TERRA MOSANA Deliverable N°1.3
Title: Development of legal frameworks

Copyright framework for digitising cultural heritage sites in Terra Mosana

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Acknowledgements

We would like to thank the Terra Mosana partners for the information provided, which formed the basis for applying the relevant copyright frameworks and conditions.

We would furthermore like to extend our gratitude to Conrado Freitas and Ana Ramalho for the work on previous versions of this report.

1. Introduction

The Terra Mosana project centres around the creation of digital narratives drawing on the cultural heritage of the Euregio Meuse-Rhine. These narratives are realised through the development of 3D models of archaeological, architectural and other cultural sites, to be shared throughout the region. In order to carry out the project responsibly, an understanding of the applicable copyright law is essential.

This report presents clear guidelines on the copyright laws applicable in the European Union, and specifically in the three countries in which members to the Terra Mosana project are located: Belgium, Germany and the Netherlands. Since copyright law in the European Union is only partly harmonized, the national legal systems provide the relevant legal context for activities carried out in relation to copyright protected works. Nevertheless, they share important cimilarities in areas of copyright law that internationally or at the European Union level have been regulated.

The present guidelines are separated into three deliverables: in 1.3.1, we present the rules applicable to identify public domain works and works protected by copyright, in 1.3.2, we discuss the acts that are restricted for copyright protected works and applicable exceptions, and in 1.3.3, we formulate best practices on how Terra Mosana partners can disseminate the works as part of the project.

DELIVERABLE 1.3.1. Guidelines for identification of public domain works vs. protected works

This deliverable sets out guidelines for identifying whether a work falls within copyright's protection, or in the pubic domain, focusing on copyright subject matter, originality, and duration. This section relates to source materials for the project—works which will be digitised and otherwise used or drawn on to create 3D models. What is not considered here is the copyright status of works and materials generated through project activities: the models themselves, photographs, and databases.

The guidelines outlined play an important role in the structure of the Terra Mosana project; supporting the project's implementation and contributing to its sustainability. Taking into account the numerous partners involved in the collaboration, and the project's cross-border context, the guidelines aim to encourage good practice and standardisation. More broadly, the guidelines are intended to be made available to the larger field of cultural heritage and to inform and support other digitisation initiatives.

As Terra Mosana is designed as a sustainable project, one which can accommodate the introduction of new partners, concentrations, and applications, these guidelines have been written to apply generally to the field of cultural heritage and to the task of digitisation. They set out the legal rules of copyright, provide context for these rules, and discuss how these apply to the creation of digital models of cultural heritage sites. The guidelines have been written for non-lawyers in the field of museums and, more broadly, in the cultural heritage domain. They contain general information on copyright rules as they apply to this field and consider examples from the works at issue in the project. For the specific application of the guide to new situations, we advise to always check the national specificities of the work, as well as the rights and possible exceptions at issue (outlined in Deliverable 1.3.2) as this field is complex and its rules contingent on various factors and considerations.

2. Requirements for a work to qualify for copyright protection

Copyright law grants certain rights to the authors of literary and artistic works, including books, music, paintings, sculptures, buildings, and computer programmes. These rights fall within two categories: economic rights, and moral rights. Economic rights protect the author's commercial interests, while moral rights are geared toward protecting the author's relationship with the work.

The first step in assessing the applicable copyright rules is determining whether copyright subsists in a work. If the work is not eligible for copyright, or if copyright in the work has expired, it falls in the public domain and hence outside the protection of intellectual property laws. Determining whether a work is protected by copyright or whether it falls in the public domain is necessarily done on a case by case basis.

Copyright law protects the creators of literary and artistic works. The eligibility of works for copyright protection is, however, limited. There is a public interest in maintaining the 'public domain': works, materials and ideas that do not fall under copyright protection are therefore free for anyone to use. The public domain comprises subject matter that is outside the scope of copyright protection, works that do not satisfy the criteria for protection, and formerly protected works for which copyright has expired.

Copyright is governed by a framework of laws at international, regional, and national levels. Berne Convention for the Protection of Literary and Artistic Works (commonly referred to as the Berne Convention) is the primary international treaty on copyright and therefore a useful starting point for determining the kinds of works protected by copyright—the scope of copyright's subject matter. The Berne Convention addresses the protection of "every production in the literary, scientific and artistic domain" (Article 2). It defines copyright subject matter explicitly, through an exemplary list of protected works, and implicitly, by imposing the conditions of originality and the idea/expression dichotomy. The Berne Convention is complemented by other international agreements, such as the Agreement on Trade Related Aspects of Intellectual Property law (TRIPS) and World Trade Organisation (WTO) Treaties, which

adopt the Berne Convention definition, specifically include certain categories of works and explicitly recognise the idea/expression dichotomy.

