The connection between Cultural Development, Copyright protection, and Technological Innovation: the evolving notion of culture in the EU moving towards a more dynamic model*

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ABSTRACT

The article aims to investigate the evolution of EU notion of "culture", which during the time has been perceived as both an economic factor and a symbol of shared identity.

Analyzing all the rules and mechanisms having cultural repercussions, especially the funding programs, the article underlines that the impact of technological innovation on the creation and distribution of cultural works encouraged the EU Institutions to change their approach. Thus, the EU regulation having cultural impact has progressively moved from a regulation based on the "cultural exception" to a discipline providing for a high level of protection of author rights, approximating the national copyright systems and promoting the activities of cultural and creative industries.

This process contributed to affirm a dynamic conception of culture, focused on the promotion of new cultural creations through the stimulation of creativity rather than on the preservation and valorization of existing cultural sites and goods.

This dynamic concept inspired the Directive 2014/26, providing for the discipline of the Right Collective Management Organizations (CMOs), and the Commission proposals, presented in September 2016, aiming to promote a fair, efficient and competitive European copyright-based economy in the Digital Single Market.

The dynamic notion of culture is also promoted by the European Commission within the negotiations of bilateral agreements with trade partnership, even if until today only within the CETA the cultural issues and copyright received a proper discipline.

In conclusion, the article shows that the State reticence in properly complying with the CMO discipline established by the Directive 2014/26 (clearly demonstrated by the Italian example), the slowness in the adoption of Commission proposals and the scarce references to cultural issues in the bilateral agreements are obstacle to the full affirmation of a dynamic notion of culture and to the realization of a consistent European Cultural Policy. The obstacles could be removed only putting the basis of a well-functioning and fair "European Cultural Market".

Key words: cultural goods/sites/expressions, European Cultural Policy, cultural exception, television broadcasters, intangible value, copyright, Information Society, network of cultural actors, cultural diversity, creativity, innovation, "Creative Europe", cultural and creative industries, static/dynamic notion of

culture, Collective Management Organizations (CMOs), Indipendent Management Entities, Digital Market, European Cultural Market, bilateral agreements, UNESCO clause, right to regulate, cultural cooperation.

SINTESI

L'articolo analizza l'evoluzione della nozione di cultura nell'UE, che nel tempo ha acquisito la duplice funzione di risorsa economica e simbolo di identità comune.

Esaminando la normativa e i meccanismi con ripercussioni in ambito culturale, specialmente i programmi di finanziamento, l'articolo sottolinea che l'impatto dell'innovazione tecnologica sulla creazione e distribuzione di opere artistiche ha indotto le Istituzioni europee ad un progressivo cambiamento di impostazione. Da una regolazione basata sulla c.d. "eccezione culturale", la regolazione europea avente implicazioni culturali si è progressivamente trasformata in una disciplina orientata a garantire un sempre più elevato livello di protezione dei diritti degli autori delle opere artistiche, ravvicinando i sistemi nazionali di copyright e puntando alla promozione di industrie culturali e creative in grado di realizzare nuovi prodotti culturali.

Il progressivo spostamento dell'attenzione delle Istituzioni europee dai beni e siti culturali agli attori culturali e al valore intangibile e simbolico dei beni e siti culturali ha contribuito, insieme agli impulsi provenienti dall'UNESCO, all'affermazione di una concezione dinamica di cultura, finalizzata alla promozione della realizzazione di nuovi prodotti culturali piuttosto che alla mera conservazione e valorizzazione di beni culturali esistenti. L'idea dinamica di cultura ha ispirato la Direttiva 2014/26/UE, recante la disciplina delle Organizzazioni di Gestione Collettiva dei diritti d'autore, e le proposte presentate dalla Commissione europea nel 2016 per offrire una maggiore protezione del copyright nel Mercato Digitale.

In più, la Commissione ha cercato di promuovere una nozione dinamica di cultura anche nei negoziati relativi agli accordi bilaterali con i partner commerciali, anche se ad oggi solo nell'ambito dell'accordo UE - Canada (CETA) si riscontrano disposizioni puntuali relative alla cooperazione culturale e ai temi relativi al copyright.

In conclusione, l'articolo mette in evidenza che gli sforzi delle Istituzioni per affermare sia a livello interno sia sul piano internazionale una nozione dinamica di cultura incontrano molti ostacoli. Basti pensare alle difficoltà nell'adozione delle proposte della Commissione su copyright e Mercato Digitale, agli scarsi riferimenti ai temi culturali negli accordi bilaterali e soprattutto alla reticenza mostrata dagli Stati nel trasporre la disciplina delle Organizzazioni di Gestione Collettiva.

In merito, è emblematico il caso dell'Italia, che solo con il recente Decreto 148 del 16 ottobre 2017 ha eliminato il monopolio SIAE nella raccolta dei diritti, comunque escludendo le entità di gestione indipendenti, che, a differenza delle Organizzazioni di Gestione Collettiva, svolgono tale attività a scopo di lucro. Gli ostacoli in parola potrebbero essere rimossi solo attraverso una chiara disciplina della governance (attori, strutture) del Mercato Culturale Europeo.

Parole chiave: *beni/siti/espressioni culturali, Politica Culturale Europea; eccezione culturale; emittenti televisive; valore intangibile; copyright; Società dell'Informazione; reti di attori culturali; diversità culturale; creatività; innovazione; "Europa Creativa"; industrie culturali e creative; nozione statica/dinamica di cultura; Organizzazioni di Gestione Collettiva; Entità di Gestione Indipendenti; Mercato Digitale; Mercato Culturale Europeo; accordi bilaterali; clausola "Unesco", autonomia regolativa; cooperazione culturale.*

1. Introduction

In the process of European integration, culture has gradually assumed a dual function as both an economic factor and a symbol of shared identity[34]. The need to take into account both these functions of culture has meant that, at the European level, a rather broad conception of culture has been contemplated since the very start, including not only material goods and archaeological and artistic sites, but also intangible goods (such as, for example, books and music). Nevertheless, historically, there has been a "static" conception of culture, concerned with protecting and valorizing the existing cultural heritage rather than promoting the production of new creative works.

Over the years, the two functions of culture seen as a resource to be valorized to obtain economic advantage and as a value in itself often collided, generating conflicts between actions put in place by the EU in different fields and mining their consistency. In an attempt to systematize the question, the EU Institutions tried to channel all the initiatives that might have a cultural effect into a single strategic pattern, mainly through some regulatory interventions falling within the field of the

[34] See E. TRIGGIANI, *Tutela internazionale ed europea dei beni culturali*, in AA.VV., *Cultura e culture. Patrimonio dell'umanità*, Vicenza, 2014, p. 7 ff.; M.L. TUFANO, S. PUGLIESE, *Patrimonio culturale europeo come veicolo di valori identitari*, in E. TRIGGIANI ET AL. (eds), *Dialoghi con Ugo Villani*, Bari, 2017, p. 685 ff.

internal market, driving a process that brought about a gradual evolution of the European notion of culture.

Starting from a critical reconstruction of the phases that have characterized the definition of a European conception of culture, this research intends to investigate whether the EU Institutions have been able to develop a coherent strategic system bringing together all actions that have cultural repercussions. The ultimate aim is to verify whether it is possible to speak about a real European Cultural Policy today.

