complementary tool in their self-funding initiatives. More precisely, some museums with contemporary art can claim copyright on the works of art they collect. Museums hosting collections of goods that are in the public domain may have tended to claim copyright protection⁵⁸ on the single digital reproductions or on the digital collections⁵⁹—and therefore asked for the related fees. This is, for instance, the case of the Louvre, via the Réseau des Musées Nationaux - Grand Palais (RNM-GP⁶⁰) in France.⁶¹ This solution is still the

50 For references Sappa, *La propriété littéraire et artistique dans les institutions muséales à l'ère du numérique. Analyse comparée en droit français et italien*, Thèse, Paris XI – Pavia, 2009.

51 The InfoSoc Directive contained art. 5.2 c), admitting only “specific acts of reproductions”, without mentioning whether digital reproduction was a requirement, nor mentioning the purpose of such reproductions. The provision was interpreted as not allowing digitization of entire collections. See EUCJ, 11 September 2014, C-117/13, case *Ulmer*. Also, the fact that this was not a mandatory provision made the EU legal framework look as a patchwork of inconsistent implementations. A thorough discussion on the topic of exceptions and limitations can be found in Sganga, *A new era for 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*, in *ERA Forum* 2020, 1 ff..

52 See Recital 26 of the DSM Directive for the rationale of art. 6.

53 See Recital 27 of the DSM Directive, expressly referring to preservation initiatives as addressing “technological obsolescence or the degradation of original supports or to insure such works and other subject matter”.

54 Dusollier, *The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition*, *CMLR* 2020, 979 ff..

55 *Ibid.*

56 Visentin, *Le nuove eccezioni per la conservazione del patrimonio culturale e per l'uso didattico in ambiente digitale e transfrontaliero*, *Giur it.* 2022, 1273 ff.

57 It has to be noted however that in case private market operators are committed to help museums with the task of digitizing collections for preservation purposes, while performing their contractual obligations these subjects may keep digital copies with them. These copies can then be used for further computational uses, upon authorization, if necessary.

58 Or neighboring rights that may protect non original photographs. As an example Berlin State Museums used to use some Creative Commons licence because of the existence of §72 of the UrheberrechtGesetz. Protection on non creative photographs exists in Italy too, under art. 87 and ff. of the Italian Copyright Act

59 Wallace, *Surrogate Intellectual Property Rights in the Cultural Sector*, 2022, available at <https://ssrn.com/abstract=4323691>

60 This body is issued from the merger between the Réseau des Musées Nationaux and du Grand Palais des Champs Elysées; it has the status of an *Etablissement Public à Caractère Industriel et Commercial*, i.e. a public sector body that ensures the management of a public task, by producing and trading products and services.

61 Terms and conditions for re-use of images of works collected at the Louvre museums are available https://collections.louvre.fr/en/page/cgu#ART4_EN. See in particular art. 4.1.1 b), stating that “The use for any purpose other than those exhaustively listed in article 4.1.1 a.

favoured one by some museums, notwithstanding the *requirement* that the EU legislator introduced expressly via Article 14 of the DSM Directive, as well as some policy positions expressed at the national level within or out of the EU.⁶² It enables them to have the control on exploitations by third parties that would like to elaborate upon the digital reproductions.⁶³ This approach underlines two things. On the one hand, it shows how legal tools designed for encouraging creativity and to grow the public domain for learning and future creations,⁶⁴ such as copyright, may be perceived in a totally different way, i.e. as a self-funding instrument. On the other hand, it emphasises the importance of digital copies as strategic tools for elaborations of cultural goods, i.e., for re-uses of works collected in museums.

- 14 Ultimately, the temptation of the museums to control some market initiatives for earning some returns that facilitate preservation and access-related initiatives is easily understandable, so is the trend that pushed them to reason like a business. This phenomenon occurred also in reaction to the COVID-19 economic crisis that recently affected the ability of receiving financial resources to face substantial costs in the cultural sector too.⁶⁵ However, museums are not business, nor market-structures, they are no-profit bodies. This statement has three main implications. The first one is that they have to prevent or limit and be able to cover any potential risk of damaging the goods they collect, as imposed by

above, and particularly any commercial use such as the manufacture and distribution of derivative products, audiovisual and multimedia production and printed publications other than those referred to in article 4.1.1, must be the subject of a written request sent by the User to RMN-GP via the website of its photography agency, photo.rmn.fr, or by email to agence_photo@rmngp.fr. The request must indicate the use or uses envisaged. The above uses are granted against payment, at the rates practiced by RMN-GP.”

- 62 Wallace, *A culture on copyright. A scoping study on open access to digital cultural heritage collections in the UK*, Commissioned Report, Towards a Digital Collection, February 2022.
- 63 Sappa, *La propriété littéraire et artistique dans les institutions muséales à l'ère du numérique*, cit. See also EUCJ, 9 March 2021, C-392/19, case *Bild-Kunst*, which confirms the ability of controlling the dissemination of protected images via legal and technical forms of protection.
- 64 See *supra* note 49.
- 65 See Walsh – Wallace – Pavis – Olszowy – Griffin – Hawkins, *Intellectual Property Rights and Access in Crisis*, in *IIC* 2021, 379 ff., studying access in a patent and copyright perspective (and beyond).

