
2. The protection of cultural heritage by copyright and related rights

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INTRODUCTION

If we are to assume that the concept of heritage points to the fact that whatever object that forms part of cultural heritage has a certain age, in the sense that it takes decennia to acquire the importance and relevance that makes it being perceived as heritage, then this chapter can be very short indeed. Copyright in a work (of cultural heritage) expires after the life of its author plus 70 years,¹ and for related rights the term of protection tends to be even shorter. Most of our cultural heritage is therefore in the public domain and is no longer protected by copyright or related rights. And the clear tendency in EU law is to preserve the public domain once copyright has expired and not to allow the erection of new hurdles to access.²

It is that last aspect that we will turn to first. That will bring us to digitisation and reproduction of those works of cultural heritage that are still in copyright and to which the general assumption mentioned above does not apply. And in a third stage we will turn to moral rights. In countries such as the United Kingdom, where the term of protection for moral rights is the same as the term of protection for economic rights,³ there is of course not a lot ~~further~~ to discuss, but in a vast number of countries, moral rights are perpetual⁴ and pass to the heirs or even to the state, and then moral rights may become the ‘copyright’ tool to protect cultural heritage.

REPRODUCTIONS OF WORKS OF ART IN THE PUBLIC DOMAIN

Cultural heritage institutions *de facto* control access to cultural heritage works even if the latter have entered the public domain. In a typical example, I will need to visit the museum if I want to see the original copy of an ancient Greek statute. When I buy the entrance ticket, the museum may use contractual means to control access, e.g., by prohibiting the making of

¹ Or life of the author plus 50 years in those countries that stick to the Berne and TRIPS minimum.

² Recital 53 to Directive 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. And see European Copyright Society, Comment of the European Copyright Society on the Implementation of Art. 14 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs_cdsm_implementation_Article_14_final.pdf.

³ Section 86(1) Copyright, Designs and Patents Act 1988, see P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Oxford University Press, (9th ed, 2019), pp.228–229. That approach is not unique. It, e.g., also applies in Belgium according to Article XI.166 § 1 WER (code of economic law).

⁴ E.g. in France, see Article L121-1 Code de la Propriété Intellectuelle.

photos or videos of the objects contained in its collection. Often such a contractual term is combined with a museum shop offering the visitor a faithful reproduction of the statue in our example, be it as a replica or as a photograph on a postcard. These faithful reproductions often come with a copyright notice and, assuming that notice is backed up by the national copyright law granting copyright to such a faithful reproduction, that means that access is restricted further as the buyer will not be able to reproduce the work or the statue or communicate the work to the public.⁵

This came to be seen as a problem and Article 14 Digital Single Market (DSM) Directive⁶ contains an attempt to address the matter. The starting point is that a work of visual art can be reproduced, communicated to the public or used otherwise without the authorisation of the author once the copyright in the work has expired. But that obvious starting point is then expanded upon with a provision stating that no copyright shall exist in a faithful reproduction of such a work of visual art that is in the public domain. Article 14 covers both copyright and related rights *expressis verbis* and it does therefore also stop the application of mechanisms such as the one found in Article 72 of the German Copyright Act⁷ that put in place a weaker regime of protection for non-original photographs and that had been held by the Bundesgerichtshof to cover faithful reproduction.⁸ Whereas related rights for non-original photographs, or in a system such as the UK one, copyright in them, are the main target of Article 14, other related rights are evidently also affected if they cover faithful reproductions of works of visual art. One could, for example, think of rights covering non-original audiovisual recordings.⁹ The exclusion from copyright will enter into effect at the moment the works of visual art enter the public domain, irrespective of when the reproduction was made, which is shown by the use of the term ‘when (the term of protection has expired)’ rather than the term ‘if’, which would have pointed towards a re-condition (that needed to be met when the reproduction was made).

What is the impact of this restriction on the protection of cultural heritage works by copyright and related rights? In as far as these faithful reproductions provide access to the works of cultural heritage that are works of visual art, they do not merely provide an income to cultural heritage institutions; copyright and related rights in the reproductions also allow them to control further use and adaptations. That tool has now disappeared. But it does not mean that they need to allow the production of reproductions by third parties, let alone the use of any kind of advanced technology for that purpose. And when allowing access and the use of certain technologies in making reproductions, contractual provisions that impose financial

⁵ Recital 53 to Directive 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.

⁶ 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.

⁷ Urheberrechtsgesetz – UrhG, https://www.gesetze-im-internet.de/englisch_urhg/.

⁸ Case I ZR 104/17 *Museumsfotos*, German Federal Supreme Court (Bundesgerichtshof), 20 December 2018, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=92142&pos=0&anz=1>. Article 14 of course only changes the outcome in relation to works of visual art and faithful reproductions thereof.

⁹ European Copyright Society, Comment of the European Copyright Society on the Implementation of Art. 14 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/eecs_cds_m_implementation_Article_14_final.pdf.

conditions and, more importantly, restrictions on the use of the reproduction can still be put in place. One should of course not overlook the fact that Article 14 only covers faithful reproductions. It is explicitly acknowledged that copyright and related rights will continue to exist in any reproduction that is original in the sense that it is the author's own intellectual creation. In other words, reproductions that pass the originality test as laid down in the *Infopaq* case¹⁰ will remain protected by copyright.¹¹ In practice this means that galleries, museums and other institutions that have works of visual art in their collections will still be able to offer via their web shops and museum shops high-quality faithful reproductions of these works and price these accordingly.¹² Article 14 will merely restrict the copyright and related rights protection and, once acquired, these reproductions can therefore be used freely unless one has agreed to contractual restrictions on their use. But if these institutions want to use copyright and related rights as a tool to control further use of the reproductions, Article 14 pushes them towards reproductions that are not faithful reproductions and that offer added value, and through that added value meet the originality standard.

