CULTURAL HERITAGE AND ITS PROTECTION AS CONTINUATION OF INTELLECTUAL PROPERTY RIGHTS

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Abstract

In the public space there is a heated debate about the extension of the public domain with works which are no longer protected through copyright and there are a lot of advocates for this idea, including for the decrease of the duration of protection of works through copyright. However, there are also the advocates for the protection of material and immaterial goods that are of high value and significance for the community from which they originate, and which are no longer protected through copyright. The first group is arguing that by continuing to protect such goods after the intellectual property has elapsed, irrespective of the system of protection, we harm the public domain on which people rely to create new works. The second group is arguing that not granting a special protection for such goods will harm both spiritually and financially the communities and their members.

Both groups seem to have logic arguments. However, a balance must be found, and we think that above all, we should try to find this balance by giving priority to the protection of goods which are of high value and significance for the community from which they originate.

The purpose of this paper is to present how these goods which are of high value and significance for the community from which they originate are protected and what means for further protection are trying to be found with a focus on Romanian legislation and case-law.

Keywords: *cultural heritage, traditional cultural expressions, World Intellectual Property Organization, United Nations Educational, Scientific and Cultural Organization, copyright, public domain.*

1. Introduction

We can notice that many industries such as entertainment, fashion, agriculture, pharma, sometimes use traditional designs, songs, knowledge and dances that belong either to states, either to small communities (*e.g.,* indigenous people, Aborigines) as their cultural heritage. Such uses are made for the purpose of creating other works which might be protected by intellectual property.

In this sense, we all saw recently that the famous puzzle company Ravensburger has been obliged by Italian courts to pay royalties for the use of the Vitruvian Man in one of its puzzle games[1].

In 2022, legal actions have been commenced against Jean Paul Gaultier by the Uffizi gallery in Florence, Italy for the use, on garments, of the images of the famous painting Birth of Venus by Sandro Botticelli[2].

In 2021, both the Louvre Museum from Paris, France and the Uffizi gallery in Florence, Italy started legal actions against Pornhub for the use of famous classic paintings in its website and mobile application „Show me the Nudes"[3] which ended with the company deleting these images from its website and mobile application.

In 2019, the company Studi d'Arte Cave Michelangelo S.r.l., who used a copy of the sculpture David to create a video in which the sculpture was wearing an outfit of a famous Italian luxury fashion house, was obliged by Italian courts to (a) refrain from using the image of the sculpture for commercial purposes by any means, (b) remove from its websites all images of the sculpture, (c) pay daily penalties per day of delay in complying with the order[4].

What do all these cases have in common? If we look carefully, we notice that in all of them works of art which were created more than a hundred years ago were used: the Vitruvian Man was painted by Leonardo Da

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[1] Le Figaro, *Ravensburger condamné à payer des droits à l'image pour son puzzle de L'Homme de Vitruve*, 2023, *https://amp-lefigaro-fr.cdn.ampproject.org/c/s/amp.lefigaro.fr/culture/ravensburger-condamne-a-payer-des-droits-a-l-image-pour-son-puzzle-de-l-homme-de-vitruve-20230328* (accessed on 01.04.2023).

[2] A. Tremayne-Pengelly, *Florence's Uffizi Museum Sues Jean Paul Gaultier for Using a Botticelli Image in Clothing*, 2022, *https://observer.com/2022/10/florences-uffizi-museum-sues-jean-paul-gaultier-for-using-a-botticelli-image-in-clothing/* (accessed on 01.04.2023).

[3] B. Latza Nadeau, *Louvre calls in lawyers over Pornhub's hardcore re-enactments*, 2021, *https://www.thedailybeast.com/louvre-calls-in-lawyers-over-pornhubs-hardcore-reenactments* (accessed on 01.04.2023).

[4] C. Marchisotti, F. Tognato, *A Copy of a Copy: The Court of Florence on the Unauthorized Reproduction of Cultural Properties*, 2022, *http://blog.galalaw.com/post/102hz4i/a-copy-of-a-copy-the-court-of-florence-on-the-unauthorized-reproduction-of-cultu* (accessed on 09.04.2023).

Vinci around the year 1487, the Birth of Venus by Sandro Botticelli between 1482 and 1485, the other paintings from the Pornhub case date around the same period.

Moreover, there are situations in which people tend to appropriate other cultures' traditions, being „attracted by the novelty and sophistication" of art and design[5] and usually such practices are made for commercial purposes without the communities to whom belong such traditions also having a pecuniary benefit. For instance, an American singer[6] showed up to a concert dressed as a geisha[7] and in a video with cornrows[8].

This paper proposes to present if these practices are correct with a focus on Romanian law, starting from international conventions, national laws, legal literature and ending with the current preoccupations at international level to better protect and safeguard these material or immaterial assets of communities.

2. General aspects about public domain in intellectual property

Regarding the works mentioned earlier, we could say that all these works are no longer protected by copyright laws having in view that art. 7 of the Berne Convention[9] states that the duration of protection is granted for the entire life of the author plus 50 years after his/her death, with the possibility for the member states to establish a higher duration. In general, most of the states grant a protection of 70 years after the death of the author.

Based on this legal provision, after the above-mentioned duration, all these works are falling into something that we conventionally call „public domain".

The notion of „public domain" must not be confused with the identical notion used in administrative law and, from an intellectual property perspective, it does not have a legal definition, and neither Berne Convention offers one. However, multiple legal international and national instruments use this notion.

If we look at art. 18 of the Berne Convention, we will see that para. (2) links „public domain" to the expiry of the protection of works through copyright [para (1)].

Therefore, in intellectual property law, „public domain" means that the works may be freely used by any person without asking permission for use and without paying any remuneration to the author or to the copyright holders[10].

However, it does not mean that the works from public domain are free for the public. For example, we cannot oblige publishing houses to offer free of charge the works written by Victor Hugo motivating that they are part of the public domain. In theory, „the fact that the works have fallen into the public domain means that they may be used by anyone without restriction and without payment of any remuneration for activities such as (a) reproduction, (b) distribution, (c) importation with a view to the domestic marketing of copies of the work, (d) rental, (e) lending, (f) communication to the public, (g) broadcasting, (h) cable retransmission, (i) making derivative works."[11]

Although there is no clear definition of the public domain in any state[12], the public domain can be viewed as follows[13]: (a) in a narrow sense - it refers to works whose protection by an intellectual property right has expired; (b) in a broad sense - encompasses: (i) works whose protection by an intellectual property right has expired; (ii) the common fond, namely information which by its nature has never been protected by an intellectual property right either because it does not meet the originality condition or because it is excluded from

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[5] J. Phillips, *Traditional knowledge and cultural genocide: a letter from Canada's West Coast*, 2015, *https://ipkitten.blogspot.com/2015/07/traditional-knowledge-and-cultural.html* (accessed on 12.04.2023).