cultural heritage provisions.⁶⁶ Thus, authorizations and any condition-based systems for accessing the premises and exploiting the cultural heritage, for instance via photography or film making, or for creating advertising material, is reasonable and aligned with preservation purposes. Also, the design of related financial conditions in this framework may reflect the rivalrous exploitation of tangible goods, and therefore they come unsurprisingly, since they are part of a traditional real realm-based business model concerning the use of scarce resources. The second implication is that museums are not structured to compete with companies. While willing to take control on any mass digitization project, for a long time many museums have not had any technological, human or legal resource to do it. They did not have negotiation ability either, nor appropriate enforcement strategies. Therefore, when well established businesses like Bridgeman, Getty Trust or Corbis approached them for concluding a deal, museums accepted. Unfortunately, these contracts were the most often unbalanced,⁶⁷ but also most of the publishers in the downstream market would have more easily addressed these private companies than museums for having a licence on the digital reproductions. This is for several reasons. Companies know the market better by definition so they are better in the communication of their products and services; due to the aforementioned unbalanced contracts, companies have digital copies that enable computational uses, while museums often do not have anything more than a mere copy for preservation or limited access purposes; and companies have more comprehensive collections, while museums generally have digital collections of goods that they host, and therefore it is possible to centralize requests when dealing with companies, but not with museums. Companies are also more effective in enforcing their rights in a complex framework where infringing-

66 As art. 20 of the Italian CGL illustrates prevention measures are a combined set of activities aimed at limiting risks for the artwork in a museum collection, or the whole collection; in this perspective, some rules expressly ban destruction, as well as any other act or physical contact with the cultural good that is able to damage it; concretely, the reference pinpoints artworks moulding, but it may affect other sort of reproductions too: see for instance art. 46 of the Greek Act 4848/2021 referring to art. 4A. With particular reference to very ancient works, prevention refers to their exhibition without appropriate display cases in premises with strong lights, or yet uncontrolled visits to premises where ancient artworks are, when the air humidity is a main element affecting their preservation.

67 For some tips on the reasons that make these contracts unbalanced, see Sappa, *Museums as education facilitators: how copyright affects access and dissemination of cultural heritage*, in Bonadio – Sappa, *The subjects of literary and artistic copyright*, Elgar, Cheltenham, 2022, 233 ff..

ers are not easily found. For all these reasons, the big companies referred to have neutralized museums on the market and limited museums' abilities to create revenue⁶⁸ via control-based mechanisms introduced by cultural heritage or copyright rules in particular. The third implication is that museums have been created as educational and inclusion tools, and they should remain as such. As the ICOM definition expressly states, they are a non-profit institutions, thus, they cannot aim at making any profit that is not reinvested into their educational mission⁶⁹; and this because their annual accounts and budget must be even. Therefore, all the attention to self-financing and market mechanisms is certainly related to their public task and their mission to enhance education. However, a disproportionate focus on financial dynamics risks driving them too far from their initial and essential goals, and shifting their interest to market-oriented practices excessively, with the consequence of distorting their vision, strategies and investments, to the detriment of the general interest of society.

- 15 In a different and complementary moral perspective, this shift towards market-oriented interests may also become an element to assess the lack of compliance with some copyright⁷⁰ or cultural heritage provisions⁷¹ that relate to the artistic integrity of the collections.⁷² According to a strict interpreta-

tion, these sorts of provisions might be understood to prevent purely market-oriented uses that favour the “trash-ification” of the cultural heritage. This sort of argument has already been used to prevent third-party use of images of cultural heritage. However, it seems that its real underpinning is not the protection of decorum, but the intention to control the economy related to cultural heritage images. Thus, this would reflect the same aim of the above-mentioned tools, but with a different make up. In any case, it is difficult to accept the argument of limiting the use of images on cultural heritage, by museums or by third parties, on the ground of the preservation of decorum. First, the argument is hardly justifiable,⁷³ considered the secular and democratic nature of access to culture, and its natural destination to be re-used. Second, should it be accepted, it would bring along the challenge of distinguishing appropriate from non-appropriate uses,⁷⁴ with the consequence of increasing the number of (potentially bad faith) legal actions. Lastly, such an argument would need to be balanced with important concerns on freedoms of expression⁷⁵ and to conduct a business, at least.

68 Factually, the revenues of Italian museums and archeological parks is a little higher than 1% in 2016 according to Tarasco, *Il patrimonio culturale: modelli di gestione e finanza pubblica*, ESI, Naples, 2017, 247 ff.). In France, the Cour des Comptes (i.e. Audit Court) issued a report in 2019, stressing on the fact that the sale of reproductions does not represent an important stake for museums. See also references in Tommasi, *Art. 14 of the Copyright Directive and its Italian transposition*, cit. footnote 60.

69 Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, in *Fordham IP&Medial L.J.* 2020, 729 ff., suggests that because of their educational and public purpose, a portion of the museums monetary resources should be mandated for the due diligence required for museums to properly conduct acquisition investigations. More precisely, the author refers to the monetary resources generally granted tax deductions and government funding, while this work refers to other sources of money received by museums.

70 The risk of affecting integrity of works can be grounded into rules on moral rights: see for instance art. L 121-1 of the French code of intellectual property; art. 20 of the Italian Copyright Act.

71 Also Art. 20 of the Italian CCGL impedes uses that are not in line with the historical or artistic character of the goods.

72 See in this sense the answer of the State Secretary for

culture of 19 February 2008 to the Italian parliamentary questions n. 4-05031 of 1 October 2007, as reported by Resta, *Chi possiede le piramidi. L'immagine dei beni tra property and commons*, in *Politica del Diritto* 2009, 567 ff.. This answer referred to the ability of reproducing public cultural goods in Italy, notwithstanding the absence of rules on the freedom of panorama, to the extent these reproductions do not modify the object reproduced and they are not offensive towards decorum nor the values the object expresses.

73 Hamma, *Public domain art in an age of easier mechanical reproducibility*, «D-Lib magazine» 2005, n. 11, <http://www.dlib.org/dlib/november05/hamma/11hamma.html>, is sceptical on the fact that when in front of Mona Lisa in the Louvre premises we find it ridiculous because of the multiple reproductions on biscuit boxes, wall papers and other items that are everywhere on the market.