2. The gradual affirmation of cultural issues within the European Economic Community (EEC)

Although the 1957 Treaty of Rome limited itself to including "the protection of national treasures possessing artistic, historic or archaeological value" among derogations to the free movement of goods (article 30 TCEE), from the 1970s, the EEC Institutions launched several various initiatives to fund the protection and valorization of some cultural sites and expressions considered highly symbolic of the common European identity[35].

After 1987, the need to accelerate the realization of the internal market and to take into account the role of the new means of communication in domestic cultural development determined the adoption of a number of acts with an indirect cultural influence. The reference is to Directive 89/552/EEC[36], "Televisions without frontiers", which, although it required broadcasters to reserve the majority of their transmission time to European works, offered the States, in establishing the

[35] European Parliament Resolution of 13th May 1974 on the motion for a resolution on measures to protect the European cultural heritage, *OJEC*, C 62 of 30th May 1974, p. 5 ff.; Commission Communication COM (77) 560, 2nd December 1977, *Community action in the cultural sector*, *Bulletin of the European Communities Supplement* 6 *I* 77; European Parliament Resolution of 8th March 1976 on Community action in the cultural sector, *OJEC*, C 79, 4th April 1976, p. 6 ff.; European Parliament Resolution of 14th September 1982 on the protection of the architectural and archaeological heritage, *OJEC*, C 267, 11th October 1982, p. 25 ff.; European Parliament Resolution of 28th October 1988 on the conservation of the Community's architectural and archaeological heritage, *OJEC*, C 309, 5th December 1988, p. 424 ff. On 13th June 1985, the intergovernmental "European Cities of Culture" action was launched to valorize and publicize some cities considered to be symbols of the process of integration.

[36] Council Directive 89/552/EEC of 3rd October 1989 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities, *OJEC* L 298, 17th October 1989, p. 23 ff.

proportions, the possibility to consider the broadcaster's cultural responsibilities towards its viewing public. Moreover, "…the Member States, whilst observing Community law, may as regards some or all programmes of television broadcasters under their jurisdiction, lay down more detailed or stricter rules in particular on the basis of language criteria" (the so-called "cultural exception"). The relationship between the discipline of broadcasters and cultural diversity was also underlined in the 1990 Decision promoting the development of the European audiovisual industry (Media)[37].

Directive 89/552 underlined the links between culture and other issues, such as, for example, the increasing internationalization of cultural media services (audio-visuals, music, cinema) and the differences found among Member States' regulatory frameworks with regard to specific issues affecting cultural production. More specifically, the differences found in the various national copyright regulations had a significant effect on the protection of artists' rights and the incentivization of their work, only partially alleviated by the EEC's first regulative interventions on the matter[38].

[37] Council Decision 90/685/EEC of 21st December 1990 concerning the implementation of an action programme to promote the development of the European audiovisual industry (Media) (1991 to 1995), *OJEC* L 380, 31st December 1990, p. 37 ff. The Programme has been constantly refunded. See Council Decision 95/563/EC of 10th July 1995 on the implementation of a programme encouraging the development and distribution of European audiovisual works (MEDIA II - Development and distribution) (1996 to 2000), *OJEC* L 321, 30th December 1995, p. 25 ff.; Council Decision 95/564/EC of 22nd December 1995 on the implementation of a training programme for professionals in the European audiovisual programme industry (MEDIA II - Training), *OJEC* L 321, 30th December 1995, p. 33 ff.; Council Decision 2000/821/EC of 20th December 2000 on the implementation of a programme to encourage the development, distribution, and promotion of European audiovisual works (MEDIA Plus — Development, Distribution and Promotion) (2001 to 2005), *OJEC* L 336, 30th December 2000, p. 82 ff.; Decision No 163/2001/EC of the European Parliament and of the Council of 19th January 2001 on the implementation of a training programme for professionals in the European audiovisual programme industry (MEDIA - Training) (2001 to 2005), *OJEC* L 26, 27th January 2001, p. 1 ff.; Decision 1718/2006/EC of the European Parliament and of the Council of 15th November 2006 concerning the implementation of a programme of support for the European audio-visual sector (MEDIA 2007), *OJEC* L 327, 24th November 2006, p. 12 ff. ; Decision 1041/2009/EC of the European Parliament and of the Council of 21st October 2009 establishing an audio-visual cooperation programme with professionals from third countries (MEDIA Mundus), *OJEC* L 288, 4th November 2009, p. 10 ff.

[38] The first ECC interventions in the copyright sector were: Council Directive 91/250/EEC of 14th May 1991 on the legal protection of computer programs, so-called "Software Directive", *OJEC* L 122 of 17th May 1991, p. 42 ff., which obliged the States to protect computer programs and literary works; Council Directive 92/100/EEC of 19th November 1992 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property, *OJEC* L 346, 27th November

At the beginning of the 90s, the adoption of the Regulation on the export of cultural goods[39] and the Directive on the return of cultural objects unlawfully removed from the territory of a Member State[40] were an attempt to respond to some endemic problems in the relationship between culture, the internal market, and trade relations with Third Countries.

The Maastricht Treaty introduced a legal basis for EC cultural actions (article 128 TEC). In the definition of EC cultural objectives, it was possible to discern an approach aiming not only to ensure the conservation of the Member States' cultural heritage, but also to promote its development[41]. Furthermore, national and

1992, p. 61 ff., that, in order to ensure an adequate income for the creative and artistic work of authors and performers, disciplined for the first time the rights of fixation, reproduction, broadcasting, communication and distribution. The Directive permitted any Member State to allow limitations to the protection of performers, producers of phonograms, broadcasting organizations and producers of the first screenings of films, "as it provides for in connection with the protection of copyright in literary and artistic works". Chapter II covered "Rights related to Copyright", which included the rights related to copyright for performers, producers of sound and recordings, broadcasting organizations and audio-visual producers (so-called "neighbouring rights"); Council Directive 93/83/EEC of 27th September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJEC* L 248 of 6th October 1993, p. 15 ff.; Directive 3/98/EEC of 29th October 1993 harmonizing the terms of copyright protection and certain related rights, *OJEC* L 290, 24th November 1993, p. 9ff., which fixed the terms of authors' rights. Case law has often addressed problems connected to copyright. See, in particular, Court just. 20th October 1993, joined cases C-92/92 and C-326/92, *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH, ECR* I-5145; 28th April 1998, Case C-200/96, *Metronome Musik GmbH v Music Point Hokamp GmbH*, *ECR*, p. I-01953, where the Court recognized that cultural development, including the aim of encouraging artistic and literacy creation, could justify restrictions on free movement; 6th June 2002, case C-360/00, *Land Hessen v G. Ricordi & Co. Bühnen- und Musikverlag GmbH, ECR*, p. I-05089 ff.; 6th February 2003, Case C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS), ECR*, p. I-01251. On the connections between copyright and cultural issues, see A. RAMALHO, *Copyright law-making in the EU: what lies under the "internal market" mask?*, in *Journal of Intellectual Property Law & practice*, 2014, p. 208 ff., 214 ff. The author underlines that, even if protecting the authors and performer interests and rewarding their works is the primary objective of copyright law, other stakeholders have to be taken into account, in particular, content industries, intermediaries, and end users. See also IDEM, *The Competence of the European Union in Copyright Law-making*, Cham, 2016.