[6] A. Trendell, *Katy Perry apologises for 'cultural appropriation'*, 2017, *https://www.nme.com/news/music/katy-perry-apologises-cultural-appropriation-2087931* (accessed on 10.04.2023).

[7] For Japanese culture, geishas represent the beauty and elegance of Japan. They are trained from the age of 14 or 15 into the traditional Japanese culture, the art of performing and of communication. For more details, *https://blog.japanwondertravel.com/the-history-of-geisha-25214#:~:text=The%20word%20geisha%20comes%20from,to%20use%20to%20entertain%20customers* (accessed on 12.04.2023).

[8] The cornrows symbolise symbolize resistance, freedom, love, and power coming to fruition, but also the slaves' resistance, being used as maps to escape from slavery. For more details, *https://www.houseofbraidla.com/history#:~:text=Cornrows%20were%20a%20sign%20of,on%20their%20way%20to%20enslavement* (accessed on 12.04.2023). were a sign of resistance for slaves because they used it as maps to escape from slavery and they would hide rice or seeds into their braids on their way to enslavement.

[9] Berne Convention for the protection of literary and artistic works of 09.09.1886 as subsequently amended and supplemented.

[10] For more details, V. Roș, *Dreptul proprietății intelectuale. vol. I. Dreptul de autor, drepturile conexe și drepturile sui-generis*, C.H. Beck Publishing House, Bucharest, 2016, p. 361-362.

[11] C. Budileanu, *Dreptul de autor în era digitală. O perspectivă asupra licențelor comune („Creative Commons")*, in RRDPI no. 1/2020, p. 72.

[12] S. Dusollier, *Scoping study on copyright and related rights and the public domain*, World Intellectual Property Organization, p. 6, *www.wipo.int/meetings/fr/doc_details.jsp?doc_id=161162* (accessed on 01.04.2023).

[13] M. Dulong de Rosnay, H. Le Crosnier, *Propriété intellectuelle. Géopolitique et Mondialisation*, CNRS Editions, 2013, Les Essentiels d'Hermès, 978-2-271-07622-9, halshs-01078531, p. 20, *https://halshs.archives-ouvertes.fr/halshs-01078531/document* (accessed on 01.04.2023).

protection (*e.g.,* ideas, theories, concepts, scientific discoveries, processes, methods of operation or mathematical concepts, official texts of a political, legislative, administrative or judicial nature and translations thereof, news and press information, etc.); (iii) the consensual public domain or voluntary public domain, namely works protected by copyright which are voluntarily put to free use by authors or copyright holders. They are considered to represent a „breathing space"[14] for our culture and knowledge because they allow free interaction between them and any person.

According to legal doctrine[15], the public domain is the rule, while protection through intellectual property rights is the exception, and almost 13 years ago, it was said that the „public domain" is „an elastic, versatile and relative concept and it is not susceptible to a uniform legal meaning. Its meaning and effect in IP theory are not yet well understood."[16]

The initiators of the Public Domain Manifesto[17] are arguing that „a healthy and thriving Public Domain is essential to the social and economic well-being of our societies" playing „a capital role in the fields of education, science, cultural heritage and public sector information". Moreover, they recommend cultural heritage institutions to „ensure that works in the Public Domain are available to all of society, by labelling them, preserving them and making them freely available."

3. Protection of cultural heritage and international organizations involved

From all of the above, we may conclude that works in the public domain can be used by anyone at any time without further consent being required and without paying any remuneration. And if this is the case with works under public domain, why Italian institutions had such a success when pursuing companies for paying royalties for the use of such works?

Even if the protection through copyright is no longer valid, there are other means to protect works of high value for the cultures from which they originate or works which are in the collection of museums.

These means refer to the protection of cultural heritage[18] which is divided into tangible cultural heritage and intangible cultural heritage and their importance is given by the fact that „protection of the cultural and intellectual property of indigenous people is an indispensable element in any effort to preserve these groups and to protect them from discrimination"[19].

Prior to moving forward with the presentation of first steps for the protection of cultural heritage, we propose to first see what „culture" is and why it is important to individuals and communities.

According to the online Oxford dictionary, „culture" is defined as representing „the customs and beliefs, art, way of life and social organization of a particular country or group"[20]. In simpler words, „culture" represents our identity related to the community to which we belong. Without this identity, we would be lost, we would feel that we do not have our place in the world.

Regarding the use of the terms, it must be specified that intangible cultural heritage is used in multiple legal instruments also with the sense of or as including folklore which is synonymous to traditional cultural expressions. These notions are applicable both to Western communities, but also to indigenous people.

The first preoccupations at international level regarding the protection of cultural heritage started in 21st of May 1971 when the Economic and Social Council of the United Nations adopted the initiative for the protection of indigenous people from discrimination[21].

Also, the World Bank was and still is involved in the preservation and protection of indigenous communities and their culture, until present having worked in 187 out of 629 projects with reference to such communities[22] and in lots of other projects regarding cultural heritage,[23] sustaining activities which support the protection,

[14] Public domain manifesto, *https://publicdomainmanifesto.org/manifesto/* (accessed on 01.04.2023).

[15] M. Dulong de Rosnay, H. Le Crosnier, *op. cit*. p. 28.

[16] IGC meeting, 17th session, 2010, *Note on the meanings of the term „public domain" in the intellectual property system with special reference to the protection of traditional knowledge and traditional cultural expressions/expressions of folklore*, p. 2, *https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_8.pdf* (accessed on 01.04.2023).

[17] Public domain manifesto, *https://publicdomainmanifesto.org/manifesto/* (accessed on 01.04.2023).

[18] The cultural heritage includes the traditional knowledge and traditional cultural expressions.

[19] M. Newcity, *Legal Protection of the Traditional Knowledge and Traditional Cultural Expressions of the Indigenous Peoples of the Former Soviet Union*, article published in *The Cambridge Handbook of Intellectual Property in Central and Eastern Europe,* edited by Mira T. Sundara Rajan, 2019, Cambridge University Press, p. 394.

[20] *https://www.oxfordlearnersdictionaries.com/definition/english/culture_1?q=culture* (accessed on 10.04.2023).

[21] UN Economic and Social Council, *The problem of indigenous populations*, 50th sess., 1971, New York, *https://digitallibrary.un.org/record/214989?ln=en* (accessed on 10.04.2023).

[22] *https://projects.worldbank.org/en/projects-operations/projects-summary?themecodev2=000511* (accessed on 10.04.2023).

