

# Common European Data Space for Cultural Heritage: Is the EU Taking the “High Road” from “A Single Access Point” to “A Single Market for Data” for Digital Cultural Content?

by Pelin Turan and Caterina Sganga \*

**Abstract:** The Common European Data Space (CEDS), currently comprising fourteen sector- and domain-specific data spaces, was launched by the European Commission (EC) in 2018 in the context of the European Strategy for Data. The CEDS is devised to catalyse the European Union’s transformation into a competitive and digitally sovereign market power informed and governed by a robust legislative framework that would facilitate the cross-border and cross-sectoral flow and reuse of multiple types of data, which are collected and held by public-sector entities, within a “single market for data”. Despite their alignment with the overarching aims and objectives of the CEDS project, the Open Data Directive (ODD) and Data Governance Act (DGA) have limited impact on the deployment of the Common Euro-

pean Data Space for Cultural Heritage (CHDS), which constitutes one of the data spaces within the CEDS. This paper investigates the legal obstacles to the successful deployment of the CHDS, including the interplay of the ODD and DGA with other legislative frameworks essential to the realisation of the CHDS (i.e. cultural heritage law and copyright law). The paper suggests that this conundrum stems from the fact that the CHDS leans toward another landmark initiative of the EC: the Europeana platform, which established a “single access point” to cultural heritage assets. Considering that an implementing act for the deployment of the CHDS is yet to be adopted by the EC, the paper provides normative solutions to tackle the legal and policy problems hampering the operationalisation of the CHDS.

**Keywords:** Common European Data Space, Cultural Heritage, Digitisation, Digital Single Market, European Strategy for Data, Online Accessibility

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## A. Introduction

1 Prompted by the Lisbon Strategy of 2000,<sup>1</sup> the

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1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, eEurope

European Union (EU) has undergone a major transformation in tandem with the global digitisation movements and ever-evolving technological trends. The Digital Agenda for Europe,<sup>2</sup> the Digital Single

2005: An information society for all – An Action Plan to be presented in view of the Sevilla European Council (21/22 June 2002), COM(2002) 263 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52002DC0263>> accessed 29 December 2024.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM(2010) 245

Market Strategy for Europe,<sup>3</sup> the European Strategy for Data,<sup>4</sup> and the 2030 Digital Compass<sup>5</sup> are only a few milestones in the EU digital strategy underpinning the Union's gradual transition into a thriving information society and data-agile economy. Amidst this plethora of public policy documents, which guide the EU's evolution into a digitally sovereign market power, is the flagship initiative aimed at accelerating the untapped potential of data corpora generated and stored in the EU: the Common European Data Space (CEDS).

- 2 The CEDS is a novel concept encapsulating the EU blueprint to create a "single market for data".<sup>6</sup> Developed under the aegis of the European Strategy for Data,<sup>7</sup> the CEDS initiative dwells upon three main pillars: (1) accelerating EU competitiveness in the global data economy, and (2) reinforcing the EU digital sovereignty, while (3) upholding and promoting European values and norms across the globe.<sup>8</sup> The first pillar recognises the value of data as a resource for economic growth and innovation, and it promotes the use of public- and private-sector data to foster the development of data-driven

goods and services.<sup>9</sup> The second and third pillars not only complement the former but also harness it, as several incidents, including the COVID-19 pandemic,<sup>10</sup> revealed that the vast amount of data collected and pooled in the EU had been processed by non-European market actors – and without having to comply with the EU economic and public policy priorities or the EU legislative framework.<sup>11</sup>

- 3 To mitigate the negative implications of these social and economic phenomena, the European Commission (EC) established the CEDS in 2018 to enable and facilitate the free and secure flow and cross-border and cross-sectoral reuse of multiple types of data through a trustworthy and secure infrastructure governed by the EU legal framework, hence endorsing the security and economic prosperity of European citizens and businesses.<sup>12</sup> Building upon the decades-long experiences (and frustrations) of the EU and European market actors, the CEDS stands as an articulate project with a robust plan informed by well-formulated objectives. On the one hand, it aims to make the data collected and stored in the EU available for access and reuse by various market actors, including but not limited to citizens and businesses.<sup>13</sup> On the other hand, it encourages the generation of new corpora of data while guaranteeing the data subjects' control over the data they generate.<sup>14</sup>
- 4 Driven by these goals, the CEDS is designed as a seamless digital area encapsulating several domain- and sector-specific data spaces representing the "strategic economic sectors and domains of public interest."<sup>15</sup> As of December 2024, the CEDS comprises fourteen data spaces dedicated to areas ranking at the top of the EU agenda, ranging from health to agriculture, public administration, energy, finance, tourism, media – and cultural heritage (CH).<sup>16</sup>
- 5 Given the diversity of sectoral/domain-specific data spaces within the CEDS, "there is no one-size-fits-all structure (...) [applicable to all] data

final <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A52010DC0245>> accessed 29 December 2024.

- 3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192>> accessed 29 December 2024.
- 4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Strategy for Data, COM(2020) 66 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020DC0066>> accessed 29 December 2024.
- 5 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2030 Digital Compass: The European Way for the Digital Decade, COM(2021) 118 final <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52021DC0118>> accessed 29 December 2024.
- 6 'Common European Data Spaces | Shaping Europe's Digital Future' (European Commission, 13 March 2024).
- 7 COM(2020) 66 final (n 4).
- 8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a common European data space, COM(2018) 232 final <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52018DC0232>> accessed 29 December 2024.

9 Ibid.

10 COM(2021) 118 final (n 5).

11 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Shaping Europe's digital future*, COM(2020) 67 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020DC0067>> accessed 29 December 2024; COM(2020) 66 (n 4); COM(2021) 118 final (n 5).

12 COM(2018) 232 final (n 8).

13 Ibid.

14 Ibid.

15 "Staff Working Document on Data Spaces | Shaping Europe's Digital Future" (European Commission, 14 February 2022).

16 Ibid.

spaces.”<sup>17</sup> Whereas each data space shall be deployed considering the specificities of the relevant sector/domain, two defining elements are shared by all: First, data infrastructures and data governance frameworks to operationalise each data space, and second, the aspiration to facilitate pooling, access and sharing data through the data space with the aid of these structures.<sup>18</sup> To rest the foundations for and realise these key objectives, the EU pursues a plan comprising four building blocks: (1) Adopting legislative measures on data governance, access and reuse; (2) making high-value publicly held datasets available to the public; (3) developing data processing infrastructures, data-sharing tools and architectures, and data governance mechanisms; and finally, (4) building up a secure and trustworthy digital area for data flows, also by adopting secure, fair and competitive cloud services.<sup>19</sup>

- 6 The ongoing efforts that fall under the first agenda item – especially the adoption of the Open Data Directive<sup>20</sup> (ODD) and, more recently, the Data Governance Act<sup>21</sup> (DGA) – are well-tuned with the overarching aims and objectives of the CEDS. Nevertheless, a closer look at the single sectoral/domain-specific data spaces and the particularities of each data space flag misalignments with the main pillars of the CEDS. This puts the efficacy of the EU legislative framework into question and raises doubts on whether and how the CEDS can be successfully deployed as initially anticipated by the EC.
- 7 In this context, the Common European Data Space for Cultural Heritage (CHDS), which was launched in 2021,<sup>22</sup> represents an interesting example. The CHDS – while waiting for the proposal for an implementing act that would contextualise and detail the roadmap for its deployment, its public policy rationale and blueprint – leans toward previous projects with similar yet relatively limited objectives, such as the *Europeana* platform – or in other words, the

renowned digital library of the EU.<sup>23</sup> However, the resemblance of the ambitions of the CEDS and the *Europeana* platform diverts the attention from the ways in which a *data space* differs from an *online platform*, and it blurs the lines between a *single market for data* and a *single access point*<sup>24</sup> for digital CH content. This conundrum is exacerbated by the fact that the CHDS’ main stakeholders and key players are yet to be identified, and the data transfers among these players, for both primary and secondary uses, are yet to be systematised via an implementing act. Until then, any future legislative endeavour in this sector requires a meticulous assessment of the capacity of existing legal tools to operationalise the CHDS project.

- 8 This paper argues that the legislative framework supporting the CEDS, once combined with the EC’s path dependence on the *Europeana* project, hampers the successful deployment of the CHDS for several interrelated reasons. The CHDS initiative places its subject matter (namely, CH assets and their trajectories in the digital domain) at the intersection of cultural heritage law, data law and copyright law – three different legal disciplines that originated in response to different needs, evolved through different timelines, and have been shaped per disparate public policy goals. The co-existence of these regimes, which are not adjusted to – let alone tailored for – the specificities of any sector/domain-specific data space, complicates rather than helps the realisation of the CHDS. Besides, the *data space* discourse adds a new dimension to the legal debates sparked by the digitisation of CH and the amendment of the EU copyright *acquis* to accommodate the *Europeana* project. The deployment of the CHDS requires legal tools enabling not only the digital reproduction of CH assets, which was sufficient to realise the *Europeana* project but also tools that would facilitate data transfers and the reuse of transferred data in a federated digital environment. Nevertheless, the EC’s reliance on the *Europeana* experience signals that the CHDS might be (mis) guided by a *single access point* vision underpinning the *Europeana* platform rather than a *single market* vision corresponding to a data space for CH.
- 9 Building upon this policy and legal background, this paper strongly advocates for the urgent enactment of an implementing act designed and devised to inform and assist the deployment of the CHDS. It aims to contribute to such a future legislative endeavour by highlighting the pitfalls in the EC’s current approach

17 COM(2018) 232 final (n 8), 3.

18 *Ibid.*, 3-4.

19 *Ibid.*, 4.

20 Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L 172/56.

21 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) [2022] OJ L 152/1.

22 The enactment of an implementing act for the CHDS is beacons by the EC in its Decision of 29.06.2021. See: Commission Decision of 29.06.2021 setting up the Commission Expert Group on the common European Data Space for Cultural Heritage and repealing Decision C(2017) 1444 <<https://digital-strategy.ec.europa.eu/en/policies/europeana-digital-heritage-expert-group>> accessed 29 December 2024, Article 2(e).

23 Council conclusions of 20 November 2008 on the European digital library EUROPEANA (2008/C 319/07) [2008] OJ C 319/18.

24 Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC) [2006] OJ L 2006/28.

to the matter. It suggests realigning the CHDS with the overarching aims of the CEDS while proposing minor readjustments of the existing legal tools to the features of the CHDS.

- 10 To explain and justify the statements above, Section B offers an insight into the genesis, evolution and particularities of the CHDS, linking it to previous EU efforts with similar ambitions, particularly the *i2010: Digital Libraries initiative* and *Europeana*, to underline the differences between a data space and an online platform, while also explaining the market-related and legal implications underlying this difference. Considering the departure of the CHDS from the overarching aims and objectives of the CEDS and its inclination to be path-dependent on the *Europeana* project, Section C realigns the CHDS' ambitions with the overarching aims and objectives of the CEDS by offering a critical analysis of the EU competences to regulate or harmonise cultural heritage law across Europe and evaluating the compatibility of the EU data and copyright legislation *vis-à-vis* the operationalisation of the CHDS. Finally, Section D concludes with a set of proposals for a legislative act necessary to ensure the proper and effective implementation of the CHDS.