Digital Art and Non-fungible Tokens to the Rescue

At first one may think that replacing the good old postcard or other faithful reproduction by a creative adaptation style reproduction is a daft idea that will not provide an income for cultural heritage institutions; recent developments, though, question that assumption. I refer here to digital art and to the phenomenon of non-fungible tokens, or NFTs. Digital art is an artistic work that uses digital technology as part of the creative or presentation process. That relatively easily translates into a creative presentation of a work of art that itself is in the public domain for our current purposes. Reproductions can be made of such a digital artwork or 'creative presentation of a public domain work of art' and these can be sold in hard copies in museum shops or via cultural heritage institution websites where digital JPEG format¹³ versions can be offered for download. The problem, though, with JPEG files, as with any digital files, is that once they are out there or once a single copy has been acquired, they can be copied and transferred easily without loss of quality. That is not the most positive characteristic if a museum or cultural heritage institution wants to make money on the back of them and the standard technical protection measures are cumbersome and unpopular with the public. This is where the non-fungible token or NFT (phenomenon) comes in. Amongst super-fans of works of art that are in the public domain, but that are kept in a single cultural heritage institution location, there may be a market for the 'original' of the creative reproduction. Whereas fungible means are exchangeable, a non-fungible token is by definition non-exchangeable. NFTs are therefore unique collectible tokens that are permanently tied to works of digital art. They cannot be separated and in a sense the token is the art and the art is the token. A non-fungible token (NFT)

¹⁰ Case C-05/08 *Infopaq International A/S v Danske Dagblades Forening* ECLI:EU:C:2009:465.

¹¹ For an example in relation to photographs, see Cour de Cassation (France), Cass. 1ère civ. 11 mai 2017, n°15-29.374, ECLI:FR:CCASS:2017:C100563, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000034705564&fastReqId=441085215&fastPos=1>.

¹² P. Torremans, 'Presenting Best Practices for Copyright and Trademarks in Common Law Countries for Cultural Heritage and Museum Collections', paper delivered 11 September 2019 at WIPO Workshop on IP for Libraries/Museums at the Bibliotheca Alexandrina, Alexandria, Egypt.

¹³ Or Joint Photographic Experts Group, the standard for digital photography having been named after the group who created it.

is a unit of data stored on a blockchain or digital ledger. That unit of data certifies the digital asset to be unique and therefore not interchangeable. Plenty of other copies of the creative reproduction of the public domain work of art can be made, sold, copied and circulated, but there will only be one NFT certified original.¹⁴

And there is a market for such original NFT certified work. And that is an understatement, as in recent years the market for them has exploded and very significant sums are currently being paid. It may be a bubble that will burst one day, but for now it is a reality. The token under the reproduction gives it value and acts as a digital certificate of ownership that can be sold. The combination of copyright and the NFT may well assist cultural heritage institutions in this area.¹⁵

PRESERVATION OF CULTURAL HERITAGE: PERMISSION TO MAKE COPIES

Let us now move away from out-of-copyright works that are in the public domain. Due to the long term of copyright, there are plenty of cultural heritage works that are still in copyright. That copyright may not be held by the cultural heritage institutions that have these works in their collections, though. These institutions have, on the other hand, the task to preserve these works in as good a condition as possible. That may result in the need to reproduce the whole or part of the work to replace the original or to have an alternative copy that can be viewed, consulted and used by the public in those cases where the original has become too fragile for that purpose. The right of reproduction may stand in the way at that stage, even if it is merely cumbersome and time-consuming to gather all the permissions beforehand. Article 6 of the Digital Single Market Directive therefore puts in place an exception to the benefit of cultural heritage institutions.¹⁶

Acts of reproduction for preservation by cultural heritage institutions was an issue that was being dealt with in different ways by member states. This hampers cooperation and the sharing of means and resources and can have a negative impact on the preservation of cultural heritage.¹⁷ Article 6 of the Digital Single Market Directive addresses this issue through the introduction of a mandatory exception to permit cultural heritage institutions to reproduce works and other subject matter permanently in their collections for preservation purposes. Preservation purposes are seen in a rather wide sense here and do not merely include remedying the degradation of the original support or addressing its technical obsolescence (e.g., old digital formats that can no longer be opened under the latest software or films in formats for which projectors are no longer available), but the need to be able to insure works or other subject matter.¹⁸ An example of the latter could be making a digital copy of the Edwin Morgan

¹⁴ See <https://www.bbc.com/news/technology-56371912> (last accessed 29 May 2021).

¹⁵ See <https://www.abc.net.au/news/science/2021-03-06/nft-crypto-digital-art-could-be-bonanza-for-artists/13220228> (last accessed 29 May 2021).

¹⁶ For a more detailed analysis see I. Stamatoudi and P. Torremans, *EU Copyright Law: a commentary*, Edward Elgar Publishing, (2nd ed, 2021), Ch. 17.

¹⁷ Recital 26 to Directive 2019/790.

¹⁸ Recital 27 to Directive 2019/790.

Scrapbooks, as the originals held by the library of the University of Glasgow are fragile and may only be insured if they are not handled by all users.¹⁹

The same broad approach continues when it comes to defining works and other subject matter that are permanently in the collection of a cultural heritage institution, i.e., what can benefit from the preservation measures. Such works and other subject matter include the scenario where copies of such works or other subject matter are owned or permanently held by that institution, for example as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements. In other words, the emphasis is put on the aspect of permanency, rather than on the aspect of ownership and title.²⁰

Let us then turn to what Article 6 describes as the making of copies or, in essence, what can be done to preserve the work or subject matter. These copies can be made in any format or medium. That means in practice that the appropriate preservation tool can be chosen for each case and that the technology involved can vary. There is also no strict limit on the number of copies that can be made. And the copies can be made at any time in the lifecycle of the work.²¹ As these operations are often complex and involve specialist knowledge and equipment, cultural heritage institutions can provide assistance to one another and can rely on third parties acting on their behalf and under their responsibility, even if these are based in other member states.²²