74 Would low quality merchandise fall into the ban? Uses of famous monuments to advertise products, such as the David of Michelangelo in jeans or with a weapon? Other uses such as instrumentalization of violence, or for political purposes? Exploitations for AI training, such as in the case of Next Rembrandt project, available at www.thenextrembrandt.com.

75 Again, see the Italian Act 106/2014 of 29 July 2014, that introduced into the CCGL the principle of free dissemination of images for the purpose of free expression of thoughts. According to that reform the mere presence of a lucrative purpose will not enable to qualify some uses of images of cultural goods as not appropriate. This is well discussed in Modolo, *Riuso dell'immagine digitale del bene culturale pubblico: problem e prospettive*, cit.

D. The current access to culture-aimed trend.

16 Museums rarely own copyrights on their hosted collections. This depends on the discrepancy between legal rules affecting the circulation of tangibles that are embed in protected works, and legal rules affecting copyright ownership of such works. Factually, museums mostly purchasing or being donated goods do not acquire the related copyright. For this reason, and because the limited room left to exceptions and limitations enabling reproductions and dissemination of copies, copyright has often been perceived as an additional deterrent to digitization projects, as well as to projects for making the digital versions of works available to the largest public. Next to this, the notion of access has traditionally been interpreted in a static fashion; only in the 2010s, has attention increased to the availability of information on cultural heritage for interests such as access to culture and education to knowledge. Thus, the broader notion of “dynamic” access has been pointed to for indicating that the outreach of educational initiatives of museums should have also been *extra muros*. Dynamic access may be open, and there is no consensus among museums about what open may mean exactly.⁷⁶ In this work dynamic access qualifies as open when online material may be enjoyed without paying any fees (free access), and it may even be re-used for different purposes (*libre*).⁷⁷

17 Several elements and actors played a major role in boosting the implementation of initiatives aimed at achieving dynamic access, i.e., a wider circulation of images, which are mainly supposed to reflect an interest of access to culture and education. Depending on the actors involved and the circumstances, the implemented access may be merely free or even *libre*.

18 Some museums have remained more anchored to the real world and show a very reluctant attitude to share information. This reluctance may reflect lack of organizational, technical or human resources to go digital, as well as a general and conservative fear of losing control over images, including when legal measures are implemented to preserve them.⁷⁸

76 Wallace, *A culture on copyright. A scoping study*, cit..

77 On the distinction between free and *libre* access see SUBER, *Open Access*, the MIT Press, 2012.

78 As known, the Covid19 pandemic has exacerbated the digital divide for institutions without digital resources, expertise and presence, that may not go digital for lack of resources. See on this Hadley, *Covid-19 Impact: Museum Sector Research Findings Summary Report* (Art Fund), 2020, available

These museums, as long as performing preservation initiatives and enabling access to premises, may be considered as serving their public task by local authorities because of a traditional interpretation of cultural heritage rules on museums. In contrast, however, other museums have taken action as if dynamic access was part of their public task—even when, while being considered as part of their public task, this is not expressly mentioned in their bylaws or in rules on CHIs, nor is there a budget for it. In this second group, many museums in the last decade stopped claiming copyright on faithful reproductions of public domain works as a matter of policy.⁷⁹ Some of them engaged in digitization process for offering the collected material online: this is the case of the Rijksmuseum in Amsterdam, the Egyptian Museum in Turin,⁸⁰ the National Museum of Stockholm, the municipal museums in Paris⁸¹ and other smaller and less known institutions, such as the Archaeological Museum of Cagliari who mainly made raw data available.⁸² More precisely, these museums have released information—i.e., surrogates of the cultural goods collected in a free and unconditioned fashion—and implemented open-access policies by making reproductions available online for free and with no condition for any potential re-use. This initiative typically concerned reproductions of works in public domain (see the Archaeological Museum of Cagliari or the Egyptian museum in Turin). Others have implemented open-access practices by making reproductions available online for free, and by conditioning their potential exploitation via more or

at <https://www.culturehive.co.uk/resources/covid-19-impact-museum-sector-research-findings/>

79 McCarty – Wallace, *Survey of GLAM open access policy and practice*, available at <http://bit.ly/OpenGLAMSurvey>. Interestingly, private market operators that used similar policies for controlling their released images, eventually made the faithful reproductions of public domain works available for free; such a release reminds to other market operators aiming at elaborating reproductions that they can use these high quality images instead of other reproductions issued by individuals on different platforms.

80 Respectively since 2012 and 2014 these museums made their collection freely available, mainly because the costs related to a control-based approach would have been more hardly sustainable than those related to an open data-based approach.

81 See information on it at <https://www.parismusees.paris.fr/en/actualite/open-content-150000-works-from-the-museum-collections-of-the-city-of-paris-freely>

82 See the official page of the museum in which data are available under a csv format, <https://museoarcheocagliari.benculturali.it/en/open-data/?Category>

less restrictive/open Creative Commons licences.⁸³ This initiative typically concerned reproductions of protected works or protectable reproductions of works.