## B. "The Road Not Taken"<sup>25</sup>: Cultural Heritage Data Space – or Online Platform?

- 11 The EC launched the CHDS in 2021,<sup>26</sup> shortly after CH became the lynchpin of the New European Agenda for Culture<sup>27</sup> during the 2018 European Year of Cultural Heritage.<sup>28</sup> The EC's decision to dedicate a data space to CH stems from the duality of CH in European public policies. On the one hand, the Union policies acknowledge CH as a building block of a common European identity, encapsulating the values and communal memory that unites Europe

"in all its diversity."<sup>29</sup> On the other hand, these policies often consider CH a catalyser of sustainable innovation and creativity, hence an important contributor to the European economy.<sup>30</sup> Mirroring these attributes and also the goals identified by the CEDS initiative, the CHDS aspires "to accelerate the digital transformation of Europe's cultural sector and foster the creation and reuse of digital [CH] content."<sup>31</sup>

- 12 Considering the pivotal importance of CH for the European social and economic *milieu*, the CHDS is devised as an instrument to embed multi-stakeholder perspectives and satisfy the diverse and interdependent needs and expectations of each stakeholder group.<sup>32</sup> For instance, from the perspective of cultural heritage institutions (CHIs), which are not only the gatekeepers of public access to CH but also the key market players to digitise CH assets, the CHDS offers the opportunity to digitise various tangible and intangible cultural assets and sites, including those at risk of extinction, inaccessible or temporally closed,<sup>33</sup> with the aid of advanced digital technologies such as 3D, artificial intelligence (AI), machine learning, cloud computing, virtual and augmented reality technologies.<sup>34</sup> As per the viewpoint of cultural and creative industries and sectors (CCISs), the aforementioned advanced technological tools would allow innovative forms of artistic creation while also making CH assets available for the development of new cultural products and services "in various sectors, such as (...) tourism [and research]."<sup>35</sup> Last, from the public's perspective, the CHDS would enhance access to digital CH whilst spurring new ways to digitally

25 By reference to Robert Frost's poem "The Road Not Taken". Frost R, *The Road Not Taken* (Henry Holt ed, Mountain Interval 1916) <<https://www.gutenberg.org/files/29345/29345-h/29345-h.htm>> accessed 29 August 2024.

26 See: Commission Recommendation (EU) 2021/1970 of 10 November 2021 on a common European data space for cultural heritage, OJ L 401/5.

27 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A New European Agenda for Culture, COM(2018) 267 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A267%3AFIN>> accessed 29 December 2024.

28 Commission Recommendation (EU) 2021/1970 (n 26).

29 Ibid; also see: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty, Strengthening European Identity through Education and Culture, COM(2017) 673 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017DC0673>> accessed 29 December 2024; Council Resolution of 25 June 2002 on preserving tomorrow's memory – preserving digital content for future generations (2002/C 162/02) [2002] OJ C 162/4.

30 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *i2010: Digital Libraries*, COM(2005) 465 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52005DC0465>> accessed 29 December 2024; Commission Recommendation 2011/711/EU of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation [2011] OJ L 283/39.

31 Ibid.

32 Commission Recommendation (EU) 2021/1970 (n 26).

33 Ibid, 7.

34 Ibid.

35 Ibid, 5-6.

engage with CH, including its reuse for various purposes.<sup>36</sup> Whereas this public policy rationale is well-aligned with the pillars of the CEDS initiative, and particularly with those aiming to enhance the EU global competitiveness in the digital market and the European digital sovereignty, several aspects prevent the transformation of this vision into reality, most of which stem from the role attributed to the *Europeana* Consortium and platform.

- 13 The EC entrusts the *Europeana* Consortium to lead a cohort of public and private institutions active in CH or technology sectors to deploy the CHDS.<sup>37</sup> Recognising the Consortium's experience and success in establishing standardised frameworks for the online transfer of digital cultural content and metadata,<sup>38</sup> the EC requires CHIs to comply with "the relevant standards and frameworks, such as (...) the *Europeana* Data Model, RightsStatement.org, and the European Publishing Framework"<sup>39</sup> developed by the *Europeana* initiative, and to "make their digital assets available through [the] *Europeana* [platform]."<sup>40</sup> In so doing, the EC reduces the CHIs' role in the CHDS to the mere transfer of their digital collections to *Europeana* while overlooking CCISs and any other stakeholders' potential contributions to this new data space. In fact, by muddling the distinction between *Europeana* and the CHDS, the EC's action plan diverts from operationalising a *data space* and serves to expand the *Europeana* platform's collections and market power.
- 14 One of the main reasons underlying this phenomenon is the lack of clarity on to what extent *Europeana*'s IT structure and principles of operation align with those of a *data space*. In broad terms, "data space" is defined as "[a] federated, open infrastructure for sovereign data sharing based on common policies, rules and standards."<sup>41</sup> In line with this generic definition, the Regulatory Scrutiny Board's Opinion of 2020 defines the common *European* data space as "arrangements comprising an IT environment and a set of legislative, administrative and contractual rules on the use of data"<sup>42</sup> to "ensure secure *processing and access to data*

by an unlimited number of organisations."<sup>43</sup> The key elements of these definitions have been eventually consolidated into a binding definition within Article 33(1) of the Data Act (DA). This provision – which is dedicated to the interoperability of data, data sharing services and the CEDS – outlines common European data spaces as "purpose- or sector-specific or cross-sectoral interoperable frameworks for common standards and practices to share or jointly process data for, inter alia, the development of new products and services, scientific research or civil society initiatives."<sup>44</sup>

- 15 Compared to these overarching definitions, the placement of the *Europeana* Consortium at the pinnacle of the CHDS' organisational structure and the path-dependence on *Europeana*'s ongoing practices risk reducing the CHDS to a *minimally decentralised* digital space, if not merely an *online platform*. That said, a glance at *Europeana*'s origins, development and features suffices to understand the differences between this initiative and the CHDS.
- 16 *Europeana* was devised by the *i2010: Digital Libraries* initiative<sup>45</sup> as a "common multilingual access point"<sup>46</sup> for digital CH assets held by CHIs across Europe.<sup>47</sup> Dedicated to democratising access to culture, *Europeana* aims to enable the online availability of cultural content for wider audiences, enhance the digitisation of analogue cultural content, and, finally, preserve and store born-digital and digitized cultural content for the sustainability of European CH.<sup>48</sup> In line with these goals, *Europeana* was constructed as a "multi-sided digital platform for digital [CH],"<sup>49</sup>

PDF/?uri=PI\_COM:SEC(2020)405> accessed 20 December 2024, 1.

43 Ibid. [Emphasis added.]

44 Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) (Text with EEA relevance) [2023] OJ L 2023/2854, Article 33(1).

45 COM(2005) 465 final (n 30).

46 Commission Recommendation (2006/585/EC) (n 24).

47 Council communication (2008/C 319/07) (n 23), 18; Commission Staff Working Document accompanying the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Europe's cultural heritage at the click of a mouse: Progress on the digitisation and online accessibility of cultural material and digital preservation across the EU, SEC(2008) 2372, 513 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008SC2372>> accessed 29 December 2024, 5-7.

48 Communication from the Commission, COM(2005) 465 final (n 30), 3-5.

49 Nadine Klass, Hajo Rupp and Julia Wildgans, "Bringing

36 Ibid.

37 Commission Decision of 29.06.2021 (n 18); "The Deployment of a Common European Data Space for Cultural Heritage | Shaping Europe's Digital Future" (19 October 2022) <<https://digital-strategy.ec.europa.eu/en/news/deployment-common-european-data-space-cultural-heritage>> accessed 22 July 2024.

38 Commission Recommendation (EU) 2021/1970 (n 26), 8.

39 Ibid, 11.

40 Ibid

41 Ibid, 1.

42 Regulatory Scrutiny Board Opinion, Proposal for a Regulation of the Parliament and of the Council on European data governance (Data Governance Act), SEC(2020) 405 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/>

which facilitates research across the collections of various national CHIs located in the EU and “acts as an interface to resources from all over Europe.”<sup>50</sup> *Europeana*, by making available the digital content provided by data aggregators through a *single access point*, serves as an online platform<sup>51</sup> to facilitate the public’s access to and engagement with digital CH.

- 17 Despite the harmony of *Europeana* and CHDS’ ambitions, the *Europeana* platform’s operation relies on the Consortium’s collaboration with a network of data aggregators comprising “national, regional, domain and thematic aggregators”<sup>52</sup> acting as intermediaries between individual CHIs – or data providers – and the *Europeana* platform.<sup>53</sup> In this organisational structure, the platform neither provides content nor stores digital CH assets or data but redirects users to the web pages of national CHIs hosting digital collections.<sup>54</sup>
- 18 This infrastructure and the *Europeana* platform’s functions are far from meeting the criteria to support the *single market for data* vision of the CEDS initiative. Therefore, placing *Europeana* at the centre of the CHDS project, if not equating the CHDS with the *Europeana* platform,<sup>55</sup> promotes the idea of an online infrastructure that is governed by a single entity as the main gatekeeper of data access practices – but not for data-sharing practices – rather than a federated and interoperable IT structure with the active involvement of multiple data-sovereign players. This conceptualisation runs counter to the main pillars of the CEDS initiative, especially those concerning competitiveness and digital sovereignty. The enhancement of the competitiveness of the EU data market via value creation is hard to achieve with the concentration of market power in the hands of *Europeana*, as this is likely to hamper the independent exchange of large sets of data among businesses or the boost of open competition in the

data market and the entry of new players (e.g. small- and medium-sized enterprises) in the market.<sup>56</sup> By the same token, it is hard to speak of sovereign control by public institutions or businesses over the data they are expected to generate by digitising cultural assets, let alone the processing of such data for several purposes by freely concluding agreements with other market players and deciding on the conditions of data exchange.<sup>57</sup>

- 19 The technical incompatibility of *Europeana* with the CHDS also carries several legal implications. The complexity of the CHDS requires the harmonious co-existence of a bundle of legal frameworks to support a single market for CH-related data, such as cultural heritage law to identify cultural assets and their legal status; copyright law for the digitisation of cultural content, making born-digital and digitised content available to market actors and the public in a digital environment, digital preservation and storage; data governance law to regulate data sharing and processing for a fully functioning data space, where born-digital and digitised CH assets can freely flow and be processed by multiple market actors for commercial and non-commercial purposes.
- 20 Therefore, the enactment of an implementing act for the CHDS requires analysis and understanding of the interplay between the current EU regulatory framework for cultural heritage, data governance, and copyright laws to identify the enablers and disablers of the move from a *single access point* to a *single market* for CH data.

## C. At the Crossroad – or Roundabout: Cultural Heritage Data Space and the Cacophony of Cultural Heritage, Data and Copyright Regimes

- 21 The legal framework informing and governing the EU single market has radically changed in the last few decades. Not only has the Union’s data regime (re)shaped the collection, processing, and sharing of personal and non-personal data, but the EU copyright *acquis* has also been modernised and updated in response to global technological advancements and

Europe’s Cultural Heritage Online: Initiatives and Challenges” in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary* (2nd edition, Edward Elgar Publishing 2021), 945.

50 Ibid, 946.

51 Council conclusions on the role of *Europeana* for the digital access, visibility and use of European cultural heritage [2016] OJ C 212/9, Annex, 9643/16, 4.

52 “*Europeana* Aggregators Forum” (*Europeana PRO*) <<https://pro.europeana.eu/page/aggregators>> accessed 24 July 2024.

53 “About” (*Europeana*) <<https://www.europeana.eu/en/about-us>> accessed 24 July 2024.

54 Klass and others (n 49), 946.

55 For a similar interpretation of the current efforts of the EC and the public policy documents on *Europeana*’s role in the deployment of the CHDS, please see: Paul Keller, “Five Things I Know about Data Spaces” (*Open Future*) <<https://openfuture.eu/blog/five-things-i-know-about-data-spaces>> accessed 26 July 2024.