But the exception only applies for the purposes of preservation, and the making of copies and the number of copies is limited to what is required for preservation purposes. Or as Recital 27 puts it: “Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject matter in their permanent collections should remain subject to the authorisation of rightholders, unless permitted by other exceptions or limitations provided for in Union law.”²³

The scope of the exception only involves the (exclusive) rights that it covers. These rights are the press publishers right in Article 15(1) of the Digital Single Market Directive, the right of reproduction in the 2001 Directive,²⁴ the right to make a permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole, in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction in Article 4(1)(a) of the Computer Programs Directive,²⁵ the right to make a temporary or permanent reproduction by any means and in any form, in whole or in part, and the *sui generis* right in the Database Directive (Articles 5(a) and 7(1)).²⁶

¹⁹ <https://www.digitisingmorgan.org/Edwin>, see P. Torremans, Copyright Infringement, Exceptions and Limitations and Access to Shared Cultural Heritage Across Borders in Andrea Wallace and Ronan Deazley, eds, *Display at Your Own Risk: An experimental exhibition of digital cultural heritage* (2016). Available at: <http://displayatyourownrisk.org/torremans/>.

²⁰ Recital 29 to Directive 2019/790.

²¹ Recital 27 to Directive 2019/790.

²² Recital 28 to Directive 2019/790.

²³ Recital 27 to Directive 2019/790.

²⁴ 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 167/1.

²⁵ 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) [2009] OJ L111/16.

²⁶ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

Article 7 of the Digital Single Market Directive²⁷ adds what it calls common provisions. For our current purposes it is important to note that paragraph (1) makes the exceptions that are created in implementing Article 6 mandatory. Parties can therefore no longer use contractual provisions to overrule them and such provisions in a contract shall be unenforceable. That re-enforces the position of cultural heritage institutions when acquiring works.

OUT-OF-COMMERCE WORKS

Cultural heritage works, the majority of which tend to have a certain age, are also frequently out-of-commerce works if they are not unique pieces, such as sculptures, paintings, etc. That means that copyright in these works may still exist, but that cultural heritage institutions cannot acquire additional copies and that any acts of reproduction, distribution and communication to the public are still restricted by the exclusive rights copyright provides for in this respect. When cultural heritage institutions want to go beyond the preservation of the works that was mentioned above and make these works available to the public, copyright can become a hindrance. Digitisation of works is a clear example of such efforts by cultural heritage institutions, as it involves an act of reproduction and as the digital copy may be communicated to the public. Copyright permissions are a real problem for out-of-commerce works as often there is no longer an entity that can supply the copies or even be used as a point of contact to clear rights. The Digital Single Market Directive defines out-of-commerce works as a work in relation to which it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public.²⁸ Verification of availability of a work shall normally take place in the member state where the cultural heritage institution concerned is established, unless verification across borders is considered reasonable, for example in cases where there is easily available information that a literary work was first published in a given language version in another member state. But one should keep in mind that when a work is available in any of its different versions, such as subsequent editions of literary works and alternative cuts of cinematographic works, or in any of its different manifestations, such as digital and printed formats of the same work, the work will not be considered to be an out-of-commerce work. Conversely, however, the commercial availability of adaptations, including other language versions or audiovisual adaptations of a literary work, should not preclude a work from being deemed to be out of commerce in a given language.²⁹

The Orphan Works' Directive already concerns certain uses of orphan works (i.e., works protected by copyright or related rights and whose rightholder(s) has not been identified or, even if identified, cannot be detected despite the fact that a diligent search has been conducted by the institutions who use the orphan works) by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public service broadcasting organisations, established in the member states, in order to achieve aims related to their public interest missions. The Digital Single Market Directive goes much further, however, in Article 8.

²⁷ Article 7 of Directive 2019/790.

²⁸ Article 8(5) of Directive 2019/790.

²⁹ Recital 37 of Directive 2019/790.

The clear idea in Article 8 is to provide the cultural heritage institution with a counterpart that can grant it a non-exclusive licence for non-commercial purposes for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works.³⁰ That counterpart role will be played by collective management organisations (CMOs). But there is an important restriction in the wording of Article 8. Only works that are permanently in the collection of the cultural heritage institution that is interested in digitising and making these works available online will be out-of-commerce works for the purposes of Article 8. According to Recital 29, works are considered to be permanently in the collection of a cultural heritage institution when copies of them are owned or permanently held by that institution, for example as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements. That will, of course, not stop these institutions from purchasing more works or acquiring them in another way, so the future pool of relevant works will become larger.

Digitisation and Other Uses Through Collective Management Organisations

That brings us in more detail to the main route provided in Article 8. Article 8(1) enables representative collective management organisations (CMOs) to issue licenses for the use of out-of-commerce works by cultural heritage institutions (CHIs).³¹ It does that irrespective of whether all rightholders covered by such licences have mandated the CMO with such rights.³² That does not, however, mean that rightholders have no say in the matter. All rightholders have the option to opt out and thus prevent cultural heritage institutions from digitising and making their works available online unless they conclude an individual licence with them. In practice this opt-out option relies on the fact that cultural heritage institutions and collective management organisations publish information about out-of-commerce works in what is called a ‘public single online portal’ that will be administered by the EUIPO. They need to do so six months before they make the works available online. This six-month period is intended to give rightholders the opportunity to opt out before their works are made available.³³ The other side of this coin is that once the six-month period has lapsed, the copyright liability of the cultural heritage institution disappears and they can make the works available on their website, digitise them, etc., for non-commercial purposes under the terms of the licence that has been agreed between the cultural heritage institution and the collective management organisation.

In this scenario member states should stipulate in their national law that where a *representative* collective management organisation exists – first of all in terms of rightholders in the relevant type of works and, second, of the rights that are the subject of the licence – this collective management organisation may (it has a discretion) conclude a *non-exclusive licence for non-commercial purposes* with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works that are permanently in its collection, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation at issue. The licence is

³⁰ For a more detailed analysis see I. Stamatoudi and P. Torremans, *EU Copyright Law: a commentary*, Edward Elgar Publishing, (2nd ed, 2021), Ch. 17.