International law provides that copyright is an automatic right. It arises at the moment of creation without the need for registration or other formalities (Article 5(2) Berne Convention). There is, therefore, no searchable register of copyright works;[5] any work eligible for copyright is automatically protected. A work's status as copyright protected or public domain depends on whether it fulfils these conditions, as expressed and implemented in national laws. Copyright is territorial. This means that protection is limited to one jurisdiction and eligibility for protection is determined at the national level. Copyright rules have been partially harmonised in the EU, however, there is scope for variation between the three national copyright systems that govern the Terra Mosana project. These systems are discussed below.

2.1. EU

In order to determine whether a cultural heritage site or any other work is copyright protected, a number of requirements need to be fulfilled. These requirements have been largely harmonized at the EU level but certain differences exist between the Netherlands, Germany and Belgium. Certain aspects of copyright have been harmonized through a series of European Directives:

- Computer Programs Directive
- Database Directive
- Digital Single Market Directive
- Information Society (InfoSoc) Directive
- Orphan Works Directive
- Rental Right Directive
- Resale Right Directive
- Term Directive

These Directives do not have direct effect and must therefore be implemented in the national laws of Member States. The Court of Justice of the European Union (CJEU) interprets European law to ensure its consistent application across Member States.

The two key requirements a work needs to meet to benefit from copyright protection is that 1) it constitutes copyright subject matter and 2) that it is original.

2.1.1. Copyright subject matter

While the Directives that deal with copyright do not explicitly address copyright subject matter, the question of the types of works that qualify for copyright protection has been subject to increasing harmonisation through the case law of the CJEU. The general principles governing this issue are set out below: open list, expressed with sufficient precision and objectivity, and the idea-expression dichotomy.

Open list approach

The EU framework does not permit a categorisation of subject matters, meaning that any type of work (e.g. literary, artistic, cinematographic, phonograms, databases, performances, etc.) shall be entitled to copyright protection, provided they fulfil the originality requirement. Designs can also be considered for copyright protection in the EU. Even though industrial designs have their own separate regime of protection in the EU, they are also eligible for copyright protection.

Expressed with sufficient precision and objectivity

Regardless of the open list approach for the eligibility for copyright, not all works can attract copyright protection. In the recent judgement from the CJEU in the *Levola Hengelo* case (C-310/17), the Court

[5] Some countries, like the United States and India have copyright registers for the purpose of verifying the owner of the copyright work or for being able to enforce copyright in a court. Registration in the register is, however, no condition for being protected as copyright work. At the same time, the fact that a work is not listed on a registry does not necessarily mean it is not protected by copyright. One will have to determine whether a creative work is copyright protected.

expressly set some important grounds for the eligibility criteria for a work to benefit from copyright. In this case, the flavour of a cheese spread called "Heksenkaas" was claimed to enjoy copyright protection. The plaintiff based its claims on a precedent from the Dutch Supreme Court, where a perfume scent was held to enjoy copyright protection.

The CJEU, however, rejected the plaintiff's claim that a taste can be a copyright subject matter. According to the Court, a work must be expressed in a manner that is identifiable with sufficient precision and objectivity, even in a non-permanent form in order to be eligible for copyright protection. The taste of a product, however, is dependent on various subjective factors, like the age, food preferences, and consumption habits of the user, as well as the environment in which the product is consumed. The flavour of a product, therefore, cannot be pinned down with enough precision and objectivity.

This case fills in the loophole present in the Information Society Directive: the Directive does not provide a definition of "work". The CJEU highlighted the importance of having an autonomous and uniform interpretation of the concept of "work" throughout the EU, in compliance with European Law. The *Levola Hengelo* judgement represents a benchmark towards the harmonisation of the eligibility criteria for copyright in Europe. Cultural heritage sites like monuments or city maps are very unlikely to lack precision or objectivity and therefore will be considered eligible copyright works.