[23] *https://projects.worldbank.org/en/projects-operations/projects-list?themecodev2=000070&os=0* (accessed on 10.04.2023).

conservation and sustainable development of cultural property and intangible heritage[24].

In 1972, UNESCO adopted the Convention concerning the protection of the World Cultural and Natural Heritage[25] („**UNESCO Cultural heritage Convention**").

In 1975, the Treaty establishing the European Economic Community also referred in its art. 128 to the cultural heritage, stipulating that the Community shall highlight the shared cultural heritage.

In 1983, UNESCO and WIPO drafted and published the „Model provisions for national laws on the protection of expressions of folklore against illicit exploitation and other prejudicial actions"[26] stating in its introductory observations that „Folklore is an important cultural heritage of every national and is still developing – albeit frequently in contemporary forms – even in modern communities all over the world" being commercialized „without due respect for the cultural or economic interests of the communities in which it originates and without conceding any share in the returns from such exploitations". They also underlined that copyright is not sufficient to protect the folklore arguing that „impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation" as happens in case of folklore is not specific to copyright. Neighbouring rights for such protection were mentioned, however it was concluded they also not are enough having in view the limited duration of protection just as in case of copyright protection. Therefore, a special (*sui generis*) type of law was suggested which could offer an adequate protection against unauthorized exploitation, the model of such suggested provisions stipulating as a rule that the utilisation of folklore would be subject to authorisation from the competent authorities and payment of fees if it is used for commercial purposes or outside the traditional or customary context with the payment of damages if violated.

In 1989, UNESCO has adopted the Recommendation on the Safeguarding of Traditional Culture and Folklore[27] stating in section B – Identification of folklore – that folklore is „a form of cultural expression" and in section F – Protection of folklore - that folklore „constitutes manifestations of intellectual creativity" and that „it deserves to be protected in a manner inspired by the protection provided for intellectual productions", suggesting states to urgently take separate actions in a range of areas to safeguard folklore.

In 2000, WIPO established its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore („**IGC**") and IGC started in 2007 to work to create and make adopted an international legal instrument to protect traditional knowledge („**TK**"). The first session of IGC has taken place in 2001. Since 2005 until present, each session of the IGC begun with the presentations by the representatives of indigenous and local communities from different states[28]. The representatives usually present experiences, concerns and aspirations of indigenous and local communities concerning the protection, promotion, and preservation of TK, traditional cultural expressions („**TCE**") and genetic resources.

The current mandate of IGC consists in, among others, continuing the work to finalise „an agreement on an international legal instrument(s) (…) relating to intellectual property, which will ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions."[29]

The next IGC meeting (*i.e.,* the 47th session) will take place from June 5 to June 9, 2023 and it has on the agenda to discuss about the drafts related to the protection of TK and TCE, including about the glossary of terms related to IP, TK and TCE[30]. Among the notions defined in this glossary, we find „codified traditional knowledge", „cultural community", „cultural expressions"[31], „cultural heritage"[32], „disclosed traditional knowledge", „expressions of folklore" for which it is mentioned that they are synonyms with TCEs, „folklore"[33], „indigenous cultural heritage", „intangible cultural heritage"[34], „public domain", TK.

In 2003, UNESCO adopted the Convention for the Safeguarding of the Intangible Cultural Heritage[35]

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[24] The World Bank, *Theme Taxonomy and definitions,* 2016, p. 78, *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://pubdocs.worldbank.org/en/275841490966525495/New-Theme-Taxonomy-and-definitions-revised-July-012016.pdf* (accessed on 10.04.2023).

[25] This Convention was adopted by UNESCO on 16.11.1972 and entered into force on 17.12.1975. 194 States are part to the Convention either through ratification, acceptance, accession, or notification of succession. Romania only accepted the Convention. *https://whc.unesco.org/en/conventiontext/* (accessed on 26.03.2023).

[26] The document is available here *https://unesdoc.unesco.org/ark:/48223/pf0000220160* (accessed on 12.04.2023).

[27] *https://www.unesco.org/en/legal-affairs/recommendation-safeguarding-traditional-culture-and-folklore* (accessed on 10.04.2023).

[28] *https://www.wipo.int/tk/en/igc/panels.html* (accessed on 26.03.2023).

[29] IGS mandate for 2022-2023, *https://www.wipo.int/export/sites/www/tk/en/docs/igc-mandate-2022-2023.pdf* (accessed on 10.04.2023).

[30] *https://www.wipo.int/meetings/en/details.jsp?meeting_id=75419* (accessed on 10.04.2023).

[31] It uses the definition from UNESCO Cultural expressions Convention.

[32] It uses the definition from UNESCO Cultural heritage Convention which we shall detail later.

[33] It uses the definition from UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore.

[34] It uses the definition from UNESCO Intangible Cultural heritage Convention which we shall detail later.

[35] This Convention was adopted by UNESCO on 17.10.2003 and entered into force on 20.04.2006. *https://ich.unesco.org/en/convention* (accessed on 26.03.2003).

(„**UNESCO Intangible Cultural heritage Convention**"), UNESCO recognising in the conventions's recitals that indigenous communities, groups and even individuals may have a significant role in producing, safeguarding, maintaining, re-creating intangible cultural heritage, helping, therefore, „to enrich cultural diversity and human creativity".

In 2005, UNESCO adopted the Convention for the Protection and Promotion of the Diversity of Cultural Expressions („**UNESCO Cultural expressions Convention**")[36]. However, it recognises the priority of the human rights and fundamental freedoms, such as freedom of expression, information, and communication, over the cultural diversity.

In 2007, the United Nations adopted the Declaration on the Rights of Indigenous Peoples[37] which grants protection to cultural heritage, cultural expressions, stating in art. 31 that „Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts", as well as to „maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

4. Tangible cultural heritage

4.1. The object of protection both at international level and national level in Romania

Art. 1 of the UNESCO Cultural heritage Convention protects the cultural heritage and it states that in this notion are included: (a) Monuments – architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; (b) Groups of buildings – groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; (c) Sites - works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

We may notice that in this definition are also included the paintings, inscriptions, cave dwellings, as expressions of the humans. Art. 4 and 5 of the UNESCO Cultural heritage Convention impose to the states party to identify, protect, conserve, present and transmit them to future generations through multiple means, such as: adoption of general policy aiming to include cultural heritage in the life of the community, setting up services for the protection, conservation, and presentation of the cultural heritage, developing scientific and technical studies and research.