³¹ As defined in Article 2 of Directive 2019/790.

³² Article 8(1) of Directive 2019/790.

³³ Article 10(1) of Directive 2019/790.

provided in accordance with its mandates from rightholders and all rightholders (whether they are its members or not) are guaranteed *equal treatment* in relation to the terms of the licence.

This can be seen as a form of extended collective licensing (ECL) along the lines of the Nordic system, as also non-members are covered by the licence.

The crucial prerequisite for this system is that a representative collective management organisation exists in the member state concerned. There may in other words be member states that either do not have a representative collective management organisation or where the collective management organisation is not (for example commercially) interested in providing such a licence, for commercial or other reasons, and in these situations the system cannot work. In addition, a licence will only be concluded if the parties, i.e., the collective management organisation and the cultural heritage institution, agree on its terms. That means that in case a collective management organisation is not interested in providing a licence or when the parties did not come to an agreement, rights need to be cleared in the traditional method or the out-of-commerce work will simply not be digitised or become available. This is a drawback, because while the Directive provides for an alternative route in Article 8(2), that route does not come into play, since it is only triggered if a representative collective management organisation does not exist. It is not triggered if a representative collective management organisation merely does not co-operate.³⁴

That brings us to the problem of which collective management organisation a cultural heritage institution should turn to, i.e., is there a choice in case one collective management organisation either does not wish to grant a licence or proposes what are considered to be unreasonable terms? Article 8(6) rules out any forum shopping or competition between collective management organisations and stipulates that a cultural heritage institution should seek a licence from a representative collective management organisation in the territory where it is established.³⁵ That solution has the advantage of simplicity, but it brings with it the risk of territoriality. Licences that are only valid in the country of establishment are not a great tool in the internet era, where things are by definition of a cross-border nature. Article 9(1)³⁶ overcomes that risk by obliging member states to ensure that licences granted under Article 8(1) allow for the use by cultural heritage institutions of out-of-commerce works in any member state separately or in all member states in a cross-border manner.³⁷ That clearly facilitates digitisation and use of works even further, especially because most – if not all – cultural heritage institutions' websites are available and accessible throughout the EU. Thus, collective management organisations should be able to provide multi-territorial licences without the need for countries to establish extra requirements for such a possibility, as is the case with multi-territorial licences for online uses of musical works.³⁸ It is, however, obvious that the

³⁴ Article 8(3) of Directive 2019/790.

³⁵ Article 8(6) of Directive 2019/790.

³⁶ Article 9(1) of Directive 2019/790.

³⁷ See Recital 31 according to which “All Member States should have legal mechanisms in place allowing licences issued by relevant and sufficiently representative collective management organisations to cultural heritage institutions, for certain uses of out-of-commerce works or other subject matter, to also apply to the rights of rightholders that have not mandated a representative collective management organisation in that regard. It should be possible, pursuant to this Directive, for such licences to cover all Member States.”

³⁸ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72 (Articles 23–32).

standards of the Directive on Collective Management apply and the collective management organisations involved should abide by them.³⁹

The option to provide broad licences that cover at least the whole of the EU should, of course, not be turned into an obligation. It is worth referring here to Recital 40, where it is provided that cultural heritage institutions and collective management organisations

should remain free to agree on the territorial scope of licences, including the option of covering all Member States, the licence fee and the uses allowed. Uses covered by such licences should not be for profit-making purposes, including where copies are distributed by the cultural heritage institution, such as in the case of promotional material about an exhibition. At the same time, given that the digitisation of the collections of the cultural heritage institution can entail significant investments, any licences granted under the mechanism provided for in this Directive should not prevent cultural heritage institutions from covering the costs of the licence and the costs of digitising and disseminating the works or other subject matter covered by the licence.⁴⁰

Digitisation and Other Uses by Means of an Exception

Article 8(2) deals with the second option for cultural heritage institutions, but this second option only applies in the absence of a representative collective management organisation. When there is no representative collective management organisation that is able to issue licences for a certain type of work, cultural heritage institutions can rely on an exception that allows them to make out-of-commerce works in their collection available online, digitise them, etc.⁴¹ That does, however, again not mean that rightholders have no say in the matter. All rightholders have the option to opt out and thus prevent cultural heritage institutions from digitising and making their works available online unless they conclude an individual licence with them. In practice, this opt-out option relies on the fact that cultural heritage institutions publish information about out-of-commerce works in what is called a ‘public single online portal’ that will be administered by the EUIPO.⁴² They need to do so six months before they make the works available online. This six-month period is intended to give rightholders the opportunity to opt out before their works are made available.⁴³ The other side of this coin is that once the six-month period has lapsed, the copyright liability of the cultural heritage institution disappears and they can make the works available on their website, digitise them, etc., for non-commercial purposes.

In practice, a member state needs to provide for an exception or limitation on the basis of which out-of-commerce works can be digitised and become available online according to what is provided in paragraph 2 of Article 8 if a representative collective management organisation does not exist in the member state concerned for a specific type of work. Such

³⁹ See Recital 34 Digital Single Market Directive. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72.

⁴⁰ Recital 40 to Directive 2019/790.

⁴¹ Article 8(2) of Directive 2019/790.

⁴² P. Keller, ‘Explainer: What will the new EU copyright rules change for Europe’s Cultural Heritage Institutions’, Europeana Pro, <https://pro.europeana.eu/post/explainer-what-will-the-new-eu-copyright-rules-change-for-europe-s-cultural-heritage-institutions>.