19 Next to individual and not necessarily coordinated initiatives at the museums level, important steps were taken thanks to institutional activities at both the local and regional level and to regulatory measures aimed at enhancing access to culture that the EU legislator issued in the last years, (e.g., the Directive on the Information Society of 2001).⁸⁴ Institutional activities are now framed by the Europeana project, launched in November 2008, with the ambitious aim of digitizing European cultural heritage and creating a more open and democratic society. Europeana is fed by national digitization projects, such as the Deutsche Digitale Bibliothek,⁸⁵ and fostered by the exchange with national bodies, such as the Italian Central Institute for the digitization of cultural heritage.⁸⁶ Local initiatives, such as those led by individual museums are also helping Europeana to grow further. More than a decade after its launch, Europeana deals with advanced interoperability issues, even though its policy is to make reproductions and metadata available under open licences (Creative Commons). Meanwhile, the European Commission issued a recommendation in 2021 on the creation of a common European Data Space for Cultural Heritage⁸⁷ that should build upon the same Europeana project, as well as many call for projects on this topic. Also, the European Parliament approved the funding of a pilot project in

December 2022 for a feasibility study for the creation of a database of public domain works,⁸⁸ that should strongly affect the field discussed here.

20 In the meantime, the European Commission also issued regulatory measures aimed at fostering dynamic access of information on cultural heritage, at a first glance for the above-mentioned educational purposes. The first binding⁸⁹ measure that captured the attention of museums was the Orphan Work Directive⁹⁰ (OW Directive), which came in 2012 after a quite long discussion; it concerns works whose author or right owner cannot be identified or found and introduces measures for enabling a limited exploitation of such works, notwithstanding such an absence of authorization. Factually, a very substantial quantity of orphan works populates museums,⁹¹ therefore the absence of a legal framework addressing the issue created challenges as to digitization projects—and as to any other potential exploitation of the works—should it be by the same museum or by third parties. The OW Directive preserves the ability to introduce a licencing scheme for these kinds of works, but it also contains an exception at Article 6, which notes that museums can exploit or-

83 Wallace – Deazley, *Display at your own risk: an experimental exhibition of digital cultural heritage*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378193; McCarthy – Wallace, *Survey of GLAM open access policy and practice*, available at <https://douglasmccarthy.com/projects/open-glam-survey/>

84 Directive 2001/29/EC on some aspects of copyright and neighbouring rights, herein after the InfoSoc Directive.

85 The DDB is a project funded by the German federal government and by German Länder, on the basis of a financial and administrative agreement of December 2009. For introducing this infrastructure, the federal government has provided a first slot of eight millions and a half from 2009 to 2011. The request to member states of the European Commission to digitize and make cultural and scientific information available via the European Digital Library (Europeana) has been essential for the creation of the DDB.

86 This body was introduced within the Ministry of Culture thanks to the decree (d.p.c.m.) 169/2019.

87 Commission, Recommendation C(2021)7953 on a Common European data space for cultural heritage, of 10 November 2021.

88 Once the exact scope of the project will be defined further by the European Commission, the project is expected to be launched next solar year, i.e. 2023, according to the Open Future Organization blog available at <https://openfuture.eu/blog/the-eu-will-fund-a-feasibility-study-for-a-public-repository-of-public-domain-works/>

89 Binding measures are also accompanied by soft law instruments. For instance, the Commission, Recommendation 2011/711/EU of 27 October 2011 on the digitization and online accessibility of cultural material and digital preservation, contains some first and interesting elements for better understanding measures that are introduced at a later stage. As its title suggests, it aims at fostering not only preservation but also online availability of information on cultural heritage and its subsequent reuse (See for instance art. 5.a) as a seed for art. 14 of the DSM Directive). See also the recent Commission, Communication COM/2021/118 final, *2030 Digital Compass: the European way for the Digital Decade*, setting the targets of digitization initiatives from now until 2030. This communication focuses primarily on the digitization aims concerning the cultural heritage at risk.

90 On Orphan Works ex multis: Hansen, *Orphan Works: Mapping the Possible Solution Spaces*, Berkeley Digital Library Copyright Project White Paper No. 2, 2012, available at <https://ssrn.com/abstract=2019121>; van Gompel, *The Orphan Works Chimera and How to Defeat It: A View From Across the Atlantic*, in *Berkley Tech. Law Journal* 2012, 1347ff.; Rodriguez-Moreno, *La nuova disciplina delle opere orfane*, in *NLCC* 2015, 893 ss..

91 Vuopala, *Assessment of the Orphan works issue and Costs for Rights Clearance*, Report for the European Commission, DG Information Society and Media, Unit E, 4, 2010.

phan works under purpose-bound conditions. They can make orphan works available or reproduce them for the purposes of preservation, restoration, indexing, cataloguing, digitisation and making them available. Thus, works covered by such an OW directive, that include some of the works collected in museums, except for photographs, can be digitized and made available online, notwithstanding the absence of their right owner's authorization. Making the reproductions of orphan works available, however does not imply any authorization for subsequent re-uses, that remain reserved to the right owner, whoever and wherever they may be.⁹² Seven years after the OW Directive, the DSM Directive saw the day. This legal instrument contains several provisions that are supposed to encourage online access as well as re-uses under specific circumstances. Here the reference goes in particular to the exception and collective licensing scheme pointed out by Article 8 on out-of-commerce works, whose notion covers museum works according to some authors⁹³, and it also goes to the lack of protection that has to be ensured in presence of mere reproductions of works of visual art in the public domain according to Article 14, whose introduction is supposed to end the discussion as to the protection of faithful copies of works collected in museums.⁹⁴ In a more transversal perspective, it is also worth addressing legal instruments beyond copyright, such as the Faro Convention on the value of cultural heritage for the society.⁹⁵ This Convention recognizes the individual and

collective right to benefit from the cultural heritage and contribute to its enrichment.⁹⁶ In other words, according to this Convention the community has the right to access and participate in cultural heritage, and this suggests that the primary role of museums is to be useful to the development of society; thus, it reinforces the above-mentioned inclusion and educational role of museums, and the crucial importance of any related digitization initiative concerning cultural heritage. The Faro Convention values re-use,⁹⁷ since it invites museums to switch from the culture of free dynamic access with no re-use to the culture of free and *libre* re-use. According to some authors, this suggests reconsidering the mission of museums even further, since they would not remain merely cultural attractors, but should become cultural activators, i.e. bodies valuing the collected goods also by actively promoting creativity and innovation processes via the free re-use of data and creation of derivative works.⁹⁸