[39] Council Regulation (EEC) 3911/92 of 9th December 1992, *OJEC* L 395, 31st December 1992, p. 1 ff.

[40] Council Directive 93/7/EEC of 15th March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, *OJEC* L 4, 27th March 1993, p. 74 ff.

[41] See article 128, §2 "Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: - improvement of the knowledge and dissemination of the culture and history of the European peoples; - conservation and safeguarding of cultural heritage of European significance; - non-commercial cultural exchanges; - artistic and literary creation, including in the audio-visual sector".

European cultural heritage were not conceived as opposing and contrasting concepts, but as a unique heritage to be both protected and enriched. This assumption was confirmed in Article 128, §5, TEC, which affirmed that "The Community shall take cultural aspects into account in its action under other provisions of this Treaty". Thus, culture had to be conceived as a mainstream, one that could underpin all EC actions in a number of fields (such as the internal market, trade policy, and the environment)[42].

The mainstreaming approach confirmed EC acceptance of a broad conception of culture, that could be embraced by EC actions in all fields. In the same sense, the first financing programmes set up on the basis of Article 128 TEC[43] pursued various – and somewhat "disparate" – objectives, including general support for cultural heritage, books and libraries, and also artistic and cultural activities, confirming the EC's holistic approach to culture, embracing both the material goods and sites and the intangible ones. Like the other funding programmes, they were based on a "reward" mechanism, where the actions received funds if they complied with EU objectives[44].

The same view of "culture" was also promoted by external EC actions, especially during GATS negotiations, where the EC inserted several exceptions regarding audio-visual services[45].

3. From "cultural goods" to "cultural expressions"

At the close of the 90s an intense debate arose within UNESCO, underlining the

[42] E. PSYCHOGIOPOULOU, *Cultural Mainstreaming: The European Union's Horizontal Cultural Diversity Agenda and its Evolution*, in *European Law Review*, 2014, p. 626 ff.
[43] Decision 719/96/EC of the European Parliament and of the Council of 29th March 1996 establishing a programme to support artistic and cultural activities having a European dimension (Kaleidoscope), *OJEC* L 99, 20th April 1996, p. 20 ff.; Decision 2228/97/EC of the European Parliament and of the Council of 13th October 1997 establishing a Community action programme in the field of cultural heritage (Raphael), *OJEC* L 305, 8th November 1997, p. 31 ff.; Decision 2085/97/EC of the European Parliament and of the Council of 6th October 1997 establishing a programme of support, including translation, in the field of books and reading (Ariane), *OJEC* L 291, 24th October 1997, p. 26 ff.
[44] On "reward" mechanisms based on "positive conditionality", see L. TUFANO, S. PUGLIESE, *Patrimonio culturale europeo*, cit., p. 689 ff.
[45] L. BELLUCCI, *The Notion of 'Cultural Diversity' in the EU Trade Agreements and Negotiations: New Challenges and Perspectives*, in *The Italian Journal of Law*, 2016, p. 433 ff., 436 ff.

importance of transferring attention from material cultural goods to immaterial cultural issues and the necessity to reinforce the protection of the intangible cultural heritage. This debate which, as is well known, led to the 2003 Convention on Intangible Cultural Heritage[46], underlining the nature of culture as a public good[47], which could be used as an instrument of development and self-government by communities and groups.

The debate developed at international level and influenced the EC in the design of the new cultural funding programme, "Culture 2000"[48] and regulatory acts strictly related to cultural issues. It underlined the need to consider culture as an element able to contribute to the realization of the EU's development strategy, emphasizing the relationship between cultural activities, employment, and growth (the so-called "Lisbon Strategy")[49].

As for "Culture 2000", the need to emphasize culture as a means of promoting employment diverted attention away from the cultural goods sectors towards cultural operators. More specifically, the programme intended to stimulate the creation of networks among them in order to increase collaboration, the sharing of resources, skills and know-how, and to make widespread a deep mutual knowledge of the culture and history of the European peoples.

Concerning legislation, the notion of culture as an instrument of economic growth led to the adoption of Directive 2001/29 on the harmonization of certain aspects of copyright contributing to strengthening of the protection of cultural operators[50]. In reality, as it was one the actions meant to create the so-called

[46] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force on 20th April 2006).
[47] On cultural heritage as a common good, see M.L. TUFANO, *CH as a 'common good': what the most suitable form of governance might be*, in M.L. TUFANO, L. BRIZZI, S. PUGLIESE, V. SPAGNA, *Towards an effective method of governance of cultural heritage sites (CH sites)*, in L. ZAGATO, S. PINTON (eds), *Cultural Heritage. Scenarios 2015- 2017*, Venice, 2017.
[48] Decision No. 508/2000/EC of the European Parliament and of the Council of 14th February 2000 establishing the Culture 2000 programme, *OJEC* L 63, 10th March 2000, p. 1 ff.
[49] See *Lisbon European Council 23rd and 24th March 2000 Presidency Conclusions*, available at the link http://www.europarl.europa.eu/summits/lis1_en.htm?textMode=on.
[50] Directive 2001/29/EC of the European Parliament and of the Council of 22nd May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJEC*, L 167, 22nd June 2001, p. 10 ff.

"Information Society", the Directive did not pursue specifically cultural objectives. Rather, it was based on the EC Institutions' awareness that digital technologies have radically changed the ways artistic works are created, stored, distributed and reproduced, facilitating and accelerating access to works and offering consumers a variety of possibilities, such as, for example, producing copies, modifying them and exploiting cultural works interactively. Yet, at the same time, these new opportunities undermined the capacity of the classical copyright rules to protect authors[51], highlighting the necessity to approximate the various national systems, creating a "fair level playing field" able to improve the market for new cultural products and services and at the same time to ensure the protection of creative contents[52].

From this perspective, the Directive attempted to face problems relating to the impact of digitization on the creation and distribution of cultural works and the relationship between copyright owners and users providing for a high level of protection of intellectual property and contrasting the illegal forms of distribution of pirated works. Thus, in the Directive framework, offering adequate legal copyright protection was conceived as "one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers"[53].

[51] In particular, the principal issues concerned protection from the production of transient or ephemeral copies, the question of whether the dissemination of a work on a web-site could be considered a form of distribution authorizing the public performance or broadcast of the work, the nature of e-mailing a work (whether it could be considered an unlawful distribution of copies), and the potential infringement of copyright determined by people who provide the equipment or electronic infrastructure for such acts. These problems are addressed by L. BENTLY, R. BURRELL, *Copyright and the Information Society in Europe: A Matter of Timing as well as Content*, in *CML Rev*., 1997, p. 1197 ff., 1198 ff.

[52] On the difficult relationship between Information Society and copyright, see M. BONOFACIO, *The Information Society and the Harmonization of Copyright and Related Rights: (Over)stretching the legal basis of Article 95 (100 A)?*, in *Legal Issues of Economic Integration*, 19999 p. 1 ff., 30. The Author underlined the inadequacy of article 95 TCE as a legal basis for copyright dispositions and the necessity to introduce a specific legal basis to protect European cultural productions. But the adequacy of article 95 was confirmed by the Court in a judgment of 12th September 2006, Case C-479/04, *Laserdisken ApS v Kulturministeriet*, in *ECR*, p. I-08089 ff., points 29 ff.