⁴³ Article 10(1) of Directive 2019/790.

an exception or limitation more specifically needs to cover (a) reproduction, communication to the public and the making to the public available right (Article 4(1) of Directive 2009/24/EC), (b) all restricted acts pertaining to software (Article 4(1) of Directive 2009/24/EC), (c) all restricted acts pertaining to copyrightable databases – except for the right of distribution – and to databases protected by a *sui generis* right (Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC), and (d) the rights provided for the press publication in the Digital Single Market Directive. In terms of content, this exception should allow cultural heritage institutions to make out-of-commerce works available, for *non-commercial purposes*, that are permanently in their collections, on condition that the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible, and such works or other subject matter are made available on non-commercial websites.

Recital 32 summarises the position for these cases where there is no practice of collective management of rights for a certain type of work or other subject matter or where the relevant collective management organisation is not sufficiently representative for the category of the rightholders and of the rights concerned in a particular country as follows:

In such particular instances, it should be possible for cultural heritage institutions to make out-of-commerce works or other subject matter that are permanently in their collection available online in all Member States under a harmonised exception or limitation to copyright and related rights. It is important that uses under such exception or limitation only take place when certain conditions, in particular as regards the availability of licensing solutions, are fulfilled. A lack of agreement on the conditions of the licence should not be interpreted as a lack of availability of licensing solutions.⁴⁴

Issues of Supervision

The Directive is, on the other hand, less specific when it comes to the issue of supervision and it is left to the member states to decide who will have legal supervision responsibility when it comes to the compliance of the licensing of out-of-commerce works and to their use, within the conditions set out in this Directive. The same applies when it comes to the compliance of the parties concerned with the terms of those licences.⁴⁵

Opt-out and Publicity Measures

It was already mentioned above that according to Article 8(4)⁴⁶ member states should provide rightholders with the option to opt out of the licensing option in paragraph 1 and the use of the exception in paragraph 2. Rightholders can opt out in a general way, or merely in specific cases. Rightholders are obliged to provide that all rightholders may, at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism set out in paragraph 1 or from the application of the exception or limitation provided for in paragraph 2, either in general or in specific cases. That includes opting out after the conclusion of a licence or after the use concerned has begun in application of the limitation or exception. It speaks for itself that this opt-out mechanism can only function appropriately if the rightholder is aware that

⁴⁴ Recital 32 to Directive 2019/790.

⁴⁵ Recital 36 to Directive 2019/790.

⁴⁶ Article 8(4) of Directive 2019/790.

their works are included in the target list of out-of-commerce works. Article 10 therefore puts in place a set of publicity measures, to which we now turn in a bit more detail.⁴⁷

A single portal is established at EU level, but the information in it needs to be supplied from the national level. The Directive therefore obliges member states to provide in their national laws that (a) information sourced from cultural heritage institutions, collective management organisations or relevant public authorities enables the identification of out-of-commerce works (that are either (potentially) covered by a licence or used under the exception or limitation), (b) information about the options available to rightholders under the opt-out provision (Art. 8(4)), and (c) where available and relevant, information on the parties to the licence, the territories covered and the uses is made permanently, easily and effectively accessible in a *public single online portal*. That needs to be the case at least *six months* before any of the authorised or exempted acts (i.e., distribution, communication to the public or making available to the public in accordance with the licence or under the exception or limitation) are performed.⁴⁸ The portal shall be established and managed by the European Union Intellectual Property Office (Regulation (EU) No 386/2012).⁴⁹ This provision does not preclude the case where other types of information ~~is~~ also included so as to facilitate the application of the mechanisms.⁵⁰ This information should be adequately publicised both before and during the use under a licence or under the exception or limitation, as appropriate, because the rightholder can opt out at any stage. Such publicity is particularly important when uses take place across borders in the internal market.⁵¹

⁴⁷ Article 10 of Directive 2019/790.

⁴⁸ See Recital 35: “Appropriate safeguards should be available for all rightholders, who should be given the opportunity of excluding the application of the licensing mechanisms and of the exception or limitation, introduced by this Directive for the use of out-of-commerce works or other subject matter, in relation to all their works or other subject matter, in relation to all licences or all uses under the exception or limitation, in relation to particular works or other subject matter, or in relation to particular licences or uses under the exception or limitation, at any time before or during the term of the licence or before or during the use under the exception or limitation. Conditions governing those licensing mechanisms should not affect their practical relevance for cultural heritage institutions. It is important that, where a rightholder excludes the application of such mechanisms or of such exception or limitation to one or more works or other subject matter, any ongoing uses are terminated within a reasonable period, and, where they take place under a collective licence, that the collective management organisation once informed ceases to issue licences covering the uses concerned. Such exclusion by rightholders should not affect their claims to remuneration for the actual use of the work or other subject matter under the licence.”

⁴⁹ Recital 41 “[...] Under Regulation (EU) No 386/2012 of the European Parliament and of the Council, the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary means and aimed at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against, including the prevention of, infringement of intellectual property rights. It is therefore appropriate to rely on that Office to establish and manage the portal making such information available. [...]”

⁵⁰ “It needs to allow batch uploads via a web interface and APIs and support commonly used metadata formats used within the cultural heritage sector. To be meaningful for visual works the portal further needs to allow the publication of reduced size thumbnails as part of the required identifying information.”

P. Keller, Independent Policy Advisor to Europeana Foundation Explainer: What will the Digital Single Market directive change for cultural heritage institutions? Europeana Foundation, June 2019 https://pro.europeana.eu/files/Europeana_Professional/Publications/Explainer_%20What%20will%20the%20DSM%20directive%20change%20for%20cultural%20heritage%20institutions_%20090619.pdf.

⁵¹ Recital 41 to Directive 2019/790.