56 For the promises of a data space, as a decentralised and federative structure, on market competitiveness, please see: Peter Kraemer, Crispin Niebel and Abel Reiberg, “What Is a Data Space?” (*Gaia-X Hub Germany* 2022) White Paper <[https://gaia-x-hub.de/wp-content/uploads/2022/10/White\\_Paper\\_Definition\\_Dataspace\\_EN.pdf](https://gaia-x-hub.de/wp-content/uploads/2022/10/White_Paper_Definition_Dataspace_EN.pdf)> accessed 5 March 2024, 5.

57 For the ways in which a data space supports the self-determination and sovereignty of the market players, please see: Ibid, 5-6.

market trends. These legislative interventions seem to provide a fertile ground for the realisation of the CEDS initiative; nevertheless, they raise several challenges to the operationalisation of the CHDS.

- 22 As already mentioned above, the CHDS requires harmony between the legal provisions enabling CH data-sharing and reuse in EU and national cultural heritage, copyright and data governance laws. This is already hampered by the limited competence of the EU to regulate CH-related matters, which prevents the Union from identifying CH assets to be digitised and made open to reuse via the CHDS. This problem is exacerbated by legal fragmentation across the national CH regimes of the EU Member States and the interaction of such legal disparities with EU law in general. Yet, it shall be admitted that the situation is not brighter in areas falling under the EU's competences. The disparate and independent public policy justifications and legislative histories of the EU data governance and copyright frameworks resulted in the independent development of these two bodies of law, with minimum or no coordination, hence causing inevitable clashes and overlaps of concepts and regulatory regimes. The implications of this phenomenon are further accelerated by the complex data regime applicable to CH assets, triggered by the public or private nature of the CHIs holding the collection and their eventual cooperation with third parties in the digitisation of the latter. Also, the EU copyright regime falls short in laying a clear regulatory framework for the reuse of digitised CH assets, especially if directed to the launch of data-based products and services. This is mainly because EU copyright law has prioritised the preservation, safeguarding and cataloguing needs of CHIs, all of which require legal tools enabling the reproduction of institutional collections but not necessarily the availability of such content to the public, let alone the transfer of digitised CH assets.
- 23 Based on these, the investigation of the interplay of cultural heritage with the EU data and copyright regimes becomes essential, especially to better perceive the gaps and enablers featuring the current legislative framework vis-à-vis the operationalisation of the CHDS.

## I. On the brink of the Common European Data Space for... Cultural Heritage

- 24 The democratisation of access to and public engagement with culture through digitisation and online availability of CH have been the lynchpin of European cultural policies since the *i2010: Digital*

*Libraries* initiative.<sup>58</sup> Yet, neither “culture” nor “cultural heritage” has a clear-cut definition in the EU legal and policy documents.<sup>59</sup> *Per contra*, the EU digital agenda dwells upon a common understanding of CH, rather than a legally binding definition, which developed through the negotiations at international norm-setting forums in the aftermath of World War II.

- 25 Since the 1950s, policymakers and scholars have attempted to find the optimum ways to protect, preserve and enhance the accessibility of CH assets in the public interest, with policy and legislative interventions informed by the socio-economic and political realities and priorities at the time.<sup>60</sup> The first

58 For a selection of the milestones in the field, see: Council Resolution of 25 June 2002 (2002/C 162/02) (n 29), Communication COM(2005) (n 30), Commission Recommendation (2006/585/C) (n 24), Commission Recommendation of 27 October 2011 (2011/711/EU) (n 30); COM(2008) 267 final (n 27); COM(2015) 192 final (n 3); Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market COM(2016) 592 final <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2016:592:FIN>> accessed 29 December 2024; Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the cultural dimension of sustainable development in the EU actions COM(2022) 709 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0709>> accessed 29 December 2024. Also see: Klass and others (n 49), 943-944.

59 The EU bodies and institutions do not refrain from admitting the hardship in defining culture and CH. See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world, COM(2007) 242 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52007DC0242>> accessed 20 December 2024, 3.

60 The first international legal instrument to refer to CH was the Hague Regulations concerning the Law and Customs of War on Land. Adopted in 1907, these Regulations aspired to protect “historical monuments” against sieges and bombardments. Likewise, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, adopted in 1954 under the aegis of UNESCO, was a response to the implications of World War II on tangible, including both tangible and intangible, CH assets (e.g. destruction, deterioration, looting). The other UN instruments that followed the Hague Regulations also concentrated on certain fragments of tangible CH assets. For instance, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in 1970, aimed at

international instruments adopted by the United Nations (UN) and Council of Europe (CoE) to preserve CH initially focused on the in-situ protection and accessibility of certain categories of assets, mainly in response to the devastating consequences of armed conflicts.<sup>61</sup> Eventually, this approach resulted in a piecemeal rather than holistic regulation of the matter, while contextualising CH as a static concept within several disparate legal instruments, without a unified and universally accepted definition which grasps CH's dynamic nature.<sup>62</sup> However, more recent international legal instruments, also ratified by the EU, mark a positive shift in the understanding of CH. The CoE Convention on the Value of Cultural Heritage for Society (Faro Convention), adopted in 2005, provides an all-encompassing definition of CH, which acknowledges not only tangible, movable and immovable assets but also intangible, cultural and natural ones.<sup>63</sup>

- 26 The Faro Convention's resolutions and vision are echoed by the current EU cultural policy agenda, including the CHDS. The EC Recommendation of

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preventing the trafficking of tangible and movable elements of CH, whereas, the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted in 1972, was not only concerned with selected elements of tangible and movable CH (i.e. monuments, groups of buildings, and sites) but also of tangible yet immovable assets (i.e. natural features, geological and physiographic formations, natural sites). As the last link in the chain, the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted only in 2003, recognised the intangible aspects of CH and extended legal protection to, for instance, oral traditions, social practices, rituals, festivals, knowledge and practices, and traditional craftsmanship. Along the same lines, the Convention for the Protection of the Architectural Heritage of Europe, adopted in 1985 by the Council of Europe, is concerned with the in-situ protection and preservation of tangible CH assets in the form of monuments, buildings, and sites.

- 61 Janet Blake, "On Defining the Cultural Heritage" (2000) 49 *International and Comparative Law Quarterly* 61 <[https://www.cambridge.org/core/product/identifier/S002058930006396X/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S002058930006396X/type/journal_article)> accessed 29 May 2024, 62.
- 62 Giulia Dore and Pelin Turan, "When Copyright Meets Digital Cultural Heritage: Picturing an EU Right to Culture in Freedom of Panorama and Reproduction of Public Domain Art" (2024) 55 *IIC - International Review of Intellectual Property and Competition Law* 668 <<https://link.springer.com/10.1007/s40319-023-01408-6>> accessed 10 February 2024, 670.
- 63 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 January 2011), CETS no. 199 <<https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=199>> accessed 24 December 2024, Art. 2.

10 November 2021 states that the CHDS strategy set therein "covers all types of [CH] (tangible, intangible, natural, born-digital)."<sup>64</sup> It promotes and prioritises the digitisation of CH assets at risk, popular monuments, buildings and sites, and the categories of under-digitised CH assets,<sup>65</sup> such as audiovisual content.<sup>66</sup> Nevertheless, a broadly formulated description of the CH as such complicates the operationalisation of the CHDS for three major reasons. First, the division of competences between the EU and its Member States regarding CH signals that the extent to which the digitisation of European CH assets can be achieved largely depends on the impact of the obstacles created by and the exclusive competence of Member States to regulate the laws concerning CH. Whereas Article 3(3) of the Treaty of the European Union (TEU) and Article 167(1) of the Treaty on the Functioning of the European Union (TFEU) refer to the common European CH and its preservation by the EU, Article 167(5) of the TFEU clarifies that cultural heritage law remains at the exclusive discretion of Member States.<sup>67</sup> The Union's role, as crystallised by Article 167(2) of the TFEU, is restricted to the encouragement and support of Member States' efforts to improve cultural exchange and the preservation of CH. This leaves the Union without a consensus on what CH is, despite the references to CH in the EU primary law.

- 27 Second, the EC Recommendation of 10 November 2021 does not differentiate between CH assets protected by copyright and those that have fallen into the public domain.<sup>68</sup> In this context, the interaction of cultural heritage and copyright law shall not be overlooked, especially given that these disciplines originated from different public policy rationales and respond to different and possibly conflicting interests whilst being shaped in line with the national policies and priorities of the Member States rather than the EU. As a result, they often feature heterogeneous rules, which may create further barriers to the sharing of digitised CH assets and CH data, particularly when cultural assets, which are allocated to the public domain, are digitally reproduced for non-commercial purposes or used for commercial purposes. The recent precedents of Italian jurisprudence exemplify this conundrum, as the Italian judiciary upheld, in several cases, the fees

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64 Commission Recommendation (EU) 2021/1097 (n 26), 9, also by referring to the UNESCO Conventions of 1972 and 2003.

65 *Ibid.*

66 *Ibid.*, 8.

67 Consolidated Versions of the Treaty of the European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016ME%2FTXT>> accessed 20 September 2024.

68 Commission Recommendation (EU) 2021/1970 (n 26), paragraphs 2 and 3.

and tariffs imposed by the Italian Code of Cultural Heritage upon the reproduction of Italian CH assets in the public domain by Italian CHIs.<sup>69</sup> These clashes are difficult to tackle with a harmonised EU-wide solution, given the limited EU competence in the field. In addition, the EC Recommendation of 2021 has limited cogency and thus a reduced impact on Member States' legislative framework.

- 28 Third, the integration of CH into the CEDS initiative shifts the focus from *in-situ* protection, preservation and accessibility to *digital* reproduction, *online* availability and accessibility, and seamless *transfer* of digital CH assets. Considering that CH is a generic term encompassing an abundance of cultural assets, the digitisation, let alone the transfer, of different types of CH assets requires different legal procedures or rights-clearance mechanisms, disparate techniques and expertise, hence different budget constraints or solutions such as public-private partnerships. The governance of these matters, however, extends the scope of cultural heritage law and interacts (or clashes) with the EU data governance and copyright regimes. Treating born-digital and digitized CH assets as *data* to be transferred and reused across the EU, the European data framework, adopts a variety of approaches to CH assets, depending on whether they are publicly or privately held, whether they contain personal data or whether they are in the public domain or subject to intellectual property rights (IPRs) of public entities, custodial organisations or private third-parties.

69 See: Giulia Dore and Giulia Priora, "The EU Imperative to a Free Public Domain: The Case of Italian Cultural Heritage" (COMMUNIA Association 2024) <<https://communia-association.org/publication/the-eu-imperative-to-a-free-public-domain-the-case-of-italian-cultural-heritage/>> accessed 29 April 2024, 19-20. Also see: Giulia Dore, "The Puzzled Tie of Copyright, Cultural Heritage and Public Domain in Italian Law: Is the Vitruvian Man Taking on Unbalanced Proportions?" (Kluwer Copyright Blog, 6 April 2023) <<https://copyrightblog.kluweriplaw.com/2023/04/06/the-puzzled-tie-of-copyright-cultural-heritage-and-public-domain-in-italian-law-is-the-vitruvian-man-taking-on-unbalanced-proportions/>> accessed 29 April 2024; Roberto Caso, "Michelangelo's David and Cultural Heritage Images. The Italian Pseudo-Intellectual Property and the End of Public Domain" (Kluwer Copyright Blog, 15 June 2023) <<https://copyrightblog.kluweriplaw.com/2023/06/15/michelangelos-david-and-cultural-heritage-images-the-italian-pseudo-intellectual-property-and-the-end-of-public-domain/>> accessed 29 April 2024; Deborah De Angelis and Guiditta Giardini, "Tales of Public Domain Protection in Italy" (COMMUNIA Association, 10 July 2023) <<https://communia-association.org/2023/07/10/tales-of-public-domain-protection-in-italy/>> accessed 29 April 2024.