Romania has in the present 9 properties inscribed on the World Heritage List (out of which the last two represent natural heritage), as follows: (a) 1993, 2010 - Churches of Moldavia; (b) 1999 - Dacian Fortresses of the Orastie Mountains; (c) 1999 - Historic Centre of Sighişoara; (d) 1993 - Monastery of Horezu; (e) 2021 - Roșia Montană Mining Landscape; (f) 1993, 1999 - Villages with Fortified Churches in Transylvania; (g) 1999 - Wooden Churches of Maramureş; (h) 2007, 2011, 2017, 2021 - Ancient and Primeval Beech Forests of the Carpathians and Other Regions of Europe; (h) 1991 – Danube Delta.

Regarding the cases from Italy presented earlier, we must mention that Italian institutions did not construe their legal actions based on copyright rules, since the length of the protection expired, instead these actions represent cultural heritage disputes, the legislation allowing „to control for-profit reproductions of Italian cultural heritage, irrespective of their copyright status."[38]

The Italian Law related to the Code of cultural heritage and landscape[39] defines the cultural assets as movable and immovable goods presenting artistic, archaeological, entoanthropological, archival interest and belonging to the state, regions, or other territorial public bodies, as well as to any other public body and institution and to legal persons, private non-profit, including ecclesiastical bodies civilly recognized. Moreover, this code offers examples of goods that are considered cultural assets, such as: (a) the collections of museums,

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[36] This Convention was adopted by UNESCO on 20.10.2005 and entered into force on 18.12.2006 *https://en.unesco.org/creativity/convention/texts* (accessed on 26.03.2003).

[37] This Declaration was adopted by the UN on 13 September 2007 *https://social.desa.un.org/sites/default/files/migrated/19/2018/11/UNDRIP_E_web.pdf* (accessed on 26.03.2023).

[38] For more details, E. Rosati, *Uffizi museum sues Jean Paul Gaultier over unauthorized reproduction of Botticelli's Venus on fashion garments*, 2022, *https://ipkitten.blogspot.com/2022/10/uffizi-museum-sues-jean-paul-gaultier.html* (accessed on 09.04.2023).

[39] *https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2004-01-22;42&_x_tr_sl=fr&_x_tr_tl=ro&_x_tr_hl=en&_x_tr_pto=wapp* (accessed on 01.04.2023).

art galleries; (b) the archives and individual documents of the state, regions, of the other territorial public bodies; (c) the book collections of the State libraries, of the regions, of other territorial public entities; (d) immovable and movable things of artistic interest, particularly important historical, archaeological or ethno-anthropological; (e) archives and individual documents, belonging to private individuals, which are of particularly important historical interest; (f) exceptional book collections belonging to private individuals; (g) immovable and movable things, belonging to whoever, which are of particularly important interest because of their reference with the history of politics, military, literature, of art, science, technology, industry and culture in general; (h) things, belonging to anyone, which present an artistic, historical, archaeological or ethno-anthropological interest exceptional for the integrity and completeness of the cultural heritage of the nation; (i) collections or series of objects, belonging to anyone, which for tradition, fame, and particular environmental characteristics, or for artistic, historical, archaeological, numismatic relevance or ethno-anthropological, as a whole are of exceptional interest.

The Romanian Constitution[40] stipulates in art. 33 para. (3) that the state must ensure the protection and conservation of cultural heritage.

According to their deontological code[41], the Romanian architects must respect the cultural heritage of the community in which they exercise their profession, contributing to its conservation and enrichment.

Romania has a similar law with the one from Italy, namely Law no. 182/2000 on the protection of national mobile cultural heritage[42] („**Law no. 182/2000**") which mentions that in national cultural heritage are included the goods representing a „testimony to and an expression of evolving values, beliefs, knowledge and traditions", simpler „it comprises all the elements resulting from the interaction, over time, between human and natural factors". Therefore, Romanian notion of „national cultural heritage" aligns with international norms and it included in the cultural heritage, the intangible cultural heritage, the TCEs.

Among the goods forming the national cultural heritage, the Law no. 182/2000 mentions: (a) archaeological and historical documentary heritage; (b) goods of artistic significance being offered the following examples: (i) plastic art works (paintings, sculptures etc.), (ii) decorative art works, (iii) cult objects; (c) goods of ethnographic significance such as tools, household and domestic items, furniture objects, pottery, fabrics, jewellery, etc.; (d) goods of scientific importance; (e) goods of technical importance such us unique technical creations, rarities, regardless of brand.

It is worth mentioning that in order to be considered goods from national cultural heritage and to enjoy the protection granted by Law no. 182/2000, the goods must be classified as such following the procedure described in art. 9-22 of this law.

Moreover, this law mentions the institutions involved in the protection of the national cultural heritage, namely the public administration authorities, specialised institutions (such as museums, public collections, memorial houses, archives and libraries, religious cults) and the non-governmental organizations.

4.2. The protection granted at international level and national level in Romania

Art. 4 of UNESCO Cultural heritage Convention obliges each state party to ensure „the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage" by using to this end its own resources, but also international assistance if it is able to obtain it.

To arrive to such end, art. 5 of the UNESCO Cultural heritage Convention provides for multiple means, such as: (a) adopting general policies aiming to give the cultural heritage a function in the community; (b) setting up services with appropriate staff; (c) developing scientific and technical studies and research; (d) taking appropriate measures to identify, protect, preserve, present the culture heritage; (e) creating regional centres for training in the protection, conservation and presentation of the cultural and natural heritage.

On the basis of these provisions of the UNESCO Cultural heritage Convention, Romanian Law no. 182/2000 states that for making copies, casts, posthumous prints and facsimiles of the goods [art. 27 para. (1) and (2)] and to reproduce them through photo, video, or numerical means [art. 27 para. (3)],the administration institution's or the goods owner's approval must be obtained.

In our opinion, Law no. 182/2000 should have included the copies, casts, posthumous prints, and facsimiles within the reproduction notion and should have given it a broader protection in a way to include the reproduction through any means and under any form, just like Law no. 8/1996 on copyright and related rights[43] defines

[40] Romanian Constitution republished in 2003 in the Official Gazette of Romania no. 767/2003.

[41] Deontological code of the architect profession adopted in 2012 by the Romanian Architects Order, published in the Official Gazette of Romania no. 342/12.05.2012.

[42] Law no. 182/2000 on the protection of national mobile cultural heritage, republished in the Official Gazette of Romania no. 259/2014.

[43] Law no. 8/1996 on copyright and related rights, republished in the Official Gazette of Romania no. 8/1996.

„reproduction".