[53] Reforming the previous Directives, with the aim of establishing well-defined legal protection under copyright, the Directive laid down a discipline for reproduction rights, the right to make works known to the public, and for distribution, attributing these rights to authors, performers or producers and excluding some exceptions and limitations. The Directive introduced new rules concerning satellite

As a consequence, although not being specifically devoted to cultural purposes, as it tried to bring the national systems of copyright protection and the sanctions and remedies to their infringements more closely into line, it indirectly sought to stimulate the production of new cultural and artistic goods, mainly in creative fields such as music, films, and literacy. Indeed, increasing the profitability of artistic works, the Directive would stimulate artists to promote innovation, contributing to the community's cultural development.

In spite of growing interest in protecting the cultural heritage and efforts to encourage the creation of new cultural goods, the "Culture 2000" programme only partially achieved its objectives. Although it addressed some shortcomings in fostering transnational cooperation, the intermediate and final Programme evaluations showed that the operators receiving funds were relatively small in terms of organisational capacity, and the cultural networks mainly involved operators from the larger countries[54].

Nevertheless, the programme was funded once again for the period 2007-2013,[55] and its general outline was left substantially unchanged. The only important difference was a greater insistence on the transnational mobility of cultural players

broadcasters, who only need to obtain licences from copyright owners in the country of origin. The Directive also established that Member States have to provide appropriate effective, proportionate and dissuasive sanctions and remedies for infringements of rights and obligations. An analysis of the Directive was proposed in P. GROVES, *Copyright Law Enters the 21st Century*, in *Business Law Review*, 2001, p. 225 ff. See also M. LEISTNER, *Copyright Law in the EC: Status Quo, Recent Case law and Policy Perspectives,* in *CML Rev.*, 2009, p. 847 ff., 850 ff. The author showed that the several exceptions envisaged by the Directive, the scarce provisions devoted to the Technological Protection Measures and Digital Rights Management, and the lack of harmonization of copyright contract rules undermined the effectiveness of the Directive. On the need to move beyond the territorial dimension and unify the discipline on copyright, see, A. RINGNALDA, *National and International Dimensions of Copyright Law in the Internet Age, in European Review of Private Law*, 2009, p. 895 ff. For the case law, see Court just. 29th January 2008, case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*. *ECR*, p. I-00271. See also 20th January 2009, Case C-240/07, *Sony Music Entertainment (Germany) GmbH v Falcon Neue Medien Vertrieb GmbH,* in *ECR*, p. I-00263 concerning Directive 2006/116/EC of the European Parliament and of the Council of 12nd December 2006 on the term of protection of copyright and certain related rights (codified version), in *OJEU* L 372, 27th December 2006, p. 12 ff.

[54]COM (2003) 722 final, 24th November 2003, *Report on the implementation of the "Culture 2000" Programme in the years 2000 and 2001*; COM (2006) 666 final, 8th November 2006, *Report on the Second External Interim Evaluation of the Culture 2000 Programme.*

[55] Decision 1855/2006/EC of the European Parliament and of the Council of 12th December 2006 establishing the Culture Programme (2007 to 2013), *OJEC* L 372, 27th December 2006, p. 1 ff.

and the transnational circulation of works and cultural and artistic products. Rather than promoting "static" networks, the aim was to encourage intercultural dialogue increasing the free circulation of cultural operators, contributing to the affirmation of a new cultural perspective.

4. The influence of the 2005 UNESCO Convention on the EU notion of "culture"

An important innovative approach in EU cultural policy came about with the signing, in 2005, of the UNESCO Convention on Cultural Diversity[56]. The Convention, that considered cultural diversity as the common heritage of humanity, pursued the recognition of the "distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning" and the sovereign rights of Parties "to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory".

Thus, the Convention affirmed that "the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy," in a logic of complementarity between economics and culture.

The Convention underlined that "cultural diversity is made manifest …also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used". Accordingly, the Convention introduced the concept of "cultural expressions" consisting in "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content". The Convention also defined the concept of "cultural activities, goods and services … which … embody or convey cultural expressions, irrespective of the commercial value they may have" and "cultural industries", producing activities that embody or convey expressions of culture[57].

[56] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20th October 2005, entered into force 18th March 2007).

[57] For a general Convention overview, F. Mucci*, La diversità del patrimonio e delle espressioni culturali nell'ordinamento internazionale – da* ratio *implicita a oggetto diretto di protezione*, Naples, 2012.

These definitions demonstrated the full affirmation, within UNESCO, of a dynamic concept of "culture", focused not only on the preservation and valorization of existing cultural sites and goods, but also on the promotion of new cultural creations through the stimulation of creativity. More specifically, the importance of protecting the cultural diversity intrinsic to each cultural expression rather than the individual cultural goods, had an important effect on the notion of "culture", now conceived of as the result of all activities through which creativity is expressed. From such a perspective, it is not only necessary to consider all cultural activities holistically (including audio-visuals, music, and literature) but also to bring under the umbrella of "culture" the industries that produce technologies when these instruments are not used for mere technical and scientific purposes, but to express creativity.

Furthermore, the protection of cultural diversity entails a new way of thinking about all economic activities that have cultural implications. Indeed, it is no longer sufficient to speak of "cultural exceptions" in liberalized activities, but it is fundamental to find a more effective discipline for a number of correlated issues, such as, for example, intellectual property, copyright, digitalization, the protection and valorisation of traditional knowledge, sustainable fruition, and opposition to forms of "cultural" (and linguistic) imperialism.

This new way of looking at cultural problems had significant influence on the EU, mainly after the conclusion of the Convention on Cultural Diversity in 2006[58].

The first effect of this influence was the new Directive "Television without frontiers"[59]. In line with the approach followed by the Convention, Directive 2007/65 acknowledges that audio-visual media services are as much cultural services as they are economic services. Thus, it endows them with a specific responsibility in stimulating the production and distribution of European works and in contributing

[58] Council Decision 2006/515/EC of 18th May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *OJEC*, L 201, 25th July 2006, p. 15 ff.

[59] Directive 2007/65/EC of the European Parliament and of the Council of 11th December 2007 amending Council Directive 89/552/EEC, *OJEC* L 332 of 18th December 2007, p. 27ff.

actively to the promotion of cultural diversity[60].

The influence of the Convention on Cultural Diversity is also visible in initiatives to further reinforce copyright protection against the risks coming from the digital diffusion of artistic works (books, music, and photos)[61].

Lastly, the influence on the EU system of the Convention on Cultural Diversity is clearly evident in the new cultural funding programme "Creative Europe 2014-2020"[62], which appears different from the previous financial programmes in terms of objectives, actions, and management methods.

Among its objectives, the programme expressly intends to carry out actions in accordance with the UNESCO Conventions, especially the Convention on Cultural Diversity[63]. Following the gradual evolution of the meaning of "culture" within UNESCO, and based on the dynamic concept of "creativity", unlike in previous programmes, Creative Europe focuses neither on cultural goods/sites/activities nor on cultural actors, but on the cultural and creative industries[64]. The programme thus pursues the objective of supporting the possibility for European cultural and creative industries[65] to operate both transnationally and internationally, also strengthening the financial possibilities of SMEs. Pursuing a holistic approach, the

[60] This responsibility specifically concerns on-demand audio-visual media services, which have to support the European works offering them financial contributions.