## II. An EU data regime – or a regime complex<sup>70</sup> – to operationalise the CHDS?

- 29 To establish a single market for data, the European Data Strategy not only launched the CEDS initiative but also revamped the EU data framework by introducing new pieces of legislation. The EU Data Package, comprising the DGA and the DA, aims to lay the framework to facilitate data-sharing practices across the EU in order to unleash the potential of the European data market and to enable the cross-border and cross-sectoral reuse of underutilised data corpora.<sup>71</sup> Whereas these acts hold several provisions addressing the CEDS, the operationalisation of this initiative is also supported by other instruments such as the General Data Protection Regulation (GDPR), the Regulation on the free flow of non-personal data (FFD) and the ODD. The most relevant acts for the CHDS are the ODD and the DGA, which have introduced, respectively, mandatory and voluntary mechanisms for the reuse of certain categories of publicly held data and public-sector data.

### 1. Open Data Directive

- 30 The ODD, which entered into force in 2019, repeals the Public-Sector Information (PSI) Directive<sup>72</sup> to modernise the Union's legislative framework to foster digital innovation.<sup>73</sup> It aims to optimise the reuse of PSI held by public-sector bodies and undertakings, as well as publicly-funded research data, for both commercial and non-commercial purposes, to promote and facilitate the launch of new digital products and services.<sup>74</sup> To this end, the Directive targets the availability of a wide spectrum of PSI including "social, (...), geographical, environmental, (...) touristic"<sup>75</sup> data, by introducing a *mandatory* data-sharing regime for public-sector entities to eliminate the remaining barriers to the

70 Coined by Kal Raustiala and David Victor, the term "regime complex" refers to "a collective of partially overlapping and non-hierarchical regimes". See: Raustiala K and Victor DG, "The Regime Complex for Plant Genetic Resources" (2004) 58 International Organization 277 <<https://www.cambridge.org/core/journals/international-organization/Article/abs/regime-complex-for-plant-genetic-resources/5C6B7B9E45268249D2893621CC64A7E5>> accessed 13 December 2024.

71 COM(2020) 66 final (n 4).

72 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information [2003] OJ L 345/90. (No longer in force.)

73 Directive (EU) 2019/1024 (n 20), Recitals 3 and 9.

74 Ibid, Article 1(1) and Article 3(1).

75 Ibid, Recital 8.

reuse such information.

- 31 In this framework, the digitisation and online availability of cultural assets held by cultural establishments and their private partners<sup>76</sup> is acknowledged as a means to achieve the open data goals of the ODD. Therefore, the ODD encourages “the wide availability and reuse of [PSI] (...)”<sup>77</sup> – including public-sector CHI’s assets – with minimal or no legal, technical or financial constraints.<sup>78</sup> However, the way the ODD identifies its beneficiaries and sets its scope, as well as the terminology it adopts, raises several questions, particularly concerning its interplay with the EU copyright *acquis* and its efficacy for the population of the CHDS with digital CH assets.
- 32 The ODD, while giving the impression of opening a vast array of PSI held by cultural establishments to (re)use, carves out multiple CHIs from its mandatory data-sharing regime. Indeed, the Directive does not apply to public-sector broadcasters and their subsidiaries, certain cultural and educational establishments as well as research-performing institutions.<sup>79</sup> Furthermore, if read together with the Copyright in the Digital Single Market Directive<sup>80</sup> (CDSMD) and its definition of CHIs,<sup>81</sup> the ODD causes asymmetries, as it circumscribes the scope of “cultural establishments” to public libraries, museums and archives while leaving, for instance, film and audio heritage institutions and research organisations (including their libraries) out of the scope.<sup>82</sup>
- 33 The ODD also limits the scope of its subject matter, which has spillover effects on the range of beneficiary institutions. The Directive distinguishes publicly held CH assets based on whether they are protected by third-party IPRs or by IPRs held by public-sector bodies and undertakings. While the former category is excluded from the scope of the ODD, Recital 65 also eliminates certain cultural establishments – orchestras, operas, ballets, theatres, and their archives – from the list of beneficiaries to which the ODD applies. This legislative decision is based on the presumption that cultural assets held by these entities are often subject to third-party IPRs.<sup>83</sup> Additionally, Recital 55 of the ODD exempts CH assets

protected by IPRs held by public-sector bodies if such IPRs were acquired from third parties. This specification introduces considerable uncertainty, which risks halting the processes of sharing and reusing whenever previous rightsholders are unknown,<sup>84</sup> as in the case of orphan works.

- 34 Last but not least, the legal concepts adopted by the ODD generate conceptual turmoil instead of providing clarity for the data-sharing practices involving born-digital or digitized CH assets. The open data strategies and the mandatory data-sharing framework envisioned by the ODD are centred around the term “document”, which Article 2(6) ODD defines as “any content whatever its medium (paper or electronic form or as sound, visual or audiovisual recording); or any part of such content.”<sup>85</sup> The definition is complemented by Recital 30 of the ODD, suggesting that the document is an umbrella concept encompassing data (in the sense of the EU data legislation)<sup>86</sup> as a sub-category while refraining from any references to works and other subject matter, which are crucial to the EU copyright *acquis*. Concurrently, concerning CH assets, which are fundamental for the CHDS, the term “document” enshrined in the ODD covers only digitized or two-dimensional analogue or digital literary works, databases enlisting cultural establishments’ inventories and their associated metadata, whereas three-dimensional artistic works and other artefacts, as well as software,<sup>87</sup> falls outside the term’s scope. In addition, it is hard to understand where digitised cinematographic works – comprising born-digital or digitized representations of acts, facts and information combined with musical works (or, audio recordings) that can be displayed via software – stand in this interplay of documents, data and works.
- 35 Against this background, it becomes evident that, in achieving the CHDS’ ambitions, the ODD is of practical use only for the digitisation and sharing of CH assets whose initial IPRs-owners (hence authors/creators/makers) are public libraries, museums or archives, and of CH assets in the public domain that are held in the collections of these public institutions.<sup>88</sup> As to the former cluster, it should be noted that the ODD’s beneficiary institutions are custodial/memory institutions rather than generators of CH assets.

76 Ibid, Recitals 33, 49, 65.

77 Ibid, Recital 16.

78 Ibid.

79 Ibid, Article 1(2) sub-paragraphs (i), (k), and (l).

80 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

81 Ibid, Article 2(3).

82 Directive (EU) 2019/1024 (n 20), Article 1(2)(j).

83 Ibid, Recital 65.

84 Paul Keller and others, “Re-Use of Public Sector Information in Cultural Heritage Institutions” (2014) 6 Journal of Open Law, Technology & Society 1 <<https://www.jolts.world/index.php/jolts/Article/view/104>> accessed 9 May 2024, 5.

85 Directive (EU) 2019/1024 (n 20), Article 2(6).

86 Intended as “the digital representation of acts, facts or information, or the compilations of such acts, facts and information”, as in Regulation (EU) 2022/868 (n 21), Article 2(1).

87 Directive (EU) 2019/1024 (n 20), Recital 30.

88 Also see: *ibid*, Recital 54.

In this sense, the types of CH assets that might have been authored/created/made by them and their relevance to the CHDS are matters yet to be clarified. As to the second cluster, empirical evidence reveals that national approaches to the interplay of publicly held data, PSI and the CH assets allocated to the public domain vary from one EU Member State to another, hence blurring the lines that contour the scope of national CH assets to which the ODD might apply.<sup>89</sup> Finally, the possible consequences of the interplay between ODD and analogue public domain CH assets is an uncharted terrain, especially if such CH assets have been digitised using techniques that might exhibit originality (e.g. restoration, translation, reconstitutions in the digitised material). It is yet to be understood whether CH assets will remain in the public domain once digitised via advanced technologies or after being digitally restored and reconstituted. Whereas public-private partnerships might be the optimal solution to reduce digitisation costs and overcome the public entities' lack of expertise in mass digitisation, the current EU regulatory framework does not provide any incentives or mechanisms to balance public-private interests over digitised content.<sup>90</sup>

- 89 The study conducted by Sganga *et al.* showcases the national legislatures' take on the public domain. Mapping the legal tools available in the national copyright laws of the EU Member States, the study confirms the previous endeavours in the field that the European legal landscape lacks a common understanding of the public domain and the subject matters allocated to the public domain. Furthermore, there are Member States whose copyright laws do not contain any references to the public domain (e.g. France), while some other States allocate certain content (e.g. legislation, official documents, court decisions) to the public domain. Yet, such content is often not essential for the operationalisation of the CHDS. See: Caterina Sganga and others, "D2.3- Copyright Flexibilities: Mapping and Comparative Assessment of EU and National Sources" <<https://zenodo.org/record/7540510>> accessed 13 February 2024; Kristofer Erickson and others, "Copyright and The Value Of The Public Domain" <<https://zenodo.org/record/14975>> accessed 29 April 2024. Focusing on the interplay of PSI, copyright and the public domain in the context of the CH sector, the study penned by Sappa *et al.* exposes that while the CHIs in certain Member States have difficulty in assigning "public domain" status to certain content, given the legal ambiguity; there is hardly any norms or incentives for CHIs to open their metadata for the reuse of the public at large. See: C Cristiana Sappa, "Legal Aspects of Public Sector Information: Best Practices in Intellectual Property" (2014) 8 Masaryk University Journal of Law and Technology 233; Cristiana Sappa, "Selected Intellectual Property Issues and PSI Re-Use" (2012) 6 Masaryk University Journal of Law and Technology 444 <<https://heionline.org/HOL/Page?handle=hein.journals/mujlt6&id=451&collection=journals&index=>>>.
- 90 *Ibid.*, 6, Recital 12.

- 36 In sum, the ODD, instead of bringing along "revolutionary changes"<sup>91</sup>, merely systematises CHIs' usual practices,<sup>92</sup> which until the PSI Directive were left to the discretion of individual institutions.<sup>93</sup>

## 2. Data Governance Act

- 37 The DGA was the first legislative text adopted under the aegis of the European Strategy for Data.<sup>94</sup> Among other goals, its provisions are conceived to support the fulfilment of the aims and objectives of the CEDS by fostering the availability, interoperability and reuse of publicly held data pooled in the Union, especially those "that are expected to be used in different data spaces."<sup>95</sup> To this end, the DGA harmonises cross-border and cross-sectoral data-sharing practices, in order to remove obstacles to the smooth functioning of the internal market for *voluntary* data exchanges with the participation of multiple intermediaries and stakeholders.<sup>96</sup>
- 38 Devised to complement the ODD,<sup>97</sup> the DGA covers most of the categories of publicly held data to which the ODD does not apply, such as data subject to different legal regimes of protection, including IPRs.<sup>98</sup> In line with the Data Package, the DGA defines data as "any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording."<sup>99</sup> The Regulation applies to data held by public-sector bodies, including their associations or any other not-for-profit legal entities formed by them if such entities are governed by public law.<sup>100</sup> It enables the reuse of such publicly held data by both natural or

91 Keller and others (n 84), 3.

92 *Ibid.*, 5.