Moreover, we can notice that art. 75 para. (1) letter l) of Law no. 182/2000 establishes that the reproduction as described above without approval constitutes contravention, while the reproduction under Law no. 8/1996 is considered a crime. The actions of making copies, casts, posthumous prints, and facsimiles are punished as crimes only if executed for commercial purposes, as per art. 80 of the same law, understanding therefore that such actions are allowed for personal purposes.

In a decision[44] having as object the request of the author of a wall mosaic to oblige Suceava City and Suceava County Direction for Culture and Patrimony to pay moral damages for the demolition of a building which had on an outside wall the author's mosaic, the author arguing that his work was classified in the registries of Suceava County Direction for Culture and Patrimony as public forum monument and that he was not informed about the destruction of his work, the Romanian courts have admitted the author's request obliging the defendants to pay 100.000 LEI as moral damages.

In reaching this decision, the Romanian courts held that the work was a wall mosaic, a composition worked in the mosaic technique of fireclayed and glazed bricks, covering an area of 456 square metres and located on the outer wall of a state building. They also held that the work was a public forum monument, Suceava City being guilty of the demolition of the building on whose wall was the mosaic and also of the non-register of the work in its registries, and Suceava County Direction for Culture and Patrimony being guilty of not informing Suceava City about the work of art which was to be destroyed, of not opposing to the demolition authorisation without notifying the author of the work and of not verifying if the work was still protected by copyright law.

In this regard, the Romanian courts showed that the defendants had a passive attitude while they were obliged by law, as state authorities, to take active and concrete measures to preserve the good which was part of the national mobile cultural heritage, including by requesting the suspension / annulment of the demolition authorisation. The Romanian courts mentioned also that the defendants have violated the author's moral right regulated by art. 10 letter d) of Law no. 8/1996, namely the author's right to claim respect for the integrity of the work and to object to any alteration of, or interference with, the work if it is prejudicial to his honour or reputation.

In our opinion, this decision is important because it makes clear that there are multiple legal instruments to protect a work: first the protection by intellectual property rights (in this case, copyright) and second the protection of the work as national cultural heritage if all legal conditions are met. In addition, if the copyright is no longer applicable, the protection of the work as part of the national cultural heritage is still possible, if, of course, it is registered as such in the public registries.

5. Intangible cultural heritage

5.1. The object of protection both at international level and national level in Romania

When we think to TCEs, we associate them mostly with African, Asian, Australian tribes. However, TCEs or folklore as they are also called (are included in the notion of „intangible cultural heritage"), are present all over the world, including in developed states, and also in Europe[45]. In Sweden there is Dala horse[46], Denmark has hygge[47], Norway has rose painting[48], Finland has *Kalevala*[49], Iceland has folk music, Greenland has traditional clothing decorated with bright patterns and designs, but also with abstract shapes and symbols.

The notion of „intangible cultural heritage" is defined by art. 2 point 1 of the UNESCO Intangible Cultural heritage Convention as „the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts, and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity."

According to the same article from UNESCO Intangible Cultural heritage Convention, „intangible cultural

[44] HCCJ dec. no. 4502/2023, consulted in Lege5 database.

[45] For more details on Scandinavian folk art, see Z. Merchant, *What is Scandinavian folk art, and where can you see it?*, 2023, *https://www.routesnorth.com/scandinavia/what-is-scandinavian-folk-art-and-where-can-you-see-it/* (accessed on 25.03.2023).

[46] *Dalahäst* or Dala horse is a horse made of wood painted in different colours and it is considered a national icon of Sweden.

[47] Hygge describes a feeling of comfort, cosiness and warmth.

[48] Rosemaling (rose painting) is a traditional style of painting that dates back to the 1700s and it consists of brightly coloured floral designs, either painted or carved on wood. For more details, A. Tomlin, *All you need to know about Norwegian Rosemaling*, 2022, *https://www.routesnorth.com/language-and-culture/all-you-need-to-know-about-norwegian-rosemaling/* (accessed on 25.03.2023).

[49] *Kalevala* is a collection of folklore, myths, and legends from Finland.

heritage" may be manifested including, but not limited to the following domains: „(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship."

It is very interesting to see that language can be protected as intangible cultural heritage. We agree that „Language is at the heart of a nations culture and knowledge retention"[50] and considering that a language together with its community may be lost easily, we think that it was included in the object of protection of the intangible cultural heritage in order to preserve it because the loss of a language will translate into the loss of traditions and identity of a certain community. Besides, we may see that there are organizations concerned about the preservation of „indigenous languages as contributors to the preservation of biodiversity and traditional knowledge"[51].

Art. 4 point 3 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions[52] defines the „cultural expressions" as „expressions that result from the creativity of individuals, groups and societies, and which have cultural content."

UNESCO has recognised for Romania as intangible cultural heritage the following[53]: (a) in 2022 - Lipizzan horse breeding traditions[54]; the art of the traditional blouse with embroidery on the shoulder (altiţă)[55]; (b) in 2017 - Cultural practices associated to the 1st of March[56]; (c) in 2016 - Traditional wall-carpet craftsmanship; (d) in 2015 – Lad's dances[57]; (e) in 2013 - Men's group Colindat, Christmas-time ritual[58]; (f) in 2012 - Craftsmanship of Horezu ceramics[59]; (g) in 2009 – Doina[60]; (h) in 2008 - Căluş ritual[61].

The Romanian Law no. 26/2008 on the protection of intangible cultural heritage[62] („**Law no. 26/2008**") defines in art. 2 letter a) the notion of „intangible cultural heritage" in the same way as the UNESCO Intangible Cultural heritage Convention.

However, the notion of „traditional cultural expressions" is more detailed in the Romanian law, being defined in art. 2 letter b) of Law no. 26/2008 as „forms of manifestation of human creativity with material, oral expression - forms of word art and traditional verbal expression - forms of musical expression - songs, dances, folk games - forms of syncretic expression - customs, rituals, celebrations, ethnoiatry, children's games and traditional sports games - forms of folk creation in the technical field, as well as traditional crafts or technologies."

This law also establishes in art. 4 the main characteristics of the intangible cultural heritage: „(a) anonymous character of the origin of the creation *(A/N – however, the literature has established that there might be instances when they are created by individuals that the community recognize as having the right, responsibility or permission)*; (b) transmission mainly by informal means *(A/N – by oral or imitation, being capable to evolve during time)*; (c) its preservation especially within the family, group and/or community; (d) demarcation according to the following criteria: territorial, ethnic, religious, age, gender and socio-professional; (e) perception as intrinsically linked to the groups and/or communities in which it was created, preserved and transmitted; (f) the

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[50] P. Settee, *Native Languages Supporting Indigenous Knowledge,* Article for United Nations International Expert Group Meeting on Indigenous Languages, New York, 2008, p. 1.