- 21 Besides museums, institutional and regulatory initiatives, it is crucial to recognize the critical role that the civil society has played and keeps playing in this. Communities such as Communia or Wikimedia, or yet Open GLAM⁹⁹—together with some projects focusing on complementary, but essential aspects, such as Creative Commons—have engaged in tremendous efforts for making bigger and bigger sets of digital reproductions available to a large public, with the least conditions possible for potential reuses, which has helped museums that would have not been able to do this because of the absence of technological, HR or legal facilities. They have been working in an autonomous and parallel-to-regulation fashion, lobbying with appropriate measures when

92 The OW Directive recently went under a review, finding that the text's mechanisms have been rarely used in practice and its relevance as a potential tool for the mass digitization of cultural heritage has proven to be limited. Despite the challenges the European Commission does not intend to propose any modifications to the Directive or measures to ensure that it has a bigger impact. See on this Matas - Zeintra - De Angelis, *Discover the review on Orphan Works Directive*, available on <https://pro.europeana.eu/post/discover-the-review-of-the-orphan-works-directive>

93 Servanzi, *Il patrimonio culturale e le opere fuori commercio nella direttiva digital copyright*, in *Il nuovo diritto delle società 2019*, 657 ff..

94 Thus, the provision takes an opposite position compared to the decision of the Bundesgerichtshof ZR 104/17. However, two elements risk to empty the rule of its effectiveness: the discretion that courts use to assess originality, which suggests that 3D reproductions of 3D works may easily fit with such a requirement; and the ability to circumvent the rule with contractual provisions enable an easy lock-up of the free information. On this see Sappa, *Hosting the public domain into a minefield: the resistance to art. 14 of the DSM Directive and to the related rules that transpose it into national law*, in *JIP&P 2022*, 924 ff..

95 Council of Europe, Framework Convention on the Value of

Cultural Heritage for the Society, 27 October 2005, Faro. The Convention entered into force in October 2011, after the tenth ratification. On this see Pinton, *The Faro Convention, the Legal European Environment and the Challenge of Commons in Cultural Heritage*, in Pinton - Zagato (eds.), *Cultural Heritage; Scenarios 2015 - 2017*, Cà Foscari, Venice, 2017, 317 ff.. It is worth noting that this Convention has not been signed, nor ratified by countries like France, Germany, Greece; Cyprus has just signed it in 2021 and Italy has ratified it in the same year; it would be interesting to study the reasons for the political choice of these countries.

96 Art. 4 of the Faro Convention.

97 Modolo, *Promozione del pubblico dominio e riuso dell'immagine del bene culturale*, cit.

98 Viola, *Da attrattori ad attivatori culturali*, in *Territori della cultura 2020*, 230 ff..

99 Created in 2013 by the Wikimedia Foundation and Creative Commons. See <https://openglam.org>

necessary,¹⁰⁰ as a result, a huge number of works are available today and users can exploit them with some flexibility.¹⁰¹ Next, individuals on social networks have been producing huge quantities of data and reproductions that circulate more or less unframed from one social network to another (Facebook and Instagram at first), and across platforms, such as Flickr. While to some extent, the circulation of works uploaded on social networks are subject to the rules imposed by the social network or the platform, factually this practice leads to a very substantial number of reproductions on the web, which are very hard to track.¹⁰² This wide circulation of faithful (or supposed-to-be) reproductions has probably encouraged the policy of some museums to comply with making cultural heritage-related information digitally available via more open standards.

- 22 In summary, some regulatory measures that foster the accessibility of digitized cultural content, such as Article 6 of the OW Directive, keep any free and libre re-use under control. More broadly, museums that consider dynamic access as part of their public task, and that introduce open and libre data policies able to enhance a wide re-use of cultural heritage-related information create spill overs, certainly for educational,¹⁰³ cultural and social growth. Factually,

100 See for instance the Public Domain Manifesto of Communia, available at <https://publicdomainmanifesto.org>, or the Europeana Public Domain Charter of 2010, available at <https://pro.europeana.eu/post/the-europeana-public-domain-charter>

101 With reference to art. 14 of the Digital Single Market directive, there is an evident connection between it and the legal action against Wikimedia of a Museum, in the famous *Museumfotos* case. See European Copyright Society, *Comment of the European Copyright Society on the Implementation of art. 14 of Directive 2019/790/EU*, in *JIPITEC* 2020, 110ff.. This also suggests how the civil society enhanced the shaping of regulatory measures (also) oriented towards access to culture.

102 Some of the concerns may be related to the decontextualization, lack of appropriate reference to the source of provenance of the image, or yet morality of some use. This means that under some circumstances it is important to balance the freedom of expression, freedom of research and maybe also freedom of conducting a business on the one hand, and the morality of some uses on the other. Some tips on the Italian approach to this issue are in Modolo, *Riuso dell'immagine digitale del bene culturale pubblico: problem e prospettive*, cit., 160 ff..