93 *Ibid.*, 3-5.

94 Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), 25.11.2020, COM(2020) 767 final, Explanatory Memorandum, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020PC0767>> accessed 29 December 2024, 1.

95 SWD(2020) 295 final (n 96), 5.

96 See: Commission Staff Working Document, Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), SWD(2020) 295 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0295>> accessed 29 December 2024, 3-4.

97 COM(2020) 767 final (n 94), Explanatory Memorandum, 1.

98 SWD(2020) 295 final (n 93), 5.

99 *Ibid.*, Article 2(1).

100 *Ibid.*, Article 2 paragraphs (17) and (18).

legal persons,<sup>101</sup> without necessarily differentiating commercial from non-commercial uses.<sup>102</sup> Within this framework, the categories of publicly held data opened to reuse comprise personal data and data that are protected by commercial confidentiality, statistical confidentiality measures, or third-party IPRs.<sup>103</sup>

- 39 The DGA devises a legal framework based upon three regulatory pillars. The first pillar provides a normative framework for the reuse of certain categories of data without necessarily imposing any obligations on the public-sector bodies holding them.<sup>104</sup> The second pillar sets out the rules applicable to data intermediation services, including the market-driven activities of public-sector bodies, to facilitate the reuse of personal and non-personal data for commercial purposes via online intermediaries.<sup>105</sup> The last pillar introduces a legal framework for data altruism to incentivise and regulate the sharing of personal data by data subjects.<sup>106</sup>
- 40 The broad formulation of data and the inclusion of IPRs-protected data in the context of the DGA seems promising for the CEDS in general, also given that the DGA was designed to “leave a significant amount of flexibility for application at sector-specific level, including for the future development of European data spaces.”<sup>107</sup> However, just like the ODD, the DGA features limitations in its subject matter and a *regime complex*<sup>108</sup> for data-sharing practices which, together with the interplay with other legal regimes applicable to such data, raise several questions on to what extent the Regulation can support the operationalisation of the CHDS.
- 41 Similar to the ODD, the DGA also omits certain categories of data in a way that endangers the successful operationalisation of several sector/domain-specific data spaces, especially the CHDS. Article 3(2) of the DGA eliminates, *inter alia*, data held by public service broadcasters and their subsidiaries, and cultural establishments and educational establishments, which Recital 12 of the DGA details as “libraries, archives and museums, as well as orchestras, operas, ballets and theatres”<sup>109</sup>, from its scope. This policy choice was initially justified by the fact that the data-sharing regime introduced by the DGA is, in principle, addressed to the publicly

held data protected by IPRs.<sup>110</sup> However, in the case of cultural and educational establishments, it is not the data held by such organisations, but the *works* and other *documents* in which such data is ingrained, which are usually protected by IPRs.<sup>111</sup> Slightly amending this statement, the final compromise text clarified that the DGA intended to exclude “data included in works or other subject matter over which third parties have [IPRs],”<sup>112</sup> adding that the works and other documents held by these institutions are predominantly subject to third-party IPRs.<sup>113</sup>

- 42 Regardless of the cryptic justification, the way in which the DGA sets its scope has two major implications for the CHDS. First, the DGA, let alone complementing the ODD, further exacerbates the gap left by the ODD by pushing the CH assets essential to the CHDS to its periphery. In this sense, it is hard to identify the categories of data that the DGA might help reuse to achieve the goals of the CHDS. Second, the terminology used in the different phases of the drafting process has also triggered an unresolved debate on whether and to what extent the subject matters of copyright can be deemed as “data” under the definition offered by the DGA and the DA.<sup>114</sup>
- 43 The interplay of data and IPRs also comes into play when framing the meaning of “data-sharing” under the DGA, which is necessary for the successful deployment of the CHDS. According to Article 2(10) of the DGA, data-sharing is an umbrella term referring to “the provision of data by a data subject or data holder to a data user, based on voluntary agreement or Union or national law, directly or through an intermediary.”<sup>115</sup> Data-sharing practices “cover many transactions, ranging from the mere provision of access to the aggregation and joint exploitation

110 COM(2020) 767 final (n 94), Recital 8.

111 Ibid.

112 Proposal for a Regulation of the European Parliament and of the Council on the European data governance (Data Governance Act) – Outcome of the European Parliament’s first reading (Strasbourg, 4-7 April 2022), P9\_TA(2022)0111, Annex, 19, Recital 10.

113 Regulation (EU) 2022/868 (n 21), Recital 12.

114 See: European Commission. Directorate General for Research and Innovation. and Martin Senftleben, *Study on EU Copyright and Related Rights and Access to and Reuse of Data* (Publications Office of the European Union 2022) <<https://data.europa.eu/doi/10.2777/78973>> accessed 10 May 2024, 9-10; Julie Baloup and others, “White Paper on the Data Governance Act” (KU Leuven, Centre for IT & IP Law (CiTiP) 2021) Technical Report <[https://www.researchgate.net/publication/352690055\\_White\\_Paper\\_on\\_the\\_Data\\_Governance\\_Act?enrichId=rgreq-3d44a0853c5573556800ac3f5dc16c62-XXX&enrichSource=Y292Z2XJQYWdlOzM1MjY5MDA1NTtBUzoXMDM5OTQzODcwNzI2MTQ0QDE2MjQ5NTMzNDgwMDg%3D&el=1\\_x\\_2\\_>](https://www.researchgate.net/publication/352690055_White_Paper_on_the_Data_Governance_Act?enrichId=rgreq-3d44a0853c5573556800ac3f5dc16c62-XXX&enrichSource=Y292Z2XJQYWdlOzM1MjY5MDA1NTtBUzoXMDM5OTQzODcwNzI2MTQ0QDE2MjQ5NTMzNDgwMDg%3D&el=1_x_2_>)>, 9-10.

115 Regulation (EU) 2022/868 (n 21), Article 2(10).

101 Ibid, Article 2(2).

102 Ibid.

103 Ibid, Article 3(1).

104 Regulation (EU) 2022/868 (n 21), Ch. II, Article s 3-9.

105 Ibid, Ch. III, Article s 10-15.

106 Ibid, Ch. IV, Article s16-25.

107 COM(2020) 767 final (n 94), 3.

108 See footnote 70.

109 Ibid, 6, Recital 2.

of data among contracting parties.”<sup>116</sup> In this context, access to data, according to the DGA, refers to the use of data “without necessarily implying the transmission or downloading of data.”<sup>117</sup> The concept of “reuse”, on the other hand, stands for the commercial or non-commercial use of data out of the context of the initial purpose for which data has been produced.<sup>118</sup> Based on these definitions, the achievement of a functioning access system, as envisioned by the DGA, also depends on the adoption of voluntary and compulsory licensing schemes under the framework of EU copyright law, given that the reuse of data entails a combination of acts of reproduction, making available/communication to the public and distribution, which are subject to EU copyright law. However, the tools provided by the EU copyright system, particularly the narrow scope and rigid nature of mandatory and optional exceptions and limitations (E&L) and compulsory licensing schemes, can hardly facilitate the commercial and non-commercial reuse of such CH assets.

44 To further complicate the framework, the performance of data-sharing, access and reuse activities through the CEDS infrastructure requires the exercise of economic rights protected under copyright law by various market players. For instance, the intermediation service providers and their data-sharing practices, as regulated by the DGA, add yet another layer of intricacies. The Act introduces a notification system for such services, which tackles the regulatory uncertainty related to the liability of intermediary services concerning legally protected data.<sup>119</sup> It enlists the conditions for providing data intermediation services, including tools to ensure the interoperability of data to be shared or to facilitate data-sharing practices (e.g. temporary storage, anonymisation or pseudonymisation of data).<sup>120</sup> Last, it establishes a monitoring system to ensure compliance with these conditions.<sup>121</sup> While data intermediation services covered by the DGA include the commercial activities of public-sector bodies, Article 2(11)(b) of the DGA carves out “services that focus on the intermediation of copyright-protected content.”<sup>122</sup>

45 Along the same lines, Article 2(11) of the DGA

116 Giovanni Comandé and Giulia Schneider, “It’s Time: Leveraging the GDPR to Shift the Balance towards Research-Friendly EU Data Spaces” (2022) 59 *Common Market Law Review* 739 <<https://kluwerlawonline.com/journalArticle/Common+Market+Law+Review/59.3/COLA2022051>> accessed 3 May 2024, 741.

117 Regulation (EU) 2022/868 (n 21), Article 2(13).

118 *Ibid.*, Article 2(2).

119 Regulation (EU) 2022/868 (n 21), Article 2(11).

120 *Ibid.*, Article 12.

121 *Ibid.*, Article 14.

122 *Ibid.*, Article 2(11)(b).

requires the separation of copyright-protected content from the public domain content to be shared via data intermediation services; while the services involving the former automatically fall out of the scope of the DGA, services concerning the latter are, in principle, subject to the DGA regime. At this point, however, the DGA introduces another filtering system. Intermediation services concerning the exchange of public domain content are covered by the Regulation only if they take place in the context of commercial relationships. Therefore, data intermediation services involving copyright-protected CH assets, as well as those that deal with the exchange of public domain content in a non-commercial setting, are subject to the piecemeal regulation outlined in the CDSMD,<sup>123</sup> the Digital Markets Act (DMA) and Digital Services Act (DSA).<sup>124</sup> This choice might cause significant uncertainties and hamper the development of the CHDS, especially since the use of advanced technologies to digitise analogue cultural content may save CH assets from the public domain, given that certain techniques used to restore, translate or regenerate them may trigger the granting of copyright to their producers, should their contributions to the digitisation process be deemed original enough to meet the benchmark required for copyright protection. All in all, the regulation of data intermediation services creates, in fact, a web of disparate legal regimes to inform and govern the sharing of different fragments of CH assets essential to the CHDS, with a negative rather than positive contribution to its operationalisation.

46 Based on these explanations, it is clear that the DGA has introduced a multi-layered system that makes data-sharing activities concerning cultural heritage subject to a plethora of different legal regimes. This creates a *regime complex* for those key market players – *Europeana*, national data aggregators, and national CHIs and educational establishments – whose activities are pivotal to the realisation of the CHDS.

### III. The Way Forward or the Dead-End? The EU Copyright *Acquis* and the Common European Data Space for Cultural Heritage

47 The EU copyright *acquis* has also undergone a major transformation since the early 2000s in

123 See: *Ibid.*, Recital 29.

124 Also see: Quintais JP and others, “Copyright Content Moderation in the EU: An Interdisciplinary Mapping Analysis” (2022) <[zenodo.7081626](https://doi.org/10.5281/zenodo.7081626)> accessed 29 December 2024.

response to technological advancements and the development of the EU digital and data strategies. Especially the Union's ambitions regarding mass digitisation projects were frustrated by the lack of harmonization of national copyright laws, which the EC underestimated in its Green Paper on Copyright and Challenge of Technology, where it stated that “[m]any issues of copyright law [did] not need to be subject of action at the Community level”<sup>125</sup> given the accession of the vast majority of Member States to the Berne Convention. These international instruments were considered sufficient to harmonise the Member States' laws to the extent needed for the smooth functioning of the internal market, whilst “[m]any of the differences that remained [were deemed to] have no significant impact on the functioning of the internal market of the Community's economic competitiveness.”<sup>126</sup>

- 48 Yet, the Google Books project, inaugurated in 2004, marked a turning point in the history of global copyright law, given that it highlighted the problems raised by the digitisation of copyright-protected works, works in the public domain and other subject matters, including the so-called orphan and out-of-commerce works, showing how an outdated copyright regime might hamper the public's access to and engagement with born-digital and digitized culture and CH.<sup>127</sup> Since then, the modernisation of the EU copyright *acquis* has gone hand in hand with the implementation of the EU Digital Single Market strategy, which included devising large-scale digitisation projects, such as *Europeana*, to ease the digitisation and dissemination of European CH assets, such as printed materials (books, journals, magazines), photographs, museum objects, archival documents and audiovisual materials.<sup>128</sup>

125 Communication from the Commission, Green Paper of Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, Brussels, 07.06.1988, COM(88) 172 final <<https://op.europa.eu/en/publication-detail/-/publication/f075fcc5-0c3d-11e4-a7d0-01aa75ed71a1>> accessed 29 December 2024, 8, paragraph 1.4.9.