[61] Commission Recommendation 2005/737/EC of 18th May 2005 on the collective cross-border management of copyright and related rights for legitimate on-line music services, *OJEU* L 276 2005 p. 54 ff.; COM (2009) 532 of 19th October 2009, *Copyright in the Knowledge Economy*; Directive 2011/77/EU of the European Parliament and of the Council of 27th September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, in *OJEU* l 265, 11th October 2011, p. 1 ff.; Directive 2012/28/EU of the European Parliament and of the Council of 25th October 2012 on certain permitted uses of orphan works, *OJEU* L 299, 27th October 2012, p. 5 ff., and the initiative "Licences for Europe – ten pledges to bring more content online" launched on 13th November 2013.

[62] Regulation 1295/2013 of the European Parliament and of the Council of 11th December 2013 establishing the Creative Europe Programme (2014 to 2020), in *OJEU* L 347, 20th December 2013, p. 221 ff.

[63] See Regulation 1295/2013, *considerandum* 1, 5, 6 and, especially, article 8.

[64] On the role of culture as a "multiplier", able to realize a more than proportionate increase in the value of invested money see L. MONTI, *Il patrimonio artistico e culturale in Europa tra economia e difesa dei valori*, in *Amministrazione in cammino*, 28th July, 2016, p. 3 ff.

[65] See Regulation 1295/2013, article 2, point 1. The definition of "cultural and creative sectors", directly inspired by the Convention on Cultural Diversity, refers to "all sectors whose activities are based on cultural values and/or artistic and other creative expressions, whether those activities are market- or non-market-oriented, whatever the type of structure that carries them out, and irrespective of how that structure is financed".

programme also embraces actions to sustain the audio-visual sector previously financed by other programmes[66], mainly to overcome obstacles to the transnational circulation of cultural and creative works[67].

In terms of actions, along with three main sub-programmes[68], "Creative Europe" absorbs three cultural actions that were previously independent (Union cultural prizes[69], the European Capitals of Culture[70], and the European Heritage Label[71]) within its framework. Even if the first two actions continue to be inspired by a "reward" mechanism, as they grant funds to cultural operators and sites or monuments of particularly significant and symbolic value for the process of integration and compliance with the EU's cultural objectives, the last of these actions is based on the concept of "labelling", first implemented in the environmental sector ("eco-labelling"[72]). Unlike classical EU funding actions, rather

[66] See *supra*, footnote 4.
[67] See Regulation 1295/2013, article 2, point 1.
[68] MEDIA Sub-programme; Culture Sub-programme; Cross-sectoral Strand.
[69] The EU Prize for Cultural Heritage/Europa Nostra Awards was launched in 2002 by the European Commission to celebrate and promote best practices related to heritage conservation, management, research, education and communication.
[70] See footnote 2. It should be noted that with the passing of time the initiative had lost sight of its cultural purposes, increasingly focusing on strictly local urban regeneration and development goals, perceived as more urgent and useful by the citizens. An example of a city using "Cities of Culture" funds to start a process of regeneration rather than to underline its European symbolic value is Glasgow. K.K. PATEL, *Integration by Interpellation: The European Capitals of Culture and the Role of Experts in European Union Cultural Policies*, in *JCMS*, p. 538 ff., p. 543 ff. In order to restore its original meaning to the action, Decision 1419/1999/EC of the European Parliament and of the Council of 25th May 1999 establishing a Community action for the European Capital of Culture event for the years 2005 to 2019, *OJEC* L 166, 1st July 1999, p. 1 ff., article 2, conferred the task of designating the capitals to a selection panel composed of experts in the cultural sector, appointed by the European Parliament, the Council, the Commission, and the Committee of the Regions. On 2006, the action was re-launched before being absorbed into "Creative Europe". See Decision No 1622/2006/EC of the European Parliament and of the Council of 24th October 2006 establishing a Community action for the European Capital of Culture event for the years 2007 to 2019, *OJEU* L 304, 3rd November 2006, p. 1ff.
[71] The European Heritage Label initiative was an intergovernmental action launched on 28th April 2006 in Granada. Decision 1194/2011/EU of the European Parliament and of the Council of 16th November 2011 established a European Union action for the European Heritage Label, *OJEU* L 303, 22nd November 2011, p. 1 ff. For an analysis, see M. CASTELLANETA, *Il marchio del patrimonio europeo e il meccanismo UE sulla valorizzazione del patrimonio culturale*, in CANNONE (edit.), *La protezione internazionale ed europea dei beni culturali*, Bari, 2014, p. 37 ff.
[72]See Council Regulation (EEC) No 880/92 of 23rd March 1992 on a Community eco-label award scheme, *OJEC* L 99, 11th April 1992, p. 1 ff.; Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25th November 2009 on the EU Ecolabel, in *OJEU* L 27 of 30th January 2010, p. 1 ff.

than verifying the contribution of a project to the fulfilment of EU objectives, the labelling aims to "certify" the compliance of a site with EU standards. As a consequence, although cultural operators in the classical "reward" mechanisms are encouraged to elaborate a project (with a well-defined deadline) responding to some EU objective, with "labelling" they have to provide the cultural site with some characteristic which will assure its permanent compliance with EU requirements. The selection methods are different too. As "Creative Europe", like the classical EU funding programmes, is principally expedient in the pursuit of Commission policy objectives, it adopts a selection method directly managed by the Directorate General (DG) for Culture. Conversely, as the European Heritage Label is both political and technical, it applies a complex selection procedure based on the involvement of experts nominated by the Commission and other Institutions[73]. Its objectives and methods encourage the labelled site managers to adopt a dynamic approach, not only with a view to protecting and preserving the site's historic and artistic value but also to promoting creative activities in order to ensure that the site could be perceived by citizens as a place that is "alive" (and "lively")[74].

The "Creative Europe" Programme also established the Cultural and Creative Sectors Guarantee Facility. Unlike the other Funds in the "Creative Europe" Programme, implemented directly by the DG for Culture, the Guarantee Facility is implemented "in an indirect management mode by entrusting tasks to the European Investment Fund" aiming to incite financial intermediaries to grant loans to cultural and creative industries, offering them guarantees[75]. The effort to foster the cultural good and service market is clearly evident.

Promoting the development of the cultural and creative industries through

[73] Attribution of the European Heritage Label consists of a two-phase procedure: after a pre-selection at national level, selection and monitoring at Union level is carried out by a European panel of independent experts appointed by the European Parliament, by the Council, by the Commission and by the Committee of the Regions. For the selection criteria, see art. 7 of Decision 1194/2011. This selection method is modelled on that of "European Capitals of Culture".

[74] See Decision 1194/2011, Article 7 "Criteria", § 1 (b) "The organisation of artistic and cultural activities which foster the mobility of European culture professionals, artists and collections, stimulate intercultural dialogue and encourage linkage between heritage and contemporary creation and creativity is to be welcomed whenever the specific nature of the site allows this".

[75] See Regulation 1295/2013, article 2, (3), article 14.

innovative management methods, Creative Europe is contributing to impose a new, completely intangible and dynamic European notion of culture, one that is not centred on the intrinsic historic or artistic importance of the cultural good, but on the value that it acquires when it is enjoyed. In this way, the relationships between cultural producers, the disseminators of cultural work, and the people enjoying it becomes the principal objective of the EU's cultural action, from a new perspective where the economic exploitation, protection and valorization of cultural sites, goods and expressions and the promotion of new creative activities are not counterposed but, on the contrary, fully integrated and reciprocally fruitful.