[51] *Indigenous Languages as Contributors to the Preservation of Biodiversity*, 2022, *https://www.culturalsurvival.org/news/indigenous-languages-contributors-preservation-biodiversity* (accessed on 25.03.2023).

[52] This Convention was adopted by UNESCO on 17.10.2005 and entered into force on 18.03.2007, *https://www.unesco.org/en/legal-affairs/convention-protection-and-promotion-diversity-cultural-expressions* (accessed on 26.03.2003).

[53] *https://ich.unesco.org/en/lists?country[]=00182&multinational=3&display1=inscriptionID#tabs* (accessed on 26.03.2023).

[54] For more details *https://ich.unesco.org/en/RL/lipizzan-horse-breeding-traditions-01687#identification* (accessed on 26.03.2023).

[55] It juxtaposes a simple cut with rich and colourful ornamentations that are stitched using complex sewing techniques. The blouses are white and made of natural fibres (flax, cotton, hemp, or floss silk), and the complex stitch combines horizontal, vertical, and diagonal seams that result in a specific pattern and texture. For more details *https://ich.unesco.org/en/RL/the-art-of-the-traditional-blouse-with-embroidery-on-the-shoulder-alti-an-element-of-cultural-identity-in-romania-and-the-republic-of-moldova-01861* (accessed on 26.03.2023).

[56] Traditions transmitted since ancient times to celebrate the beginning of spring. The main practice consists of making, offering, and wearing a red and white thread, which is then untied when the first blossom tree, swallow or stork is seen. For more details *https://ich.unesco.org/en/RL/cultural-practices-associated-to-the-1st-of-march-01287#identification* (accessed on 26.03.2023).

[57] A genre of men's folk dance practised in community life on festive occasions, such as weddings and holidays, as well as during stage performances. For more details *https://ich.unesco.org/en/RL/lads-dances-in-romania-01092* (accessed on 26.03.2023).

[58] A practice that takes place each Christmas Eve. Men go from house to house performing festive songs and the hosts offer them gifts and money. For more details *https://ich.unesco.org/en/RL/mens-group-colindat-christmas-time-ritual-00865#identification* (accessed on 26.03.2023).

[59] A unique traditional craft of ceramics from northern part of Vâlcea county. For more details *https://ich.unesco.org/en/RL/craftsmanship-of-horezu-ceramics-00610#identification* (accessed on 26.03.2023).

[60] A lyrical, solemn chant that is improvised and spontaneous, being performed solo, with or without instrumental accompaniment. For more details *https://ich.unesco.org/en/RL/doina-00192#identification* (accessed on 26.03.2023).

[61] A ritual featuring a series of games, skits, songs, and dances enacted by all-male dancers to the accompaniment of two violins and an accordion. For more details: *https://ich.unesco.org/en/RL/clu-ritual-00090#identification* (accessed on 26.03.2023).

[62] Law no. 26/2008 on the protection of intangible cultural heritage, published in the Official Gazette of Romania no. 168/2008.

realisation, interpretation or creation of elements of intangible cultural heritage within the group and/or the community, respecting traditional forms and techniques."

We might add to the above, the following characteristics of the intangible cultural heritage[63]: (a) it represents intellectual activity and is passed from one generation to another; (b) it reflects the cultural and social identity of a community; (c) usually, it is created for spiritual and religious reasons and not for commercial purposes; (d) usually, it is created from natural resources that exist in a given community.

Also, art. 1 para. (2) expressly states that Law no. 26/2008 „may not be used, in whole or in part, by any natural or legal person to obtain protection of an element of the intangible cultural heritage through legislation governing industrial property or copyright."

5.2. The protection granted at international level and national level in Romania

Art. 2 point 3 of the UNESCO Intangible Cultural heritage Convention states that such intangible cultural heritage is safeguarded through „identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage".

According to art. 9 of Law no. 26/2008, Romania protects the intangible cultural heritage through multiple means, by developing safeguard strategies, establishing criteria for identifying and evaluating them. Also, based on art. 12 of the same law, it was created the National Registry of Intangible cultural heritage.

6. Protection of cultural heritage by copyright

International organizations are working hard to stop the violation of TCEs, mainly for commercial purposes by companies, in order to recognise to the communities their right to grant or not permission of using their TCEs and to cash in a part of the gains.

However, is it possible to protect TCEs through copyright?

Copyright grants protection to a variety of works that are original, irrespective of the mode of creation or the form of expression and independently of their value and destination.

The works protected by copyright are protected as of their creation, even in unfinished form and independently of their presentation to the public. However, these works do not include ideas.

In a case before the Romanian courts[64], the complainant tried to obtain the recognition of copyright for his musical work which was inspired from folklore. The complainant even registered his musical composition with the Romanian Union of music composers and with the Romanian Copyright Office indicating himself as composer and text editor of his musical work. However, this registration is not constitutive of rights over the work.

Analysing the text of the music and the music with the support of specialists, the Romanian courts have concluded that the complainant's work was just a personalised version of a song belonging to the folklore, the complainant not being, therefore, entitled to claim a violation of his copyright, him being only the holder of a related right to copyright, as performing artist.

In its motivation, the Supreme Court of Justice indicated that the folklore comprises impersonal creations of a community, handed down and processed by grinding from generation to generation, the property being exercised collectively and being inalienable having in view that the law expressly states the impossibility to individually appropriate these elements through copyright, both by individuals belonging to the said community and by third parties. The use of such elements within the community, by any of its members, is free, while the third parties may use them only with the community's approval.

The Supreme Court of Justice also indicated that collective creations may never fall in the public domain having in view their transmission from generation to generation, therefore their property being imprescriptible, while the works protected through copyright are falling in the public domain after the expiry of the term of protection.

Moreover, the Supreme Court of Justice said that „if it is not possible to protect elements of traditional cultural expression by means of copyright, a *sui generis* form of protection must be recognised by including them in the intangible cultural heritage". Therefore, the Supreme Court of Justice stated that it is not impossible to recognise the copyright to works created from folklore as long as the derivative work accomplishes the originality condition, meaning that „the derivative work must be sufficiently distant from the original source for the imprint of the author's creative personality to be identifiable". In the absence of the originality condition, the

[63] Singh & Associates, *Traditional cultural expressions*, India, 2012, *https://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635* (accessed on 25.03.2023).

[64] HCCJ dec. no. 597/2013, consulted in Lege5 database.

complainant cannot invoke a copyright over a musical composition inspired from folklore.