126 Ibid.

127 Simone Schroff, Marcella Favale and Aura Bertoni, “The Impossible Quest – Problems with Diligent Search for Orphan Works” (2017) 48 IIC - International Review of Intellectual Property and Competition Law 286 <<https://doi.org/10.1007/s40319-017-0568-z>> accessed 30 April 2024; Katharina de la Durantaye, “Orphan Works: A Comparative and International Perspective” in Daniel J Gervais (ed), *International Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing), 193.

128 Commission Staff Working Document, SEC(2008) 2372 (n 48); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Towards a modern, more European copyright framework, COM(2015) 626 final

- 49 Despite these attempts, the EU's efforts to digitise CH assets and *Europeana*'s success were not enough to build a single access point to CH. As admitted by the EC, not even half of the digitised CH assets in *Europeana* collections can be reused for commercial or non-commercial purposes.<sup>129</sup> Now that the EU is committed to establishing a data space to enhance the online access to, availability and reuse of CH assets, it is of pivotal importance to assess the EU copyright *acquis vis-à-vis* its fitness to foster the digitisation of analogue cultural content and enable its reuse by multiple stakeholders for different purposes, in order to understand whether and what reforms are needed to facilitate the implementation of the CHDS. To this end, the following pages will focus on the Information Society Directive<sup>130</sup> (InfoSoc Directive), Copyright in the Digital Single Market Directive<sup>131</sup> (CDSMD), and the Orphan Works Directive<sup>132</sup> (OWD), read through the prism of the CHDS.

## 1. Information Society Directive

- 50 Entered into force in June 2001,<sup>133</sup> the InfoSoc Directive represents the first major horizontal intervention of the EU legislator to harmonise national copyright regimes and adjust them to technological advancements and the widespread use of the Internet. The Directive took the opportunity offered by the implementation of the WIPO Internet Treaties<sup>134</sup> to standardise exclusive economic rights enshrined in copyright, regulate digital rights management and technological protection measures, and harmonise national approaches to the democratisation of access and use of protected works by introducing a list of twenty optional and one mandatory E&Ls to copyright and related

<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A626%3AFIN>> accessed 29 December 2024, 2; Council conclusion on the role of *Europeana* for the digital access, visibility and use of European cultural heritage (2016/C 212/06) [2016] OJ C 212/6 9.

129 Commission Recommendation (EU) 2021/1970 (n 26), 8.

130 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

131 Directive (EU) 2019/790 (n 78).

132 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (Text with EEA relevance) [2012] OJ L 299/5.

133 Directive 2001/29/EC (n 127), Article 14.

134 Ibid, Rec. 15; Christophe Geiger and Franciska Schönherr, “The Information Society Directive” in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary* (Second Edition, Edward Elgar Publishing 2021), 280, para. 11.01.

rights.<sup>135</sup> Among these E&Ls, only one is relevant to the population of the CHDS with digitized CH assets in general, whereas another one comes into mind with regard to the born-digital and analogue artistic and architectural works.

- 51 To begin with, Article 5(2)(c) of the InfoSoc Directive introduces an *optional* E&L to the exclusive right of reproduction, directed to facilitate certain acts of reproduction “made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.”<sup>136</sup> The provision applies to authorial works, fixations of performances, phonograms, original and copies of films, and fixations of broadcasts.<sup>137</sup> Computer programs and databases<sup>138</sup> are excluded from the scope of Article 5(2)(c) of the InfoSoc Directive, but the provision finds correspondence in the Database Directive<sup>139</sup> and Software Directive.<sup>140</sup>
- 52 In line with Recital 21 of the InfoSoc Directive, the act of reproduction referred to in Article 5(2)(c) of the Directive shall be interpreted broadly to ensure legal certainty across the EU, and encompass “direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.”<sup>141</sup> This formulation covers both digital and analogue reproductions of a work or other subject matter, regardless of the original format of the reproduced content, whilst enabling their fixation on a material carrier or via immaterial means.<sup>142</sup>
- 53 The positive impact of this E&L on the digitisation, digital restoration, digital cataloguing and preservation activities of CHIs is beyond doubt, and so is its contribution to achieving the online accessibility, availability and reuse of born-digital and digitized cultural content. However, once considered in tandem with the multi-stakeholder perspectives underpinning the CHDS initiative, Article 5(2)(c) of the InfoSoc Directive responds to the needs and expectations of only one of the three main players identified by the CHDS initiative – CHIs. The restriction of permitted uses to mere non-commercial purposes is not enough to allow

the exploitation of CH assets by creative industries to develop data-based goods and services. Similarly, the limitation of the scope of the provision to reproduction only makes it beneficial for the internal operation of CHIs, and just limitedly to boost the engagement of the public with digitised CH assets.

- 54 Aside from Article 5(2)(c) of the InfoSoc Directive, the so-called freedom of panorama enshrined in Article 5(3)(h) of the Directive might be considered to assist the cross-border and cross-sectoral data flows within the CHDS. This provision, formulated as yet another *optional* E&L to copyright, allows the Member States to provide an exception or limitation to the reproduction right and the rights for communication and making available to the public in the context of the “use of works, such as works of architecture or sculpture, made to be located permanently in public spaces.”<sup>143</sup>
- 55 Regardless of its broad articulation, several other indicators condemn the freedom of panorama exception to facilitate the operationalisation of the CHDS. First and foremost, the material scope of the provision is quite limited as this provision is devised to legitimise the reproduction of works of fine art available in publicly accessible spaces in various ways, including analogue and digital means, such as sketching, drawing, painting, and photography. Given the ways in which the InfoSoc Directive described the acts that fall under “reproduction”, there is no ground to refrain from extending the modes of reproduction in this context also to AI-aided duplication methods or 3D printing. Nevertheless, the public policy rationale and the formulation of this provision leave a significant portion of CH assets – which are clustered under other categories of works, exhibited in CHIs or other closed spaces, or preserved in the archives or repositories of custodial/memorial institutions – outside its scope.
- 56 Second, a comparative and cross-national analysis of the national copyright regimes of the EU Member States exposes the remarkably fragmented implementation of the freedom of panorama exception across Europe. Indeed, not only the optional nature of the provision but also the simplicity of the letter of the law bestowed the national legislators with the margin of discretion to readjust the scope of the freedom of panorama in accordance with the national cultural policies and priorities. Indeed, there have been legislative attempts to recognise this freedom to certain selected beneficiaries, redefine the scope of the provision by elaborating on the concept of “public spaces”, and introduce certain purposes or methods of reproduction.<sup>144</sup> That said, the variations in the

135 Sganga and other (n 89).

136 Directive 2001/29/EC (n 127), Article 5(2)(c).

137 See: Ibid, Article 2(1).

138 Ibid, Article 1.

139 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, Article s 6(1) and 8.

140 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) (Text with EEA relevance) [2009] OJ L 111/16, Article s 5 and 6.

141 Directive 2001/29/EC (n 127), Article 2.

142 Geiger and Schönherr (n 131), 285, paragraph 11.07.

143 Directive 2001/29/EC (n 127), Article 5(3)(h).

144 Dore and Turan (n 62), 48-56. Also see: Sganga and others (n

national freedom of panorama provisions put the efficacy of this legal tool under scrutiny with respect to the smooth and free flow of data in a federated data space.

- 57 Last but not least, the so-called three-step test, which was introduced into the EU copyright *acquis* through Article 5(5) of the InfoSoc Directive, has become a tool at the hands of the national courts to further limit the efficacy of Article 5(3)(h) of the Directive. In fact, after the notorious *Wikimedia* case<sup>145</sup> – in which the Swedish Supreme Court ruled that the exploitation of images of works of visual art in outdoor spaces through online content-sharing platforms is incompliant with the three-step test, hence the provision in question – the freedom of panorama can be hardly taken into account among the legal tools that might support the operationalising of the CHDS.<sup>146</sup>
- 58 As a matter of fact, the conservative approach of the InfoSoc Directive, reflected in the identification of the beneficiaries of E&Ls and the national courts' interpretation of the three-step test – also characterises more recent interventions on copyright law, namely the OWD and the CDSMD.

## 2. Orphan Works Directive

- 59 Copyright-protected works whose rightsholders can be identified and located constitute merely a fragment of CHIs' collections. While securing digital access to such content via E&Ls or various licensing mechanisms is already a difficult endeavour, the Google Books experiment showcased the hardship entailed in digitising the so-called orphan works and making them available online and revealed that a significant portion of European CHIs' archives and collections comprise orphan works.<sup>147</sup>
- 60 To give impetus to the “i2010: Digital Libraries” initiative by closing the so-called “20<sup>th</sup>-century

blackhole”<sup>148</sup>, the EU adopted the OWD<sup>149</sup> in 2012. The OWD aimed at facilitating the digitisation and wider dissemination of orphan works and other subject matter by setting EU-wide standards for the recognition and termination of the orphan status to works across the EU and by regulating their permitted uses.<sup>150</sup>

- 61 The OWD is addressed to publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations.<sup>151</sup> It covers literary, cinematographic and audiovisual works, phonograms as well as the works and other subject matter incorporated therein.<sup>152</sup> To be granted the status of “orphan work”, CHIs should perform a diligent search<sup>153</sup> to ensure that rightsholders cannot be identified or located for rights clearance to reproduce and make such content available to the public.<sup>154</sup> Rightsholders can always terminate this status and have the right to be compensated for the use of their intellectual creations by CHIs.<sup>155</sup>
- 62 The OWD is the outcome of a comprehensive cross-border mapping of different legislative approaches and a comparative assessment of the strengths and weaknesses of several alternative routes taken by various States to enhance the exploitation of orphan works.<sup>156</sup> In this regard, an E&L to copyright and related rights, complemented by a diligent research requirement, has been considered the most convenient tool to facilitate mass digitisation projects that could empower European digital libraries. Despite its good intentions, the Directive has not achieved the level of success initially anticipated by EU policymakers, primarily because

148 Boyle J, “Google Books and the Escape from the Black Hole” (*The Public Domain: Enclosing the Commons of the Mind*, 9 June 2009) <<https://www.thepublicdomain.org/2009/09/06/google-books-and-the-escape-from-the-black-hole/>>. Also see: “The Missing Decades: The 20th Century Black Hole in Europeana” (*Europeana Pro*) <<https://pro.europeana.eu/post/the-missing-decades-the-20th-century-black-hole-in-europeana>>.

149 Directive 2012/28/EU (n 129).

150 See: *Ibid*, Article s 3-6.

151 *Ibid*, Article 1(1).

152 *Ibid*, Article 1 paragraphs (2) and (4).

153 *Ibid*, Article 3 and Article 6.

154 *Ibid*, Article 3.

155 *Ibid*, Article 5 and Article 6(4).