103 Denoyelle – Durand – Daniel – Doulikaridou-Ramantani, *Rapport sur les régimes de diffusion des images patrimoniales et leur impact sur la recherche, l'enseignement et la mise en valeur des collections publiques*, 2018, available at <https://isidore.science/document/10670/1.46r9u7#>

fewer and fewer museums remain reluctant in making their collections available online. On the contrary, more and more museums make their collections available online, should they officially consider this as a part of their public task or not. However, not all the museums belonging to this second group enable an easy, libre re-use of the information accessible online, via suitable technical formats and licensing conditions. While dynamic access is recognized as a more and more important element for achieving the educational mission appropriately, measures to implement an adequate wide re-use of data are not regularly there. This may be explained in different ways. For instance, the situation is sometimes seen through a non-holistic perspective; thus, the reading of copyright rules does not necessarily embed the incentive to re-use that a more general approach provided by a combined readings of copyright instruments and the Faro Convention would give. Secondly, since the analysis is primarily made with copyright glasses, the concern about costs related to the loss of control on re-uses remains dominant compared to others. This last aspect reveals the maintenance of worries on economic aspects behind the curtains.

E. Are current rules on access and re-use aiming only at non-economic interests?

- 23 In recent times, actual practice shows that exclusive rights are increasingly perceived as ways too present in the field of museums. Thus, many of these bodies have shifted towards open (and sometimes libre) access policies, at a local or institutional level, even though there is no consistency as to what open access really means.¹⁰⁴ Civil society has helped to find online information on cultural heritage more easily. On top of that, regulatory measures have been introduced. Should these rules enable dynamic access and maintain control on further re-uses, or should they introduce *libre* open-access policies, thus enhancing both dynamic access and any re-use at a very low cost, a close look at them shows that they satisfy economic interests and therefore contribute to the discourse on commodification of information on cultural heritage.

- 24 Some regulatory measures foster the accessibility of digitized cultural heritage, but keep re-use under the control of museums or whomever acts on their behalf. This suggests that re-use is perceived as more closely connected to market dynamics that museums want to maintain under control for self-funding purposes; in other words, the mere presence of a market interest towards re-use provides legitimacy to the control-

104 Wallace, *A culture on copyright. A scoping study*, cit..

based approach, according to which museums are entitled to boost mechanisms for self-funding purposes. Thus, when referring to wide dynamic access, the non-economic interest of easily accessing culture and knowledge is tied to the economic interest of authorizing any re-use of the digitized content. The question is whether regulatory measures introducing *libre* open-access policies are merely embedding an interest in access to culture and knowledge or a solely economic interest, without asking to whom that interest belongs. As an illustration, two rules will be taken into account here.

- 25 The first measure is Article 14 of the DSM Directive, which expressly reserves some room to public domain.¹⁰⁵ At a first glance, Article 14 seems to be focused on access to culture, in particular when read together with recital 53 of the same Directive, which expressly refers to “access to and promotion to culture, and the access to cultural heritage”; therefore the reference contained to this rule in the former paragraph of this work could be justified. However, two arguments at least can be used for proving that this provision mainly aims at protecting some economic interests.
- 26 According to a first argument, it is crucial to read current provisions in light of the preparatory and former works. Recommendation 2011/117 contained information about the competitive advantage brought along by digitisation and digital preservation of cultural heritage,¹⁰⁶ and the chance of digitized material for being re-used for both commercial and non-commercial purposes¹⁰⁷ and for “innovative applications”.¹⁰⁸ Thus, even though this information is not clearly mentioned in the current provision, it has to be taken into account while interpreting the binding text of the more recent DSM Directive.
- 27 According to a second argument, it is essential to read each provision in a systemic fashion. Article 14 is one of the provisions in a Directive aimed at governing the good functioning of the Digital Single Market. Thus, unsurprisingly economic interests are connected to each clause contained in this text and to

this article as well. Two different perspectives have to be studied in connection with this last statement. First, Article 14 does not necessarily exclude protection for material resulting from acts of reproductions. On the contrary, it expressly states that protection can be enjoyed by original reproductions.¹⁰⁹ On one hand, this part of the provision merely ensures consistency with general copyright requirements; on the other hand, this specific extract of the rule suggests that the outcome of reproductions can enjoy protection and therefore implies the recognition of economic interests too. Second, the option of leaving reproductions unprotected is beneficial for any market operator that wants to exploit them for elaboration purposes.¹¹⁰ New creations are designed around and built upon former creative works of other authors.¹¹¹ Thus, not only protecting, but also limiting protection helps to develop the next generation of creative processes and knowledge. Copyright rules have been planned with this in mind, since fundamentally copyright has been conceived as a legal tool to promote creativity and not as a tool mainly for self-funding purposes. From this perspective, copyright has, therefore, been designed by combining exclusive rights and related limits. Once forms of exclusivity, including copyright, expire “works fall into the public domain and effectively become everyone’s shared property”¹¹². This implies that the “public owns them and they are in lawful right to create and use reproductions of the artworks for any purpose they like”,¹¹³ including for elaborating works for commercial purposes. The cost of accessing and re-using them is lower in absence of copyright (or any other form of) protection, even though contractual provisions are used for charging some fees for re-use.¹¹⁴ This leads to three statements. The cultural aspects, referred particularly in Recital 53 of the DSM Directive, are certainly there, but they are complementary aspects, not as a primary ones. Also, the economic interests referred to are for whomever

105 European Copyright Society, *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*, JIPITEC 2020, 226 ff.; Torremans, *The Digital Single Market Directive. Chapter 4 Works of Visual Art in the Public Domain*, in Stamatoudi - Torremans (eds.), *EU Copyright Law. A Commentary*, Edward Elgar, Cheltenham, 2 ed., 2021, 718 ff..

106 See recital 5 of the Recommendation 2011/117, referring to (cultural and) economic benefits of these initiatives.

107 Recital 7 of *ibid.*

108 Art. 7 (f). of *ibid.*

109 For a discussion on the potential copyright reproductions of 2D and 3D copies of cultural goods see Sappa, *Hosting the public domain into a minefield*, *cit.*

110 However see *supra* footnote 94.

111 Crew, *Museum policies and art images: conflicting objectives and copyright overreaching*, in *Fordham IP, Media & Ent. L. Rev.* 2012, 795ff..