Allowing the rightholder to opt out at any stage does not merely offer flexibility to the rightholder in a sign of respect for their exclusive right; it also has an impact on the activities that the cultural heritage institution has already deployed. While the logical consequence of the appearance of an opt-out is that a rightholder excludes the application of either of the mechanisms (i.e., licensing of their works or the application of the exception) and that any ongoing uses are terminated, the cultural heritage institutions are allowed a reasonable period within which to terminate any use. And, where the use takes place under a collective licence, the collective management organisation will, once it has been informed of the opt-out, stop issuing licences covering the works and uses concerned. Such exclusion by rightholders will not affect their claims to remuneration for the actual use of the work under the licence.⁵² It is clear from the presence of the opt-out option that the exception at issue is not mandatory.

It is clear that in terms of publicity, this is only the bare minimum. The member state where the licence is sought under Article 8(1), or in the case of a use under the exception or limitation under Article 8(2) where the cultural heritage institution is established, also has the ability to provide for ‘additional appropriate publicity measures’ – if necessary – for the general awareness of rightholders. These measures concern (i) the ability of collective management organisations to license out-of-commerce works, (ii) the licences granted or uses allowed under the exception or limitation, and (iii) the options available to rightholders through the opt-out.⁵³ In this respect the system of publicity is reinforced even further to the benefit of rightholders without, however, providing for an extension of the initial six-month period.⁵⁴ And if there is evidence, such as the origin of the works or other subject matter, to suggest that the awareness of rightholders could be more efficiently raised in other member states or third countries, such publicity measures should also cover those member states and third countries.

Stakeholder Dialogue

All of this is rather new and all kind of complexities that are not dealt with in detail by the Directive are bound to arise. Cultural heritage institutions may find themselves confronted with the need to identify large numbers of works as being out-of-commerce works, especially when it comes to works other than published works (e.g., books and journals), such as artworks, audiovisual works or photographs; this may become particularly cumbersome. Another difficult case that may well arise is where a collective management organisation is representative but is not interested in licensing an out-of-commerce work, because, for example, this is not commercially interesting for it (or merely because it cannot agree to the contractual terms

⁵² Recital 35 to Directive 2019/790.

⁵³ Article 8(4) of Directive 2019/790.

⁵⁴ See also Recital 41 “[...] In addition to making the information available through the portal, further appropriate publicity measures might need to be taken on a case-by-case basis in order to increase the awareness in that regard of the rightholders concerned, for example through the use of additional channels of communication to reach a wider public. The necessity, the nature and the geographic scope of the additional publicity measures should depend on the characteristics of the relevant out-of-commerce works or other subject matter, the terms of the licences or the type of use under the exception or limitation, and the existing practices in Member States. Publicity measures should be effective without the need to inform each rightholder individually.”

suggested by the cultural heritage institution. In these cases, there is a risk that the whole process cannot go ahead.⁵⁵

And in the same vein, not all works and their management and exploitation have the same particularities. In order to reflect the specificities of different types of work (or other subject matter) as regards modes of publication and distribution, and to facilitate the usability of those mechanisms, specific requirements and procedures may have to be established for the practical application of those licensing mechanisms, such as a requirement that a certain time period should have elapsed since the work was first commercially available. The Directive provides that it is appropriate that member states consult rightholders, cultural heritage institutions and collective management organisations when they establish such requirements and procedures.⁵⁶

All of this shows the importance of a stakeholder in this context.⁵⁷ Article 11⁵⁸ turns that into a practical reality and stipulates that member states should consult rightholders, collective management organisations and cultural heritage institutions in each sector before they establish the specific requirements for out-of-commerce works pursuant to Article 8(5). And they should encourage regular dialogue between representative users' and rightholders' organisations, including collective management organisations, and any other relevant stakeholder organisations, on a sector-specific basis, to foster the relevance and usability of the licensing mechanisms set out in Article 8(1) and to ensure that the safeguards for rightholders referred in the Directive's relevant provisions remain effective.

No Replacements, but Additional Measures

It remains of course the case that the measures provided in these articles to facilitate the collective licensing of rights in out-of-commerce works should not impinge on the use of such works under the exceptions or limitations provided for in EU law, or under other licences with an extended effect, where such licensing is not based on the out-of-commerce status of the covered works. These measures should also not prejudice national mechanisms for the use of out-of-commerce works that are based on licences between collective management organisations and users other than cultural heritage institutions.⁵⁹ These are new, additional measures, and they do not replace existing copyright law and licensing arrangements set up under it.

⁵⁵ P. Keller, Independent Policy Advisor to Europeana Foundation Explainer: What will the Digital Single Market directive change for cultural heritage institutions? Europeana Foundation, June 2019 https://pro.europeana.eu/files/Europeana_Professional/Publications/Explainer_%20What%20will%20the%20DSM%20directive%20change%20for%20cultural%20heritage%20institutions_%20090619.pdf.

⁵⁶ Recital 37 to Directive 2019/790.

⁵⁷ See Recital 42: "In order to ensure that the licensing mechanisms established by this Directive for out-of-commerce works or other subject matter are relevant and function properly, that rightholders are adequately protected, that licences are properly publicised and that legal certainty is provided with regard to the representativeness of collective management organisations and the categorisation of works, Member States should foster sector-specific stakeholder dialogue."

⁵⁸ Article 11 of Directive 2019/790.

⁵⁹ Recital 42 to Directive 2019/790.

Cross-border Uses

Licences granted by a national collective management organisation in the member state where the cultural heritage institution is established stand in sharp contrast with the cross-border nature of the Internet. As already mentioned above, Article 9(1)⁶⁰ overcomes that issue by obliging member states to ensure that licences granted under Article 8(1) allow for the use by cultural heritage institutions of out-of-commerce works in any member state separately or in all member states in a cross-border manner.⁶¹ This approach is vital for the success of the measures. Digitisation may involve significant investments that may not be capable of being recouped on a purely national basis, and cultural heritage institutions may wish to attract an international audience. It is therefore important that the use authorised by the licence provided for in Article 8 can cover use by cultural heritage institutions in all member states. An example of such use that comes to mind is the cross-border use on the promotional material for an exhibition. Collective management organisations may historically on the other hand only have the national rights available for licensing, and use in other member states could therefore remain an infringing use. Paragraph one of Article 9 obliges member states therefore to make a licence allowing for cross-border use. As a result, all the options remain open and contracting cultural heritage institutions and collective management organisations remain free to negotiate and agree on the territorial scope of licences, including the option of covering all member states, the licence fee and the uses allowed, and to make suitable and appropriate choices in this respect.⁶² And there is no real risk of forum shopping for a cheap deal, as the cultural heritage institutions are based in one place and will have to deal with the local collective management organisation for works in their collections.