156 See: Commission Decision of 27 February 2006 on setting up a High Level Expert Group on Digital Libraries (2006/178/EC) [2006] OJ L 63/25; European Commission, Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM(2011) 289 final <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0289:FIN:EN:PDF>> accessed 29 December 2024.

87).

145 *Bildupphovsraätt i Sverige (BUS) ek. fö. r. v Wikimedia Sverige*, Ö 849-15.

146 Dore and Turan (n 62), 48-56. Also see: Sganga and others (n 89)

147 Simone Schroff and others (n 124), 287; Katharina de la Durantaye (n 124), 190.

of the intricacies of the diligent search requirements and the redress mechanism provided in favour of rightsholders.<sup>157</sup> The Study on the application of the Orphan Work Directive,<sup>158</sup> published in 2020, showed that less than a quarter of the beneficiary CHIs had found the OWD a useful contribution to the field, whilst half of them expressed their scepticism on the positive impacts of the Directive on digitisation and dissemination of orphan works.<sup>159</sup> As a consequence, the aforementioned Study proved how the mechanism introduced by the OWD is better suited for small-scale digitisation projects rather than for the larger, massive endeavours envisioned by the EC.<sup>160</sup>

- 63 Aside from these concerns, two other features weaken the potential of this Directive to assist in the operationalisation of the CHDS. First, the OWD leaves stand-alone graphic works (e.g. photographs, posters, illustrations or postcards) out of its scope,<sup>161</sup> unless they are “embedded or incorporated in, or constitute an integral part of, [orphan] works and phonograms.”<sup>162</sup> Second, permitted acts do not cover commercial uses or communication to the public.<sup>163</sup> While these elements constitute shortcomings of the OWD mechanisms already for the *Europeana* project,<sup>164</sup> there is no doubt that their impact on the CEDS and CHDS will be even stronger.

### 3. Copyright in the Digital Single Market Directive

- 64 The CDSMD, which entered into force in 2019,<sup>165</sup> constitutes the second horizontal EU intervention in the field of copyright and the most recent attempt to streamline the EU copyright system with the goals of the EU digital agenda. The Directive covers fields that have not (or only cursorily) been touched upon in the past by the EU copyright *acquis*, such as E&Ls for research, innovation, education, and preservation of CH.<sup>166</sup> The latter aims at facilitating

large-scale digitisation activities and cross-border and online access to and use of copyright-protected content in the context of these four major fields.<sup>167</sup>

- 65 Article 6 of the CDSMD is devised to foster the preservation of CH, especially for future generations.<sup>168</sup> It provides a mandatory exception to copyright and related rights in favour of a non-exhaustive list of CHIs such as, *inter alia*, publicly accessible libraries or museums, archives, film or audio heritage institutions.<sup>169</sup> Recital 13 of the CDSMD specifies the range of beneficiaries by listing national libraries and national archives, educational establishments’ archives and publicly accessible libraries, research organisations, and public sector broadcasting organisations. Taking into account the financial and technical hurdles faced by CHIs when managing large-scale digitisation activities,<sup>170</sup> the Directive also allows them to benefit from the exception in case of public-private partnerships, by holding that CHIs “should be allowed to rely on third parties acting on their behalf and under their responsibility, including those that are based in other Member States, for the making of copies.”<sup>171</sup>

- 66 Article 6 of the CDSMD permits the reproduction of any works or other subject matter in the CHI’s permanent collections, regardless of their nature.<sup>172</sup> The definition covers authorial works, computer programs, databases, fixations of performances, phonograms, fixations of broadcasts, and press publications held in the permanent collections of the beneficiary institutions. Recital 29 of the CDSMD clarifies the notion of “permanent” by specifying that the provision applies only to copies that are “owned or permanently held by that institution, for example as a result of the transfer of ownership or a license agreement, legal deposit obligations or permanent custody agreements.”<sup>173</sup> Reproductions can be performed in any format or medium, and “by the appropriate preservation tool, means or technology, (...) in the required number, at any point in the life of a work or other subject matter and to the extent required for preservation purposes”<sup>174</sup>, as long as these acts are “for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation.”<sup>175</sup>

157 European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn J, Spröge, J, Omersa, E, Borrett C and others, *Study on the application of the Orphan Works Directive (2012/28/EU) – Final report*, Publications Office of the European Union, 2021 <<https://data.europa.eu/doi/10.2759/32123>> accessed 29 December 2024, 87-89.

158 Ibid.

159 Ibid, 83.

160 Ibid.

161 Ibid, 87.

162 Directive 2012/28/EU (n 129), Article 1(4).

163 McGuinn and others (n 150), 88.

164 Ibid.

165 Directive (EU) 2019/790 (n 78), Article 31.

166 Ibid, Recital 5.

167 Ibid, Recital 3.

168 Ibid, Recitals 25 and 26.

169 Ibid, Article 2(3).

170 Ibid, Rec. 28. Also see: “Cultural Heritage: Digitisation, Online Accessibility and Digital Preservation: Consolidated Progress Report on the Implementation of Commission Recommendation (2011/711/EU) 2015-2017”, 15-16.

171 Directive (EU) 2019/790 (n 78), Recital 28.

172 Ibid, Recital 13.

173 Ibid, Recital 29.

174 Ibid.

175 Ibid, Article 6.

- 67 The exception fills in the gaps left by the national transposition of Article 5(2)(c) of the InfoSoc Directive, which in several Member States do not include digitisation and digital preservation,<sup>176</sup> by introducing a harmonized rule that allows the reproduction of copyright-protected CH assets by digital means. Nevertheless, just like its predecessor, Article 6 of the CDSMD is limited to the internal activities of CHIs, since it covers the right to reproduction but not the right to communication and making available to the public. In this sense, the provision falls short of addressing the needs of businesses and citizens as envisioned by the CHDS initiative.
- 68 In fact, only a handful of the E&Ls and licensing schemes belonging to the EU copyright *acquis* feature an external dimension. One of these instances can be found in Article 8 of the CDSMD, which introduces measures to ease the accessibility of works and other subject matter that are no longer “available to the public through customary channels of commerce”<sup>177</sup>, also known as out-of-commerce works. The provision entrusts collective management organisations (CMOs) with the power to conclude non-exclusive extended collective licensing schemes, covering also works of non-CMO members, with CHIs, which allow them to reproduce, distribute, communicate or make available to the public out-of-commerce works or other subject-matter that are in their permanent collections. CMOs should meet specific representativeness and operational requirements. Should this not be possible in a Member State, or for works and other subject matter which cannot be licensed by any CMOs,<sup>178</sup> Article 8(2) of the CDSMD prescribes the implementation of an exception having the same purpose and content of the extended license. Accordingly, CHIs are permitted to reproduce, by any means, in whole or in part, original databases; translate, adapt, arrange or perform any other alteration of copyright-protected databases and communicate, display or perform them to the public; and extract or re-utilize the contents of databases protected by sui generis right. They can also reproduce, translate, adapt, arrange, or perform any other alteration of computer programs, as well as reproduce, communicate and make available to the public works and other subject matter, including works protected by press publisher’s rights. Such acts shall be performed for non-commercial purposes and be accompanied by “the name of the author or any other identifiable rightsholder (...) unless this turns out to be impossible”<sup>179</sup> and only if such works

and other subject matter are made available on non-commercial websites.<sup>180</sup>

- 69 Whereas Article 8 of the CDSMD revitalizes the European cultural space by facilitating the flow of cultural and CH content to the European cultural marketplace, it still misses setting common criteria or a standardised procedure to determine the out-of-commerce status of cultural content. By simply requiring that “a reasonable effort has been made to determine whether [the work] is available to the public”<sup>181</sup>, the provision leaves any further specification to Member States. This carries obvious risks of fragmentation of national solutions, scarce harmonization and related negative impact on cross-border exchanges, which weaken the potential of Article 8 of the CDSMD to contribute to the realization of the CHDS. The same can be said for the absence of any extended licensing scheme for end users’ commercial and non-commercial reuse of out-of-commerce works. This critique, in fact, circles back to the discussions on the EU copyright regime’s approach in tackling the digitisation of orphan works, which was another major obstacle to large-scale digitisation projects.

#### 4. Public Domain and the Copyright in the Digital Single Market Directive

- 70 The public domain has remained at the periphery of the EU legal harmonisation endeavours.<sup>182</sup> Not only does the Union lack a common binding definition of the boundaries of the notion, but the provisions that directly or indirectly refer to it are scattered and vary from one Member State to another.<sup>183</sup>
- 71 Except for Article 1(2) of the Software Directive,<sup>184</sup> the only other EU copyright provision that explicitly intervenes in the public domain is enshrined in Article 14 of the CDSMD. This provision requires

180 Ibid, Article 8(2) sub-paragraphs (a) and (b).

181 Ibid, Article 5.

182 Séverine Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain* (World Intellectual Property Organization (WIPO)) <<https://tind.wipo.int/record/28967>> accessed 19 August 2024.

183 Ibid, Sganga and others (n 89).

184 Article 1(2) of the Software Directive transposes Article 9(2) of the Agreement on the Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement) by crystallising that “copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.” Accordingly, this provision carves the “ideas and principles which underlie any element of a computer program, including those which underlie its interfaces” out of the scope of copyright protection. See: Directive 2009/24/EC (n 137), Article 1(2).

176 COM(2015) 626 final (n 125), 3; Rosati E, *Copyright in the Digital Single Market: Article -by-Article Commentary to the Provisions of Directive 2019/790* (Oxford University Press 2021), 131, 133.

177 Directive (EU) 2019/790 (n 78), Article 8(5).

178 Ibid, Article 8(3).

179 Ibid, Article 8(2)(a).

Member States to ensure that “when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights.”<sup>185</sup> This rule, however, does not apply if the material resulting from the reproduction represents an original work, “in the sense that it is the author’s own intellectual creation.”<sup>186</sup>

72 This provision is crucial for large-scale digitisation activities of CHIs, mainly because public domain materials are prioritised over copyright-protected CH assets for mass digitisation initiatives, including the *Europeana* project.<sup>187</sup> Yet, Article 14 of the CDSMD is not immune to critique, especially if considered through the lens of the CHDS initiative. The letter of the law consists of several vague phrases, which are prone to trigger adverse effects for its beneficiaries, thus discouraging rather than incentivising the digital reproduction of public domain materials, for at least three interdependent reasons. First, the provision employs a new term, namely “works of visual art”, which has neither been used before in the EU copyright legislation nor is it defined in the CDSMD.<sup>188</sup> Therefore, the concept carries different meanings, with varying scopes, in different Member States.