5. The connection between European Cultural Policy and the Digital Single Market: regulating Collective Management Organizations

Since 2014 the Commission has adopted a new approach to culture and the role the EU has to take on for its protection, valorisation and promotion[76]. By acknowledging cultural heritage as a common good, the Commission expresses its intention to "help Member States and stakeholders… make Europe a laboratory for heritage-based innovation"[77]. Hence the Commission insists on the need to stress the "promotion of culture as a catalyst for creativity"[78].

This new approach has highlighted the necessity to discipline the relationship between cultural and artistic activities and the new creative and communications media. In this light, the more "dynamic" issue of cultural regulation and copyright in the EU intersected the rules of the Digital Single Market[79].

[76] See COM (2014) 477 of 22nd July 2014, *Towards an integrated approach to cultural heritage for Europe.*
[77] COM (2014) 477, p. 3.
[78] *Ibidem*, p. 6.
[79] This link has also been underlined by EU judges. See Court just. 24th November 2011, Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, *ECR*, p. I-11959 ff.; 9th February 2012, Case C-277/10, *Martin Luksan v. Petrus van der Let*, *Electronic Report of Cases,* https://curia.europa.eu/jcms/jcms/P_106320/it/?rec=RG&jur=C&anchor=201202C0012#201202C0012; 19th April 2012, Case C-461/10, *Bonnier Audio AB and Others v Perfect Communication Sweden AB,Electronic Report of Cases,* https://curia.europa.eu/jcms/jcms/P_106320/it/?rec=RG&jur=C&anchor=201204C0067#201204C0067; 13th February 2014, Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*, *Electronic Report of Cases,*

The first step in this direction was the adoption of Directive 2014/26 on the collective management of copyright and related rights and the multi-territorial licensing of rights protecting musical works for online use within the internal market[80]. This Directive serves to complete the above-mentioned copyright legislation establishing norms on Collective Management Organisations (CMOs)[81],

https://curia.europa.eu/jcms/jcms/P_106320/it/?rec=RG&jur=C&anchor=201402C0039#201402C0039; 27th March 2014, Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, *Electronic Report of Cases*,https://curia.europa.eu/jcms/jcms/P_106320/it/?rec=RG&jur=C&anchor=201403C0089#201403C0089. For an analysis of the case law see, M. LEINSTER, *Europe's Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspective*, in *CML Rev*., 2014, p. 559 ff., 573 ff.; M. HUSOVEC, *Intellectual Property Rights and Integration by Conflict: The Past, Present and Future*, in *Cambridge Yearbook of European Legal Studies*, 2016, p. 239 ff.

[80] Directive 2014/26/EU of the European Parliament and of the Council of 26th February 2014, *OJEU* L 84, 20th March 2014, p. 72 ff. On the importance of the 2014/26 directive, A.M. MARINESCU, *EU Directives in the field of copyright and related rights*, in *LESIJ*, 2015, p. 50 ff., 62 ff.

[81] According to article 3, letter a) "The collective management organisation" means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right-holder, for the collective benefit of those right-holders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis". These Organizations are particularly important in the music sector, where copyright owners are composers and lyricists whose creative and artistic contribution is protected, and publishers are protected in terms of the use and distribution of their music. In order to play music in public (broadcasters, in shops, professional studios or offices open to the public), it is necessary to obtain the permission of the right holder (the publisher), paying a fee (or 'royalty'). In this process, CMOs assume a role of intermediation, providing users with licences, collecting royalties, and distributing them to copyright owners and their members, monitoring the use of works and the actual payment of royalties. Through their activities, CMOs contribute to lowering transaction costs, standardizing licences for similar users and facilitating the collection of royalties. In almost all EU countries, CMOs are legal or de facto monopolies and, in some jurisdictions, they assume very wide-ranging functions, such as, for example, providing social benefits (acting as "trade unions" in bargaining with users or providing social security and sometimes pensions, taking on a "solidarity function"). They may also take on a function of cultural protection, ensuring revenues for producers of less popular genres and representing less commercially successful authors. European case law has principally addressed problems regarding CMO competition issues. See, for example, Court just. 13th July 1971, Case 8/71, *Deutscher Komponistenverband e.V. v Commission of the European Communities*, in *ECR,* p. 705 ff.; Court of First Instance (CFI) of 9th January 1996, Case T-575/93, *Casper Koelman v Commission of the European Communities*, in *ECR,* p. II-00001 ff.; Judgment of the General Court of 12th April 2013, Case T-433/08, *Società italiana degli autori ed editori (SIAE) v. European Commission, Electronic Report of Cases*, https://curia.europa.eu/jcms/jcms/P_106319/it/?rec=RG&jur=T&anchor=201304T2097#201304T2097, and the recent 14th September 2017, *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome.* In other cases, European judges faced the problems related to the rapprochement of national legislation. See, for example, 29th June 1999, Case C-60/98, *Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED)*, *ECR*, p. I-03939 ff.; 22nd September 2016, Case C-110/15, *Microsoft Mobile Sales International Oy and Others v Ministero per i beni e le attività culturali (MiBAC)*, *SIAE and Others*, *Electronic Report of Cases* https://curia.europa.eu/jcms/jcms/P_106320/it/?rec=RG&jur=C&anchor=201609C0262#201609C

which, according to the Directive, "play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their right-holders and the public"[82]. Even if the Directive does not pursue specifically cultural objectives, it has radically innovated the way the EU faces the problems associated with cultural services. Indeed, for the first time, the EU does not treat culture as an exception, but by directly regulating the management and business problems of the principal actors operating within sectors, such as, for example, literature or music, it attempts to create a market organization for these cultural services, seeking to build up a discipline for the "EU Cultural Market".

Some scholars have argued that Directive 2014/26 shifts the CMO discipline away from the "copyright system" to "the competition-based approach" and that the licence system is oriented towards market efficiency rather than to the promotion of cultural diversity[83]. Nevertheless, taking into account the States' resistance to the deeper harmonization of national copyright systems, the EU institutions have probably used the classical method of constructing an efficient

0262; 16th November 2016, Case C-301/15, *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication*, *Electronic Report of Cases*, https://curia.europa.eu/jcms/jcms/P_106320/it/?rec=RG&jur=C&anchor=201611C0320#201611C0320. See in general, on the role of CMOs in the music market, S. SCHROFF, J. STREET, *The politics of the Digital Single Market: culture vs. Competition vs. Copyright*, in *Information, Communication and Society*, 2017, p. 1 ff., 3 f. Directive 2014/26 disciplines not only CMOs but also the " 'independent management entity' [which] means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right-holder, for the collective benefit of those right-holders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by right-holders; and (ii) organised on a for-profit basis".

[82]See *considerandum* 3. The Directive requires the coordination of national rules concerning access to the management of copyright by collective management organizations and independent managing entities, the modalities for their governance, and their supervisory framework. In article 23 *et seq.*, the Directive lays down requirements for multi-territorial licensing by collective management organizations for authors' rights in musical works for online use. It also sets out a framework for facilitating the voluntary aggregation of the music repertoire and rights, thus reducing the number of licences a user needs to operate a multi-territory, multi-repertoire service in order to enhance cultural diversity. On the competition and transparency problems of CMO's, see C. LUCENA, *Collective Rights and Digital Content*, Cham. Heidelberg, New York, Dordrecht, London, 2015, p. 21 ff., 30 ff.