But there is another, potentially burdensome, side to this very welcome approach. Member states will introduce national exceptions and limitation into their national copyright law to implement Article 8 of the Directive. That means by definition that there will be 27 different versions of the exception and limitation and also the licensing provisions will differ member state by member state. That creates potentially serious issues of applicable law, as copyright laws are applied country by country in a territorial manner. Or to put it bluntly, Article 8(1) Rome II Regulation⁶³ would result here in the application of the law of the country for which protection is sought on a country-by-country basis for each country where the use takes place. Even if they have a licence or can rely on an exception and limitation, cultural heritage institutions would have to deal with 27 national laws that are based on the same principles, but whose details differ. The application of multiple laws on a country-by-country basis is undesirable here and would place an additional heavy burden on the cultural heritage institutions. This is avoided by the creation of a presumption that any use of works under the exception or

⁶⁰ Article 9(1) of Directive 2019/790.

⁶¹ See Recital 31, according to which “All Member States should have legal mechanisms in place allowing licences issued by relevant and sufficiently representative collective management organisations to cultural heritage institutions, for certain uses of out-of-commerce works or other subject matter, to also apply to the rights of rightholders that have not mandated a representative collective management organisation in that regard. It should be possible, pursuant to this Directive, for such licences to cover all Member States.”

⁶² Recital 40 of Directive 2019/790.

⁶³ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

limitation is deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established.⁶⁴ Article 8(1) then results in the application of a single law that will be the law of the exception and limitation and the law of the place of establishment of the cultural heritage institution involved.⁶⁵

MORAL RIGHTS

There are countries where the duration of moral rights is linked to the duration of the economic rights in copyright and there are countries where moral rights are perpetual. We referred to that distinction above. This is an important distinction, but one we can leave to one side for a moment.

The Paternity Right

The author has the moral right to be identified in their capacity as the author of the work.⁶⁶ That means that cultural heritage institutions should identify the author in their authorial capacity whenever the work is shown, reproduced or communicated to the public.⁶⁷ The same applies in relation to reproductions of the work, and if these productions are original and attract copyright protection, the author of the reproductions enjoys the same paternity right.⁶⁸ Separating both and clearly identifying who is the author of which (part of the) work is then of course also of the essence. In principle, the paternity right only needs to be observed until the moral rights expire, but as moral rights are territorial in nature just as any other aspect of copyright, global exploitation, especially when it comes to communication to the public on the internet, results in the application of the *lex loci protectionis* on a country-by-country basis around the world.⁶⁹ That means that at least in some jurisdictions perpetual moral rights, including the right of paternity, will apply. It is therefore advisable that cultural heritage institutions always, and without temporal restriction, observe the paternity right and identify the author in their authorial capacity.

⁶⁴ Article 9(2) of Directive 2019/790.

⁶⁵ J.J. Fawcett and P. Torremans, *Intellectual Property and Private International Law*, Oxford University Press (2nd ed, 2011), Ch. 12.

⁶⁶ Article 6(bis) Berne Convention 1886.

⁶⁷ See in general for Belgium P. Torremans and J. Deene, 'Belgium', in G. Davies and K. Garnett, *Moral Rights*, Sweet & Maxwell (2nd ed, 2016), Chapter 11, p.337 *seq.* and for the United Kingdom P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Oxford University Press (9th ed, 2019), Chapter 14.

⁶⁸ See e.g the UK case. *John Walmsley v. Education Limited t/a Oise Cambridge* [2014] 3 WLUK 354 (IPEC), paras. 11–13.

⁶⁹ European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property: The Clip Principles and Commentary*, Oxford University Press (2013), 231. J.J. Fawcett and P. Torremans, *Intellectual Property and Private International Law*, Oxford University Press, (2nd ed, 2011), 13.52–13.56, pp.708–710.

The Integrity Right

In its most advanced, or shall we say most extreme, incarnation in national copyright laws, the integrity right gives the author the right to oppose any alteration to their work, even if they have transferred all the economic rights in the work.⁷⁰ That can give rise to significant problems,⁷¹ as almost any preservation or other efforts by cultural heritage institutions will involve some kind of changes to the work. The involvement of digital technology inevitably leads to that result. Digitisation involves a change of technical format and the resolution/number of pixels and the format/inevitable resizing do result in changes and alterations, even if one attempts to stay as close as possible to the original. To make things even more sensitive, most national laws accept that the author who invokes their integrity right does not have to show that they suffered any prejudice or damage.⁷²

Many national legal systems do, however, accept that such a strict approach can in practice make things unworkable. It is then accepted that those who exploit works that are protected by copyright can make such modifications as are customary for the particular mode of exploitation, such as formatting, etc., without the permission of the author and that the author cannot in all reasonableness and fairness oppose these.⁷³ It followed in practice, for example, in Belgian case law that the remastering of a recording in order to improve the sound quality cannot violate the moral rights of the composer of the work when the cover of the CD states explicitly that the recording has been remastered and remixed. In the same way, the distribution of a fragment of a recording for mere promotional purposes cannot violate the moral right of the composer when it is clearly stated that what is circulated is only a fragment.⁷⁴ This case law can easily be translated into the digitisation and original representation contexts and the issue that arises in this area for cultural heritage institutions. Careful digitisation efforts that mention that the work has been digitised whenever the outcome is used, reproduced or communicated to the public will therefore be entirely unlikely to infringe the integrity right. Another example from the Belgian courts shows that a photographer of a dish with cheese croquettes against a pale blue background could not successfully invoke his integrity right when the blue background was replaced by a yellow one on new packaging for the product. The background colour had in this case no special function or link with the dish of cheese croquettes and was not determinative from an aesthetic point of view.⁷⁵ That in turn opens up a framework and perspectives for original representations, without falling foul of the integrity right of the original author. This becomes even clearer if one contrasts it with the case in which the unauthorised – and from

⁷⁰ See e.g. in Belgian copyright law Article XI.165(2)(6) of the Code of Economic Law and Civ. Brussels, 17 October 1996, [1996] *Auteurs & media* 430 and A. Berenboom, *Le nouveau droit d'auteur et les droits voisins*, Brussels: Larcier, (4th ed, 2008), 185, nos 101, 107 and 190.