112 As referred by Dusollier, *Scoping study on copyright and related rights and the public domain*, Report for the Committee on Development and IP, WIPO, May 2011.

113 Sanderhoff, *Open images. Risk or opportunity for art collections in the digital age?*, Nordisk Museologi, 2013.

114 This practice remains consistent with the rules on Public Sector Information re-use, because of art. 6.5 of the Directive 2019/1024, discussed in the next lines.

wants to design something upon the reproductions, since, in case of original elaborations, copyright can be enjoyed by their authors and right owners. Factually, this seems to favour market operators' interests, even though it is not possible to exclude *ex ante* that museums themselves elaborate material upon the digitized versions of collected goods. In any case, a systemic and trans-disciplinary reading of rules on copyright and re-use of Public Sector Information points to economic initiatives that can be initiated in the field, which would satisfy related economic interests.

- 28 The second reference goes to the Directive on the re-use of Public Sector Information and Open Data that was issued in 2019,¹¹⁵ two months later than the DSM Directive. It (allegedly) tried to reply to the need of fostering a European market for the re-use of some data, as well as the democratization and enhancement of a more participative society. This Open Data Directive is the second review of a text that was introduced in 2003 for boosting the cross-border market of re-uses of information managed by public sector bodies. From 2010 to 2014, the European Commission funded two Thematic Networks on legal aspects of re-use of Public Sector Information (PSI), i.e., LAPSI and LAPSI 2.0.¹¹⁶ The aim of these thematic networks was to bring legal scholars together in the field in order to study strategies and policies for introducing an appropriate legal framework and practices on PSI re-uses. As the outcome of the first thematic network shows, such a group of scholars worked on aspects closely related to market interests. A constant exchange existed between the members of the LAPSI projects and the representatives of the related DG at the European Commission. In this context, in 2013 the first revision of the Directive was issued.¹¹⁷ Unsurprisingly, this text was focusing on market interest. However, it is worth mentioning that some reference to non-economic interests—such as the re-use of public sector information for creating a more democratic society—was pointed out already in the very final phase of the LAPSI project and, even more explicitly, in the very beginning of the LAPSI 2.0 project. Seven years later, the second revision of the text of 2003 was issued and, again, market interests

are central to this text.¹¹⁸ This last version applies to museums—as well as others CHIs—too.¹¹⁹ This means that information produced and managed by museums—including digital reproductions—can be considered as PSI. Thus, the PSI Directive can apply when such an information on cultural heritage is not covered by IPRs belonging to third parties; this implies that when this information is available, it shall be re-usable. Some charges may be included for enabling re-use according to Article 6.2(b) of the Open Data Directive. Next to this, such a Directive is relevant in the discourse because it contains some provisions that limit the exclusive agreements¹²⁰ that typically were concluded within the framework of Public-Private Partnerships. In this way, the text enables museums to conclude (more) balanced contracts with well-established companies—such as Bridgeman or Google—that may tend to use their bargaining power while negotiating with them.¹²¹ Finally, Article 11 of the Open Data Directive imposes non-discriminatory conditions for comparable categories of re-uses; within this analysis, this is related to exploitations of works that museums authorize.¹²²

- 29 All this suggests that rules introducing limits to protection and encouraging wide re-uses, via open standards and licences, are there mainly for fostering economic interests. More precisely, such interests are those of private market operators that are already or want to enter the ecosystem developed around museums, such as editors of different products and using different technologies. In contrast, museums do not necessarily have an excessive interest in becoming pseudo-market structures, even though they have an interest in exploiting the elaborated works and material commissioned or independently developed by market operators—such as interactive multimedia

118 See Recitals 7, 9, 10, 12, 13, 15, 20, 31 (and in particular the reference to the economic value of dynamic data), 36 - 40, 46 - 49, 51, 69.

119 This was not the case in 2003, while cultural heritage institutions entered under the scope of the 2013 Directive on PSI by way of exception.

120 Art. 12 of the Open Data directive states that agreements granting exclusivity are subjects to review on a regular basis, at least every three years. This rule is of particular relevance for agreements such as those noted supra at note 29.

121 See supra III.

122 Questions may raise as to the compliance with this provision of art. 108 of the Italian code on cultural heritage, which suggests that fees for exploiting cultural goods can be issued discretionarily by the authority with jurisdiction, even though some terms of reference are indicated by the same provision in the code.

115 V. Sappa, *Access and Re-Use of Public Sector Information in a Copyright Perspective*, in Stamatoudi - Torremans, *EU Copyright Law. A Commentary*, 2 ed., EE, Cheltenham, 2021, 762 ff..

116 LAPSI stand for Legal Aspects of Public Sector Information. Information about the output of LAPSI and LAPSI 2.0 are available here: <https://digital-strategy.ec.europa.eu/en/news/legal-aspects-public-sector-information-lapsi-thematic-network-outputs>.

117 Directive 2013/37 on the re-use of public sector information.

works, virtual and augmented reality experiences—for educational purposes.