73 Second, despite the vague legal formulation within Article 14 of the CDSMD, Recital 53 of the Directive clarifies that the act of reproduction covered by the provision encompasses both analogue and digital copies. Furthermore, the notion of “reproduction” used in EU copyright directives includes direct and indirect, temporary and permanent, and two- and three-dimensional reproductions as well.<sup>189</sup> However, Article 14 of the CDSMD gives the possibility to exclude *original* reproductions that may be protected as new works for they represent an *author’s own intellectual creation*. While a limited number of court decisions offer guidance on how to determine the originality of analogue reproductions,<sup>190</sup> there is much less clarity on the relevance of acts accessory to digitisation practices, such as restoration (e.g. removing blemishes and damages, refining resolution) and editorial interventions on the original work (e.g. transliteration and transcription of ancient texts, annotation, emendation and

conjectures in the text). This circumstance creates a remarkable uncertainty on the applicability of Article 14 of the CDSMD on a wide range of digital reproductions, with an inevitable negative impact on the usefulness of the provision *vis-à-vis* the implementation of the CHDS.<sup>191</sup>

74 Third, Article 14 of the CDSMD prevents only the restoration of copyright protection for faithful reproductions of public domain materials, while it remains silent on the reproductions of materials subject to related rights that have fallen into the public domain.<sup>192</sup> Along the same lines, Article 6 of the Term Directive<sup>193</sup>, which introduces a *sui generis* protection for non-original photographs, raises additional uncertainties as to the applicability of Article 14 of the CDSMD to digital reproductions of original photographs in the public domain, in case the latter satisfies the requirements for *sui generis* protection.<sup>194</sup> The same can be said for unpublished works and works of critical or scientific nature that are in the public domain, which Member States are free to protect through a related right in case of new publication or communication to the public, lasting for 25 or 30 years after the date of first publication or communication, respectively.<sup>195</sup>

185 Directive (EU) 2019/790 (n 78), Article 14.

186 Ibid.

187 COM(2005) 465 final (n 30).

188 Andrea Wallace and Ellen Euler, “Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments” (2020) 51 IIC - International Review of Intellectual Property and Competition Law 823 <<https://link.springer.com/10.1007/s40319-020-00961-8>> accessed 30 April 2024, 839.

189 Rosati (n 173), 243.

190 Wallace and Euler (n 185), 826.

191 See: Cristiana Sappa and Bohdan Widła, “Framing Texts and Images: Critical and Posthumous Editions in the Digital Single Market” (2023) 54 IIC - International Review of Intellectual Property and Competition Law 1359 <<https://link.springer.com/10.1007/s40319-023-01394-9>> accessed 29 April 2024, 1361, 1373; Cristiana Sappa, “Hosting the Public Domain into a Minefield: The Resistance to Article 14 of the DSM Directive and to the Related Rules That Transpose It into National Law” (2022) 17 Journal of Intellectual Property Law & Practice 924 <<https://academic.oup.com/jiplp/Article/17/11/924/6693374>> accessed 30 April 2024, 936.

192 Rosati (n 173), 248; Valérie-Laure Benabou and others, “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” (European Copyright Society (ECS), 2020).

193 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L 372/12, Article 6.

194 Rosati (n 173), 248; Séverine Dusollier, “The 2019 Directive on Copyright in the Digital Single Market: Some Progress, A Few Bad Choices, and An Overall Failed Ambition” (2020) 57 Common Market Law Review 979, 997-998; Cristiana Sappa and Bohdan Widła, (n 188), 1369; Marta Arisi, “Digital Single Market Copyright Directive: Making (Digital) Room for Works of Visual Art in the Public Domain” (2020) 1 *Opinio Juris in Comparatione* 119 <<https://www.opiniojurisincomparatione.org/Article/s/digital-single-market-copyright-directive-making-digital-room-for-works-of-visual-art-in-the-public-domain/>> accessed 30 April 2024, 128-131, 141-144; Wallace and Euler (n 185), 838.

195 See: Directive 2006/116/EC (n 190), Article 4 and Article 5.

- 75 The *verbatim* implementation of Article 14 of the CDSMD by most Member States offers no additional guidance on the interplay between this provision and the optional *sui generis* rights introduced by the Term Directive.<sup>196</sup> Besides, given that Article 14 of the CDSMD mentions only copyright-protected works, it is reasonable to argue that Articles 4 to 6 of the Term Directive will not only shrink the public domain but prevent CHIs from populating the CHDS with digitised public domain works of these kinds.<sup>197</sup>
- 76 It is also important to assess the possible adverse impacts of the interplay of Article 14 of the CDSMD and the ODD on the operationalisation of the CHDS. On the one hand, Article 14 of the CDSMD curtails the capacity of public-sector bodies to exploit the digital copies of public domain works held in their collections or archives.<sup>198</sup> On the other hand, Article 12(3) of the ODD comes into play when public-sector bodies opt for public-private partnerships to cope with the financial and technical aspects of digitisation (e.g. automated digitisation, AI-aided digitisation and post-production editing techniques),<sup>199</sup> allowing the conclusion of exclusive agreements with private partners, which grant them the exclusive right to exploit the outcome of this digitisation venture for up to ten years. Copyright ownership, combined with such exclusivity, would not only hamper the free flow and reuse of data but also create the need for natural and legal persons to stipulate *ad hoc* license agreements to use such data for commercial or non-commercial purposes.

Also see: Wallace and Euler (n 185), 838-839; Benabou and others. (n 189). For an analysis of Article 4 of the Term Directive and its justification vis-à-vis the technological advancement and the ease in post-humous publication, please see: Sappa and Widła (n 188), 1370-1371; Sappa (n 188), 935.

196 For a comparative analysis of the implementation of Article 14 of the CDSMD Directive in the national laws of the selected EU Member States, please see: Dore and Turan (n 62).

197 Ibid.

198 Also see: Wallace and Euler (n 185), 843.

199 Also see: Sappa (n 191), 937.

## D. Conclusion

- 77 A brief analysis of the interplay of the cultural heritage, data and copyright regimes at the EU and national levels reveals that an EU legislative intervention is inevitable should the CHDS be operationalised as an interoperable and federated IT infrastructure dedicated to the free flow and reuse of CH-related data. This, however, will not be an easy task, as the EC inherited several unresolved issues and unmet needs of a wide array of stakeholders interested in born-digital and digitized CH assets.
- 78 Given its limited competence to regulate European CH,<sup>200</sup> the EU legislator's margin of manoeuvre does not reach beyond encouraging Member States to adopt measures for "higher quality digitisation, reuse and digital preservation"<sup>201</sup> of CH assets in their territories, and leaving the EU with merely the authority to set indicative targets to be reached in digitisation activities by 2030.<sup>202</sup> This partially explains why the Commission has entrusted the *Europeana* Consortium to monitor and govern the operationalisation of the CHDS,<sup>203</sup> which in return assimilated this brand-new *single market for data* project into the EU's previous initiative, the *Europeana* platform – or the initiative to create a *single digital access point* for cultural content. In addition, the key legislations adopted in the last two decades to facilitate the digitisation, online availability and reuse of CH assets feature several shortcomings in supporting a data space dedicated to CH.
- 79 First and foremost, the genesis and evolution of international instruments concerning CH and the distribution of powers among the EU and Member States have led to conceptual overlaps and conflicts stemming from the lack of a harmonised definition of CH and the norms that govern the born-digital or digitized CH assets critical for the CHDS.
- 80 Second, the legislative frameworks supporting the CEDS – mainly the ODD and DGA – leave CH assets that are critical to the CHDS outside the scope, while the EU copyright *acquis* – even after the InfoSoc Directive, the OWD and the CDSMD – does not feature effective tools tailored for or adapted to the overarching aims and objectives of the CHDS. Indeed, despite being promoted by the EC as the
- 200 See: Treaty on the Functioning of the European Union (n 34), Article 6.
- 201 Commission Recommendation (EU) 2021/1970 (n 26), 6.
- 202 Ibid, Annex.
- 203 Commission Decision of 29.06.2021 setting up the Commission Expert Group on the common European Data Space for Cultural Heritage and repealing Decision C(2017) 1444, C(2021) 4647 final <<https://digital-strategy.ec.europa.eu/en/news/expert-group-common-european-data-space-cultural-heritage>> accessed 29 December 2024.

key legislation for the CEDS,<sup>204</sup> the ODD and the DGA do not apply, respectively, to IPRs-protected data and to “data held by cultural establishments and educational establishments.”<sup>205</sup> As a result, the EU data governance framework is of help to populate the CHDS only with public domain material held by public libraries, museums and archives, and copyright-protected works and other materials on which the aforementioned public institutions hold exclusive rights.

- 81** Third, because the modernisation of the EU copyright framework happened in parallel to the Union’s *i2010* initiative,<sup>206</sup> the vast majority of the E&Ls and licensing schemes target only CHIs due to their intermediary role in giving access to CH.<sup>207</sup> Therefore, the existing copyright regime does not allow the reproduction and making available or communication of works to the public – neither by citizens and businesses nor by CHIs for commercial purposes. These features of the existing legal tools drastically reduce the possibility of increasing access to, free flow and reuse of copyright-protected CH assets.
- 82** Finally, the only legal provision preserving the public domain against further privatisations, namely Article 14 of the CDSMD, is also of limited use for the CHDS project, since its scope is limited to works of visual art only, and there is still no clarity on the implications of the use of advanced technology on the public domain status of digitised works.<sup>208</sup>
- 83** On top of the points raised above, the interaction of the cultural heritage, data and copyright regimes raises several unresolved issues. It is yet to be clarified whether the concepts of “document”, “data”, and “work” can be better linked and reconciled. Likewise, the compatibility of the ODD and the DGA with national CH law regimes, and the post-digitisation legal status of public domain materials, especially if realised in public-private partnerships, are among the matters pending resolution.
- 84** Regardless of the prevalence of such matters, EU policymakers have the tools to mitigate these shortcomings and make the CHDS a successful endeavour. As the first step, it is essential to break the patterns of path-dependency towards *Europeana* and re-focus on the “federated data space”, which

also encompasses online platforms, to enable access to or reuse of born-digital and digitized CH assets in different forms and formats, such as digital twins, derivative works, user-generated content. Down this pathway, a Memorandum of Understanding, to be concluded under the auspices of the EU, might be a useful option to effectively standardise the selection of CH assets to be digitised, without prejudice to the distribution of competencies among the EU and Member States.

- 85** Building upon this common ground, an implementing act would help identify, consolidate and systematise the various stakeholders’ views and needs as well as the data transfers expected to occur through the CHDS. The implementing act could intervene in the EU data and copyright regimes to successfully operationalise the CHDS, adapting, for instance, existing copyright tools to the features of the CHDS, along with what the proposed Regulation for the European Health Data Space (EHDS) is doing to adjust data portability to the EHDS, by extending the scope originally envisioned by the GDPR.<sup>209</sup> This solution would save the EU legislator from another wave of copyright interventions, but still stretch the scope of the acts permitted by the E&Ls and licensing schemes provided by the EU copyright *acquis*. The implementing act would also be the right venue for the EU legislature to finally reflect on and introduce solutions for the interpretation of Article 14 CDSMD and its interplay with a broader spectrum of public domain works, including CH assets.
- 86** Whereas the highway currently taken to establish the CHDS is jammed with several bumps and obstacles along the way, the roadmap designed by the overarching aims and objectives of the CEDS initiative could serve as a reliable guide and source of inspiration. In this sense, the prospective implementing Act for the CHDS will need to move from a *single access point* to a *single market for data* model for digital cultural content. This is essential to avoid taking the wrong exit at the roundabout, which might lead the EC to abandon the CEDS path for CHDS for once and forever – an outcome which would be fully detrimental not only from the perspective of the fulfilment of the European Strategy for Data but also for the cultural and economic prosperity of European citizens and businesses.

204 See: Commission Staff Working Document on Common European Data Spaces (n 17).

205 Regulation (EU) 2022/868 (n 21), Article 3(2).

206 See: COM(2008) 513 final (n 47); COM(2015) 626 final (n 125).

207 See: Directive 2001/29/EC (n 127), Directive 2012/28/EU (n 129); Directive (EU) 2019/790 (n 78). Also see: Dore and Turan (n 62).

208 Benabou and others. (n 189); Dusollier (n 191); Sappa and Widla (n 188).

209 Proposal for a Regulation of the European Parliament and of the Council on the European Health Data Space, COM(2022) 197 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0197>> accessed 29 December 2024.