⁷¹ See in general for Belgium P. Torremans and J. Deene, 'Belgium', in G. Davies and K. Garnett, *Moral Rights*, Sweet & Maxwell (2nd ed, 2016), Chapter 11, p.337 *seq.* and for the United Kingdom P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Oxford University Press (9th ed, 2019), Chapter 14.

⁷² See e.g. in Belgium: Cass. 8 May 2008 (Belgian Supreme Court), [2009] *Auteurs & Media* 102, annotated by F. Gotzen and [2008] ICIP 605, annotated by P. Campolini and B. Michaux.

⁷³ H. Vanhees, *Auteursrecht in een notendop*, Leuven: Garant (1998), 54; A. Berenboom, *Le nouveau droit d'auteur et les droits voisins*, Brussels: Larcier (4th ed, 2008) 192, no. 107c and 197, no. 109.

⁷⁴ Court of Appeal Brussels, 19 June 2006, [2006] *Auteurs & Media* 438, annotated by O. Sasserath.

⁷⁵ Court of Appeal Brussels, 27 June 2007, no.2004/AR/1013, unreported.

a technical point of view, unnecessary – modernisation of a logo for fabric softeners was held to constitute an infringement of the integrity of the creation of the original designer.⁷⁶

In other countries, such as the United Kingdom,⁷⁷ the scope of the integrity right is much more limited. In these countries the copyright law sticks much more narrowly to the text of Article 6 bis Berne Convention, which stipulates that the minimum scope of the integrity right is the right “to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation”. Infringement of the integrity right will then require the cumulative proof of honour and reputation and prejudice to that honour and reputation as a result of the treatment that is meted out to the work.⁷⁸ This integrity right can then, of course, not apply to any modification or be exercised at the discretion of the author. Instead, it has to be proven “that the distortion or other mutilation of [the] work really prejudices [the author’s] lawful intellectual or personal interests in the work”.⁷⁹ This involves the balancing of all relevant interests involved. An important factor in this balancing exercise will be the purpose and the character of the use of the work in order to arrive at a fundamentally fair balance between the interests of the author and the user of the work.⁸⁰ Acts of preservation and digitisation to keep the original of the work in good shape and at the same time guarantee access to the user must therefore have a good chance of not being held to amount to derogatory treatment that conflicts with the integrity right of the author. No doubt the same conclusion as the one that applied in the stricter systems also applies here, and those who exploit works that are protected by copyright can make such modifications as are customary for the particular mode of exploitation, such as formatting, etc., without the permission of the author and the author cannot in all reasonableness and fairness oppose these, especially when this is done by cultural heritage institutions within the scope of their mission and according to the standards generally applicable in the relevant area.

Consent and Waivers

In the United Kingdom the owner of the moral right can consent to certain things being done and these will then not be an infringement of the moral rights concerned.⁸¹ Other jurisdictions will not go that far, but arguably the author can always (tacitly) consent to their name not being mentioned or to certain treatment of the work and promise not to rely on the moral rights concerned. All of this may then not be enforceable, but it is submitted that it could reduce the damages to a nominal amount. Whenever possible, cultural heritage institutions are well advised to seek the consent of the author or the owner of the moral right whenever they feel their activities could affect the moral rights.

⁷⁶ Civ. Tournai, 8 September 1997, [1997] *Ingénieur Conseil* 357.

⁷⁷ Section 80(1) Copyright, Designs and Patents Act 1988.

⁷⁸ P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Oxford University Press (9th ed, 2019), 231–233. *Confetti Records, Fundamental Records & Andrew Alcee v. Warner Music UK Ltd (t/a East West Records)* [2003] ECDR 336.

⁷⁹ A. Dietz, ‘The Artist’s Right of Integrity under Copyright Law: A Comparative Approach’ (1994) 25 *IIC* 177, at 183.

⁸⁰ P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Oxford University Press (9th ed, 2019), 232.

⁸¹ Section 87(1) Copyright, Designs and Patents Act 1988.

In the United Kingdom the copyright act even allows one to waive their moral rights and to surrender them in advance by means of a written and signed instrument.⁸² Most national laws around the world do not have an equivalent for this radically flexible rule⁸³ and cultural heritage institutions are therefore advised not to rely on it in the digital age.

CONCLUSION

The new legislation that is designed to bring copyright and related rights into the digital age and address specific issues⁸⁴ creates opportunities for preservation and digitisation for cultural heritage institutions. There are opportunities there that can be put to good and productive use in the interest of all parties involved. And as we demonstrated, moral rights will not be a hindrance in that respect if industry standards of the digital era are observed. It is therefore important to continue and to strengthen the dialogue between the cultural heritage institution community on the one hand and the copyright and related rights community on the other hand.

⁸² Sections 87(2) and (3) Copyright, Designs and Patents Act 1988.

⁸³ P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Oxford University Press (9th ed, 2019), 237.

⁸⁴ See I. Stamatoudi and P. Torremans, *EU Copyright Law: a commentary*, Edward Elgar Publishing, (2nd ed, 2021), Ch. 17.