F. Conclusion

- 30 Internet and digital technologies shaped a world and a society that are substantially different compared to those of ten or twenty years ago, when individuals were simple users of cultural content, while they are now creators of it. Nowadays, individuals, bodies and associations want to access the cultural heritage, but also actively participate in its management and in valuing a subsidiary perspective.¹²³ This does not imply taking over of museums' tasks and missions. On the contrary, today more than ever it is essential that museums use their authority and their role as cultural mediators.¹²⁴ This applies also when, while implementing their educational mission, they release information on the internet and let third parties use them for any purpose, including commercial ones, so that the fundamental freedom of conducting a business is appropriately boosted.
- 31 The high costs related to preservation of and access to cultural heritage drove museums to take position on how to strike the balance between money-oriented exploitations, mainly for self-funding purposes, and inclusivity-aimed initiatives. If the public tasks of museums can be enhanced via an access that is dynamic and not merely static, even more efforts than in the past may be expected by these bodies, including higher costs. In line with this concern, case law and regulations at first favoured the extension of property rules or other control-based mechanisms on images of tangible goods¹²⁵ hosted by museums. However, general management and enforcement costs of control-based systems are higher than the revenues that may be generated by traditional authorization tools, including copyright licences. In commodifying cultural heritage, on one hand, rivalrous uses concerning tangible goods collected in museums may be controlled by authorization-based mechanisms in order to ensure preservation and, at the same time, to satisfy some economic and self-funding interests. On the other hand, images of cultural heritage may be produced and made available by museums, and—in particular—by other market operators too. The latter may replace museums in their role as intermediaries, with companies at the downstream level of the market

chain such as publishers in different fields. At this stage, the attention shifts from the tangible goods to their reproductions. Here, as this paper discusses, it is essential that *libre* open-data policies are implemented because they are able to create more spill overs than control-based practices. This is why regulatory measures for limiting control-based approaches on one hand, and for boosting open access and—to some extent—re-uses on the other, have been introduced on the top of the practices of the civil society and of national or regional projects aimed at releasing data on cultural heritage under a free and *libre* access (and re-use) regimes. This statement has to be interpreted with an economic perspective, and not merely in an access-to-culture perspective.

- 32 *Libre* open data models may positively affect the notoriety of the museum,¹²⁶ as well as the ecosystem surrounding it, since they enable third-party economic initiatives to flourish. Therefore, (real) open data practices clearly facilitate the use of information on digitized cultural heritage and are a strategy to satisfy the economic interests of market operators mainly, unless museums are substantially involved in the elaboration of derivative works for commercial purposes. This last position, however, cannot be supported because it would not be sustainable. Museums may enjoy control on the rivalrous exploitations of cultural goods they host, mainly for controlling damages that could affect their preservation. It is totally understandable that museums need funds and need to introduce some activities to gather such funds, in particular in times of reduced public money and where substantial costs related to heritage preservation and access to works exist. The same EU texts on digitization of cultural heritage take these costs into account and do not underestimate the challenge that museums will face while engaging in educational initiatives via the use of digital tools.¹²⁷ However, adopting an excessively financial-based approach does not seem to be aligned with the main goal of museums, and therefore it is essential that they are involved in money-oriented exploitations for self-funding purposes as far as necessary and not beyond that. Museums have been created with the political intention to introduce educational tools for the society; the political intention is still there and thus, they should remain as educational tools. In addition, the normative element intro-

123 National Constitutions also refers to this. See for instance art. 118 of the Italian Constitution.

124 Modolo, *Promozione del pubblico dominio e riuso dell'immagine del bene culturale*, cit., 158.

125 Geiger, *La remise en cause du droit à l'image des biens: une privatisation du domaine public enfin freinée?*, in *RLDI* 2005, 6ff..

126 Bertacchini - Morando, *The future of museums in the digital age: new models of access and use of digital collections*, in *International journal of arts management* 2013, 60 ff.

127 See Commission, Communication COM/2021/118 final, *2030 Digital Compass: the European way for the Digital Decade*, cit.; Id., Recommendation C(2021)7953 on a Common European data space for cultural heritage; and Id., Recommendation 2011/711/EU of 27 October 2011 on the digitization and online accessibility of cultural material and digital preservation.

duced by the ICOM definition, which qualifies them as non-profit bodies impedes them to act as mere market structures and imposes them to re-invest all their income into activities of their educational missions.

- 33 From an economic or strategic perspective, an excessive devotion of museums to economic activities¹²⁸ shifts their focus from the core mission they have, and they should maintain education for democratic purposes rather than an economic mission that is typical of market structures, which in any case would see them as neutralized competitors in the market. From a different perspective, museums that re-invest their income into an educational mission might still be limited in the exploitations they make for commercial purposes that dilute the decorum in cultural heritage, according to a (non-desirable, but still existing) strict and morality-based interpretation of provisions that some jurisdictions aiming at keeping the control on the dissemination of images of cultural goods may use.
- 34 Therefore, the shift to an entirely entrepreneurial paradigm means museums risk to lose three times: politically, ethically and legally. It would also risk creating distortive interpretations of current rules for the mere purpose of controlling the circulation of images and the related economics. In other words, museums should maintain their focus on inclusive practices of dissemination of information on cultural heritage under open formats that encourage third-party re-uses, while keeping their distance from invasive market-oriented approaches. This solution is essential for implementing appropriately fundamental values such as freedom of expression, transparency, development of culture and research, education, as well as pluralism and therefore inclusion.¹²⁹

128 This text quickly mentions NFTs. These assets are the essence of blockchain and Web3.0 philosophy. They reflect the intention to create, manage and exchange values embedded into digital formats; blockchain-based applications put an emphasis on the creation of proprietary rights over digital assets. And this does not shorten the distance from both the possibilities to share information widely offered by the digital infrastructure, as well as from the mission of museums and any open-data underpinning idea, which would aim at create and disseminate information. On NFTs Revolidis, *On Arrogance an Drunkenness – A Primer on International Jurisdiction and the Blockchain*, in *Lex&Forum* 2022, 349 ff..

129 Inclusivity is one of the indicators of community enrichment and well-being according to Kraeger – Cloutier – Talmage (eds.), *Re-Thinking Diversity, Inclusion and Inclusiveness: The Quest to Better Understand Indicators of Community Enrichment and Well-Being*, Springer, 2017.