We may notice that in this case, someone tried to appropriate a work which is considered „folklore" being part of the intangible cultural heritage. Such persons exist everywhere, not only in Romania, and in order to avoid such cases, at least in the music industry, one author[65] suggests to create within collective management bodies, specialist committees in the field of folklore which shall evaluate from the point of view of scientific and musical evaluation of the pieces proposed for recording.

In another case before the Romanian courts having as object the crosses from Merry Cemetery from Săpânța, Maramureș County[66], the complainant, as successor of the person who firstly made the crosses, requested the recognition of her predecessor as author of 151 crosses and 171 sculptures, pictures and literary works, as well as the recognition of hers patrimonial rights together with pecuniary damages.

The Maramureș court, as first court, rejected all complainant's requests motivating that the person who created the crosses, sculptures, pictures and literary works was a folk creator, not being, therefore, able to enjoy of the protection of copyright for his works because „folklore is represented by the totality of popular, literary, musical, handicraft creations that belong to the popular traditions and customs of a nation or a region". In addition, the court states that folklore does not find protection in Law no. 8/1996, being „perceived as an intellectual creation, however, due to their popular character, popular creations are used freely, not being provided for in Law no. 8/1996, as an object of copyright." According to the court, another aspect which strengthens the popular character of the crosses is that their creator did not sign them, they are anonymous, and their creator taught his apprentices to make them, continuing therefore the tradition.

The Court of Appeal from Cluj, on the other hand, has admitted the appeal formulated by the complainant.

The Court of Appeal from Cluj firstly analysed if the crosses were protected by copyright taking into consideration the conditions established in the above analysed Decision of the Supreme Court of Justice no. 597/2013 and the arguments of the specialists who showed that the creator's crosses have taken over the traditional form from the Maramureş area, but they present specific elements, used for the first time by their creator, their specificity being represented by a stylistic whole: colour, shape, text, of obvious and recognized originality.

In addition, the specialists indicated that the creator „made works of art, discovering a new way of looking at death, which he materialized in an original way", writing „a true artistic monograph of the village with the monument crosses created by him, creating an original work by merging his qualities and talent as a sculptor, painter and poet, combining the old symbol of the wooden cross with the bas-relief, naive painting and folk verse inspired by specific activities of the village".

Moreover, the specialists have argued that the crosses made by the person in discussion in this case, differ from the rest of the crosses in the cemetery by colour, shape, proportions, and other elements which are specific to the creator, being executed in the spirit of an artist who gives free rein to his imagination and hand.

Another own compositional element of the creator was identified as the sacred space, represented on the crosses by a square in which a floral element is configured, located at the junction of the arms of the cross, where the horizontal becomes vertical and the vertical becomes horizontal, thus making the correlation between telluric and celestial. The artist was not focused on details, he thought more about the essence, not being concerned with symmetry, but with the message, being a creative genius.

The specialists also made a comparison between the crosses created by the person in discussion in this case and the crosses created by other persons which are also present in the Merry Cemetery, highlighting a main difference represented by the fact that the successors' crosses are closer to perfection, to the template, revealing the concern for realism, using high-performance tools and a current work technique, there being no compositional connection and only a small amount of the elements used by our creator being reused, specifying also the fact that he was the first to use folklore decorations and verses on crosses, previously the crosses being simple.

Therefore, based on what the specialists indicated, the court of appeal stated that the work of the person who created the crosses is „original, being undoubtedly the identifiable imprint of the author's creative personality, the fact that elements of ethnography and folklore were used in his creation showing no relevance."

After establishing that the creator of the crosses has the capacity of author, his works being protected by copyright, the Court of Appeal analysed if the complainant was entitled to patrimonial rights over reproduction, distribution, and public communication of the works. Based on the definitions of these notions in Law no. 8/1996 which are cvasi-identical with the definitions from the applicable EU directives and on the fact that the defendant

[65] M. Olariu, *Protecția operelor muzicale folclorice prin intermediul dreptului de autor*, in RRDPI no. 4/2017, p. 148-150.

[66] Merry Cemetery (in Romanian „Cimitirul Vesel") is famous for its brightly blue coloured crosses with paintings and poems describing the people who are buried there, their live and how they died.

represented by the Parish from Săpânța sells postcards representing photos of crosses and that it charges an entrance fee to the cemetery, the court established that the complainant was entitled to patrimonial rights over reproduction, and public communication of the works.

The defendant attacked the decision of the Court of Appeal, and the Supreme Court of Justice rejected it entirely stating that the craft of crosses may be an object of copyright if the originality condition is accomplished as it is in our case. In addition, the Supreme Court of Justice mentioned that art. 7 of Law no. 8/1996 offer examples of works which may be protected by copyright and that the legal operation of classifying a human creation in the category of works that fall within the scope of protection as copyright belongs to the essence of judicial activity in disputes that have such an object and the application of the law to the factual situation deduced from the judgment.

From the above cases, we may notice that intangible cultural heritage (TCEs) that might be protected by copyright are, for example, songs, stories, paintings, etc.

However, there are also disadvantages of protecting TCEs through copyright and we may refer to the fact that: (a) not all TCEs are original and one of the conditions of copyright protection, as we saw earlier is the originality, which is not defined in any international act. However, it is commonly agreed that original means the work to reflect its author's personality; (b) not each time the author of a TCE can be identified, case in which we can designate an authority to represent the author; (c) not all TCE can be fixed. The fixation requirement is provided in some states, but not all. For example, the Romanian laws recognize the copyright to oral works; (d) the limited term of protection. However, this can be prevented by creating a cultural heritage system, as Italy and Romania did, or by instating a *sui generis* system as the international forums are trying to do, and to oblige users to request the prior approval under the condition of paying a fee.

Having in view all the above-mentioned disadvantages, we would say that one of the advantages to protect TCE through copyright system is represented by the situation in which no other legal protection is recognized to the given TCE.

7. Public domain discussions in case of cultural heritage (TKs and TCEs included)

When referring to cultural heritage (TCE and TK included), it is true that some opinions are oriented as not providing protection to pre-existing TCE and TK arguing that in order to be able to continue to innovate, we must have a big range of knowledge in the public domain on which we can rely on.

Agreed until some point. What means „pre-existing TCE and TK"? TCE and TK created until a certain date? This expression is not defined anywhere. And how could we establish when a TCE or a TK was created? And why not recognising it the protection for an indetermined period as it happens with geographical indications? [67]

In our opinion, if works that represent cultural heritage would be protected for a limited period, in time, they would disappear together with the community that created them.

Therefore, we see that there are two groups. While there are international or national organizations which are fighting to better protect the cultural heritage (*e.g.,* traditional knowledge, traditional cultural expressions) from illegal use in order to recognise to the right people their pecuniary rights, there are also organizations, such as the initiators of Public Domain Manifesto who are recommending also that works that constitute cultural heritage to be made freely available to the society.