[83]S. SCHROFF, J. STREET, *The politics of the Digital Single Market*, cit., p. 10 ff.

market system to pursue broader objectives, considering it to be the most fluid for the dissemination of artistic works, enhancement of cultural diversity, and stimulation of creativity. It should also be noted that the success of the Directive depends largely on the States' ability to bring their national systems of collective rights management into line with European provisions[84].

In line with the contents of Directive 2014/26, in September 2016 the Commission submitted proposals for the modernisation of copyright law to increase cultural diversity in Europe and content available online, offering cultural institutions specific tools for innovation.

Acknowledging that "The EU is… a global industrial and cultural leader" and considering that the "internet has become the main marketplace for accessing and distributing copyright-protected content", especially cultural content, the regulation of copyright is, in the opinion of the Commission, a fundamental way to address problems related to competitiveness and the entrepreneurial and funding challenges to cultural and creative industries[85]. The proposals aim to strengthen

[84] For the transposition of the Directive into Italian law, see Law 2345 of 28th July 2016 and Legislative Decree 35 of 15th March 2017. It should be noted that significant reform of the SIAE (the Italian CMO established in 1882 and become a public entity after the Law 633/1941) and opening the music rights management market up to new operators (such as Soundreef) does not deprive SIAE of its monopoly on collecting rights. See C. MEO, *Il recepimento della direttiva 2014/26/UE in Italia e il futuro del monopolio della SIAE*, in *Federalismi.it*. 21/9/2016, p. 1 ff. Fearing that the Commission would begin an action for infringement, Decree-Law 148 of 16th October 2017, "Disposizioni urgenti in materia finanziaria e per esigenze indifferibili" (*GU Serie Generale* n. 242 del 16-10-2017), Article 19, opened the possibility of intermediation activity (licensing, rights collecting and apportioning) to the other CMOs but not to independent management entities.

[85] COM (2016) 592 final, *Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market*, 14th September 2016. With this in mind, on 14th September 2016, the Commission issued a set of proposals comprising a "Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes" (COM/2016/0594 final), a "Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market" (COM/2016/0593 final), and COM(2016) 596 final and COM(2016) 595 final, aiming to enact the Treaty of Marrakesh to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, adopted on 27th June 2013 and concluded by the EU through the Council Decision of 14th April 2014, *OJEU* L 115, 17th April 2014, p. 1 ff. The last two proposals were adopted in September. See Directive (EU) 2017/1564 of the European Parliament and of the Council of 13th September 2017 on some permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired, or otherwise print-disabled, in *OJEU* L 242, 20th September 2017, p. 6 ff.; Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13th September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other

protection for authors and right-holders including on-line works, and to establish specific norms for cultural heritage institutions offering on-line access to their goods. In view of the fact that cultural institutions often resort to on-line fruition not only for promotion but also for preservation purposes (mainly to reduce mass access to the fragile sites), the Directive fully espouses the two-fold UNESCO objective of protection and valorization of cultural goods and sites[86].

6. Cultural issues and the protection of cultural and creative works in bilateral agreements

Several references to culture are contained in the recent bilateral agreements stipulated by the EU with its trade partners – both emergent economic powers and transatlantic countries.

Regarding emergent countries, the 2010 EU-Korea bilateral agreement (KOREU) contains a Protocol on Cultural Cooperation, setting up a framework within which the Parties will cooperate to facilitate exchanges regarding cultural activities, goods and services, including, *inter alia*, the audio-visual sector[87]. Specifically, the

subject matter protected by copyright, and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, *OJEU* L 242, 20th September 2017, p. 1 ff.

[86] The Proposal for a Directive on copyright in the Digital Single Market introduces a specific mechanism to facilitate the conclusion of licences by cultural heritage institutions wanting to provide online access, including across borders, to out-of-circulation works contained in their catalogues. The proposed Directive also establishes a mandatory exception for digital preservation by cultural heritage institutions, which takes into account the need for content in digital forms and the use of digital technology in cultural preservation. This exception considers the use of digitisation as a preservation technique but underlines the increased number of 'born-digital' works in the collections of cultural heritage institutions. The Commission also added, "increased preservation rates will be beneficial for the survival of cultural heritage and allow citizens to engage with it for longer". As a consequence, it is particularly useful for cultural institutions that offer systems of remote access. In more general terms, the proposal provides for measures to improve the position of right-holders to negotiate and be remunerated for the use of their work by online services giving access to user-uploaded content. It also includes measures to improve transparency and better-balanced contractual relationships between authors and performers and those to whom they assign their rights. It therefore contributes to strengthening the rights of artists and producers in the fields of music, literature and cinema

[87] The text states that, "The Parties shall aim at fostering their capacities to determine and develop their cultural policies, developing their cultural industries and enhancing exchange opportunities for cultural goods and services of the Parties, including through entitlement to benefit from schemes for the promotion of local/regional cultural content. The Parties shall cooperate to foster the development of a common understanding and enhanced exchange of information on cultural and audio-visual matters through a dialogue, as well as on good practices in the field of intellectual property rights protection. This dialogue will take place within the Committee on Cultural

Parties commit themselves to facilitating, in compliance with their respective laws, the entry and temporary presence on their territories of artists and other cultural professionals and practitioners from the other Party for a period of up to 90 days in any twelve month period[88]. The Agreement also contains several provisions concerning copyright[89], including cooperation on collective management rights[90].

KOREU's specific attention to the cultural and artistic sector is probably justified by Korea's growing importance in the international cultural and creative markets. It is not present in the EU-Singapore Free Trade Agreement and the EU-Vietnam Agreement, which are not dependent on the ratification of the UNESCO Conventions (the so-called UNESCO Clause) by the Parties and where the only reference to cultural diversity is within provisions concerning the right of States to maintain their freedom in adopting restrictive rules on trade and investments to pursue public policy objectives (the so-called "right to regulate" clauses)[91]. The several references to copyright in the chapters concerning Intellectual Property appear to show more concern for protecting technological inventions rather than cultural or artistic creations[92].

Cooperation as well as in other relevant forums as and when appropriate". According to Article 3 of the Protocol, a Committee on Cultural Cooperation responsible for implementing the Protocol is to be set up.

[88] In addition to the horizontal provisions, several sub-sectoral provisions concern audio-visual cooperation, co-production, the temporary import of material and equipment for the purpose of shooting audio-visual works, the performing arts, publications, and the protection of cultural heritage sites and historic monuments. According to article 15.10, §3, the entry into force of the Protocol depended on Korea ratifying the 2005 UNESCO Convention (the so-called "UNESCO Clause"). Korea ratified the Convention 4th April 2010, before the decision of the Council. On the UNESCO clauses, see E. PSYCHOGIOPOULOU, *The External Dimension of EU Cultural Action and Free Trade: Exploring an Interface*, in *Legal Issues of Economic Integration*, 2014, p. 65ff.

[89] Chapter Ten "Intellectual Property", Article. 10.2; Article 10.4. See also article 10.6 "Duration of authors' rights"; Article 10.7 "Broadcasting organisations"; Article 10.9 "Broadcasting and communication to the public"; Article 10.10 "Artists' resale right in works of Art".

[90] Article 10.8 "Cooperation on collective management of rights".

[91] On the EU-Singapore FTA, see the Preamble p. 1:"reaffirming each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity"; for the EU -Vietnam FTA, see article 13 bis "Article 13bis Investment and regulatory measures/objectives. The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity".

[92] On the EU- Singapore FTA, see Chapter 11 "Intellectual Property", article 11.4 ff., and for the EU - Vietnam FTA, see the Chapter on "Intellectual Property", article 4 ff.

Regarding the transatlantic partners, in the negotiations between the EU and the US leading to the now suspended "Transatlantic Trade and Investment Partnership" (TTIP), begun in 2013, the Commission did not initially intend to completely exclude cultural issues from the negotiations[93], but during negotiations, interest by both Parties on this subject waned. Audio-visuals were expressly excluded in the Commission Proposal on "Services"[94], while cultural diversity appeared only within the clause on the "right to regulate" in the EU proposal on "Investment"[95]. In the Commission proposal on Intellectual Property, there are several references to copyright, but they seem to be devoted to ensuring the proper functioning of trade rather than protecting cultural diversity.

Unlike the Agreements analyzed so far, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, signed on 30th October 2016 and entered into force provisionally on 21st September 2017, focuses strongly on cultural issues.

Starting from the Preamble, EU and Canada affirm their commitment as parties to the UNESCO Convention on Cultural Diversity and recognize that "States have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support". Audio-visuals and cultural industries are exempted from the restrictions concerning subsides[96] as well as from the rules concerning service liberalization[97]. As in the above-described agreements, article 8.9, §1, includes cultural diversity in the provision on the "right to regulate", and

[93] EUROPEAN COMMISSION, *Position Paper "TTIP and Culture"*, 15th July 2014.
[94] See European Commission, *EU Proposal "Transatlantic Trade and Investment Partnership - Trade in Services, Investment and E-Commerce"*, 31st July 2015.
[95] See, EU Proposal on Investment, 12th November 2015, article 2, § 1, Annex I: Expropriation, paragraph 3. On the notion of cultural diversity in the TTIP and CETA, L. BELLUCCI, *The Notion of 'Cultural Diversity'*, cit., p. 433 ff., 440 ff.
[96] Article 7.7
[97] More specifically, in the chapter on cross-border service trade, while the EU only included audio-visuals among the exceptions, Canada excepted all cultural industries. See also article 12.2, §2, concerning domestic regulation of licensing requirements, licensing procedures, qualification requirements, qualification procedures and the exception concerning works of art in public procurement. All the sectoral exceptions applicable to culture are brought together in article 28.9.

Canada added other exceptions regarding investments in conflict with cultural objectives[98].

The provisions concerning copyright are very specific and acknowledge the role of the collective right management bodies, which have to be entitled to seek application for procedures and remedies for the enforcement of intellectual property rights for both the Parties.

Although CETA does address cultural problems linked to trade, cultural cooperation between the EU and CANADA is prefigured by the Strategic Partnership that was signed at the same time. Indeed, article 16 aims to promote the diversity of cultural expressions, education and youth, and people-to-people contacts, encouraging "the long-standing cultural, linguistic and traditional ties that have built bridges of understanding between them", fostering the diversity of cultural expressions, through the promotion, as appropriate, of the principles and objectives of the 2005 UNESCO Convention on Cultural Diversity and facilitating exchanges, cooperation and dialogue between their cultural institutions and professionals.

The provisions concerning cultural issues within the bilateral agreement highlight that, despite the EU's efforts to promote a broader and more dynamic notion of culture in relationships with its partners, culture remains largely an exception in trade relationships and is used to justify restrictions on the free movement of goods and people. It is still difficult to establish common positive standards of cultural protection, development and valorization or to incentivize forms of cultural cooperation in this field. From this point of view, CETA represents a "unique" experience, as it sets the trade relationship inside a framework of broader political and cultural cooperation that could become an example for other negotiations.

In fact, following the example of CETA, in the on-going negotiations between EU

[98] See Reservation I-C-1 that, according to the Investment Canada Act, allows the Minister responsible to review the compatibility of investments with cultural policies and objectives and the specific acquisition or establishment of a new business in designated types of business activities relating to Canada's cultural heritage or national identity. See Reservation I-C-12 concerning the examination of services relating to the export and import of cultural property and museum services except for historical sites and buildings.

and Japan, along with the Economic Partnership Agreement, where, according to the provisionally disclosed texts, culture is envisaged only in the dispositions related to the "right to regulate"[99], and copyright is mainly considered in terms of its interconnections with technologies, a Strategic Partnership is being drawn up that will probably also contain provisions for cultural cooperation.

7. Conclusions

The analysis presented here demonstrates that the European notion of culture has evolved significantly over time. If culture was conceived as an exception to the free movement of goods and services in the early days of the integration process – something that could allow the States to adopt restrictions to protect national cultural and linguistic specificities – it has acquired growing importance as a symbol of the integration process and as a catalyst of European values and principles. Yet, at the same time, culture has been acknowledged as a resource to be exploited for purposes of economic growth and social development. For this reason, the attention of the EU has moved from cultural goods and sites to include cultural actors and, more recently, the cultural and creative industries, embracing a dynamic conception of culture based not on the intrinsic cultural value of the sites or goods but on the benefits their fruition can bring.

More specifically, acknowledging the close dependence of cultural development on the protection of artists' rights and the influence of technological development on these issues, the EU has reacted by stimulating the development of a European Cultural Market. The idea would seem to be that in following through the integration process from its very origins, building an efficient market in sectors with sensitive political significance could contribute to the pursuit of more ambitious objectives, such as, for example, the protection and conservation of cultural diversity or fostering creativity. For this reason, the EU insists on adequate protection for artists and producer rights that will become crucial in a system increasingly characterized

[99] See Japan-EU Economic Partnership Agreement, *Trade in Services, Investment and E-Commerce, Consolidated Text*, (Status 5 July 2017), Article 1, §2.

by digitalization, one that is fluid by nature and that brings its own difficulties in controlling and sanctioning infringements.

In reality, the proposals presented by the Commission in September 2016 are fomenting intense discussions within Parliament[100] and the Council[101], confirming the high political sensitivity of problems related to the culture-market relationship. At the same time, the few references found in bilateral agreements show how difficult it is to find common ground with the emergent and transatlantic partners.

It would seem that the dynamic notion of culture, which is more complex than the static traditional one, is struggling for recognition, on account of its important implications for States, international trade relationships, and cultural stakeholders, despite being proposed on more than one occasion by the Institutions. This difficulty affects all actions with a cultural scope, undermining the coherence and effectiveness of European Cultural Policy.

Nevertheless, reinforcing cultural market structures (CMOs) and cultural economic operators (the cultural and creative industries) and ensuring that competition, innovation, creativity, and diversity are effectively promoted and rewarded in the European Cultural Market could contribute to endowing European Cultural Policy with greater coherence and efficacy and lead to the affirmation of the EU Institutions as points of reference in cultural governance.

[100] A. ERIKSSON, *Parliament to defang EU copyright reform*, 9 March 2017, https://euobserver.com/digital/137164

[101] See the Consolidated Presidency compromise proposal on the Directive on copyright in the Digital Market presented on 30th October 2017 and the Revised Presidency compromise proposal regarding the Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes presented on 10th October 2017.