Also, people from Creative Commons advocate for the protection and enrichment of the public domain and they have created in 2022 a guide „Towards better sharing of cultural heritage. A call to action to policymakers" [68] in which they suggested the actions to be taken to „advance open culture and better sharing of cultural heritage".

In this regard, they suggest the following: (a) to protect the public domain from erosion – meaning to make public domain materials legally used freely by anyone and for any purpose, including for commercial purposes and not be restricted anymore by the application of other laws, such as the cultural heritage laws that exist in Italy, Romania, France etc; (b) to reduce the term of copyright protection – they argue that the length of protection is too high. But if such duration is not granted, what would be the creators' motivation to continue to create works if not the reason that they would get paid for them? In our opinion, less and less people create for the „romantic" purpose of having his/her name under the works, instead they create to be remunerated for the

[67] It is said that due to their regional and cultural nature, geographical indications may have more in common with traditional knowledge than other forms of intellectual property. For more details, J. Janewa Osei-Tutu, *What Do Traditional Knowledge and Traditional Cultural Expressions Have to Do with Intellectual Property Rights*, Landslide 9, no. 4, (March/April 2017), p. 24.

[68] *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://creativecommons.org/wp-content/uploads/2022/12/Towards-better-sharing-of-cultural-heritage-%E2%80%94-A-Creative-Commons-Call-to-Action-to-Policymakers.pdf* (accessed on 09.04.2023).

use of their work and make a living out of it both for them and their heirs[69]; (c) to legally allow necessary activities of cultural heritage institutions, (d) to shield cultural heritage institutions from liability; (e) to ensure respect, equity, diversity, and inclusivity.

Some authors[70] consider that the cultural heritage system is infringing and is incompatible with art. 14 of the EU Digital Single Market Directive[71] which states, as a rule, that if a work of visual art is no longer protected under copyright, any material resulting from the reproduction is not subject to copyright or related rights. The exception consists in the recognition of the copyright if the material resulting from the reproduction is original, meaning that „it is the author's own intellectual creation". We do not agree with these authors mainly because the cultural heritage system is not founded on the copyright one, but it is a sort of continuation, and it applies either if the works are still protected by copyright either if not. The main condition of the cultural heritage system is the works to be included in this category.

The Romanian law has transposed art. 14 of the EU Digital Single Market Directive without any change and even if Romania did not include the exception of the cultural heritage like Italy[72], we consider that this exception is still applicable for the reason mentioned in the earlier paragraph.

Others are of the opinion that „Properly applied, the public domain does not constitute a barrier to the effective protection of traditional knowledge"[73]. And this author suggests a protection in 4 tiers. First tier refers to „secret traditional knowledge" and „sacred traditional knowledge" – this is included in the cultural heritage - (which would receive a protection equivalent to the trade secrets), second tier refers to „closely held traditional knowledge" (which would imply requesting the approval and paying fees for use), third tier refers to „widely diffused traditional knowledge" (which will involve only the right of attribution, meaning paying no fees and no approval for use necessary) and forth tier refers to „generic TK and TCE" (*i.e.,* which are sufficiently widespread as to be incapable of belonging to a single group) [74].

Other authors[75] also consider that „after a specific period of time everyone should be able to use, and build upon, artworks that have fallen into the public domain" and that it is not normal „to turn copyright upside down so as to indirectly be able to monopolise artistic works, which are simply too old to be protected." However, again, it is not about extending the protection through intellectual property, but offering another type of protection and, in fact, control of the most valuable goods of a community.

And would it be proportional? It is one thing to grant such right to natural persons which are using those works for their own personal needs, such as study, research, freedom of expression, promotion of the knowledge of cultural heritage, it is another thing to grant it to natural or legal persons which are using them for commercial purposes, meaning for obtaining profit from their exploitation having in view that the rights that museums grant for the use of goods in their collection represent significant revenues and we all know that states forms their budgets with contributions, taxes and fees collected from natural and legal persons which help them to cover the functioning costs, including also the preservation and restauration of objects of art.

Letting aside the financial reason, in our opinion a use, for commercial purposes, of the goods which are part of the cultural heritage of a community, must be made with the prior approval of that community also to make sure that the respective use is not offensive to that community. Such offense may be given, for example, because of the lack of knowledge of the symbolistic of the goods and its significance for that community. For example, some symbols may have religious significance and their use on kitchen napkins is surely offensive.

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[69] Let us take the example of Ludwig van Beethoven (1770-1827). He was a genius composer recognized even in his time. However, his revenues were not at the level of today's recognized artists and his modest social background always prevented him to marry well-born women.

[70] D. De Angelis, B. Vezina, *The Vitruvian Man: A Puzzling Case for the Public Domain*, 2023, *https://communia-association.org/2023/03/01/the-vitruvian-man-a-puzzling-case-for-the-public-domain/* (accessed on 12.04.2023).

[71] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ no. 130/2019.

[72] *https://www.brocardi.it/legge-diritto-autore/titolo-i/capo-iii/sezione-iii/art32quater.html?utm_source=internal&utm_medium=link&utm_campaign=articolo&utm_content=nav_art_prec_dispositivo* (accessed on 12.04.2023).

[73] R.L. Okediji, *Traditional Knowledge and the Public Domain*, CIGI Papers no. 176/2018, p. 1.

[74] *Idem*, p. 22.

[75] E. Bonadio, M. Contardi, *How could an Italian gallery sue over use of its public domain art?*, 2021, *https://www.city.ac.uk/news-and-events/news/2021/08/how-could-an-italian-gallery-sue-over-use-of-its-public-domain-art* (accessed on 09.04.2023).

8. Conclusions

Folklore or traditional cultural expressions represent the cultural heritage of peoples.

There is a strong debate between two groups: one supporting a wider public domain and another supporting the protection of valuable goods which fall in the category of cultural heritage.

Also, there is not much legal certainty in the present regarding the protection of folklore and actions at international level are taken. We will see which will be the final draft of the IGC regarding the protection of folklore and other traditions of communities.

Even if works are no longer protected under the copyright laws, we consider that states must be more vigilant, like Italian authorities, and protect works which are part of their cultural heritage, making from such cases „a patrimony issue"[76] because such works deserve a special regime unlike other works which do not have the same cultural importance for their communities.

However, a balance must be found between the interests of the community from which the traditions, cultural heritage originates and the interests of the user in order not to violate the free speech, the exceptions and limitations recognized by copyright if they are still protected by it, but also to encourage the creation of new works which rely on the public domain.

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