Idea-expression dichotomy

Ideas themselves are not eligible for copyright protection; copyright protects only expressions of ideas.[6] This principle is known as the idea-expression dichotomy. Copyright, therefore, does not protect ideas, methods, concepts, and factual information. An important step in ascertaining whether a work is eligible for copyright protection is therefore to assess whether it is a mere idea (not protectable by copyright), or an expression of an idea (protectable by copyright).

The underlying reason for excluding ideas from the scope of copyright is the public interest in maintaining a robust public domain of ideas. Allowing new works to be made from the same idea encourages the development of innovation, creativity and expression. If copyright were to be extended to simple ideas, then this would build monopolies around basic ideas, undermining societal progression and stifling innovation. Maps represent an example of how copyright protects expressions and not ideas. Maps may be protected as artistic or literary works, but only insofar as they are expressions of underlying geographical information, leaving this information in the public domain. It is hence only the cartographer's aesthetic choices, use of colour, selection and design that falls under expression and therefore qualifies for copyright protection.

There is not always a clear-cut distinction between idea and expression, and assessing whether a work satisfies this requirement will always depend on the facts of the case. In practice, the types of works that will be encountered in the Terra Mosana project, the distinction between ideas and expressions will rarely be an issue. Specific architectural sites, buildings, sculptures, and paintings are all clearly expressions of ideas.

To summarize, for a work to classify as copyright subject matter in the EU, it must satisfy the following criteria for protection:

i. a work

ii. that is identifiable in a precise and objective fashion and

iii. that represents the expression of an idea.

If a work is subject matter that is eligible for copyright protection, it still needs to fulfil the requirement of originality in order to be protected under copyright.

[6] This distinction is set out in Article 9(2) of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), and has been invoked by the CJEU in Levola Hengelo decision.

2.1.2. Originality

Only those works that demonstrate the requisite level of originality qualify for copyright protection in the EU. The originality test is, therefore, an important step in identifying if a work is protected by copyright or whether it falls into the public domain. According to the landmark decision *Infopaq* by the CJEU in 2009, all categories of works must meet the standard of the "author's own intellectual creation" in order for a creation to qualify for copyright protection within the scope of the [1]InfoSoc Directive.

Until 2009, there was not a unified European standard for assessing a copyright work's originality. Some countries had different requirements to determine original works. For instance, while the UK adopted the "sweat of the brow" approach, which granted copyright protection to any work to which the author has put enough skill, labour, or judgement, Germany adopted the creativity doctrine, under which computer programmes, for example, would only deserve protection if they exceeded the average ability of the programmer. To a certain degree, we still see some of these country-specific approaches back in the interpretation of the now EU concept of the "author's own intellectual creation".

Following the *Infopaq* case, the CJEU has continued to refine its concept of originality, also as a response to the slightly different interpretations given to the concept of the author's own intellectual creation by Member States. The Court determined that the originality standard requires the work to reflect the author's personality or personal touch. This "personal touch" test requires that the author has made her own, subjective choices. The type of work must, therefore provide space for the author to exercise creative freedom in making choices about the work.

This standard was recently articulated by the court in *Painer* (C-145/10) and *Football Dataco* (C-604/10) as requiring that a work be the product of the author's "free and creative choices." This formulation combines objective and subjective elements. This standard also applies to works of applied arts (designs), as the recent *Cofemel v G Star Raw* CJEU ruling clarified.

As soon as there is a creative human activity with an individual character, the scope of protection of all types of works is, in principle, the same. There is no distinction in copyright law between strong and weak works. This does not alter the fact that copyright infringement requires that the use of a copyright protectable element is established. In the case of strong creative works, more protectable elements can be established than in the case of less original creations.

Artistic value, artistic character, good or bad taste and qualitative characteristics are in any case irrelevant when assessing the question of whether a work enjoys copyright protection. Even the bringing together of elements that are not original in and of themselves can, by the way this is done, produce an original whole. The same applies to the transposition of a known design in a different manner.

Therefore, in assessing the originality of works to be digitised as part of Terra Mosana, the scope for the work's creator to make creative choices should be considered. It is more than likely that the works in question will readily satisfy this standard, provided that their form is not solely dictated by technical function.

To summarize, the harmonized standards of copyright subject matter and originality in the European Union require a work to be identified precisely and objectively, to reflect the expression of an idea and not the idea itself, and it must be original in the sense that it represents the "author's own intellectual creation", not solely dictated by technical function. Works that are part of cultural heritage sites are very likely to meet these standards. Nevertheless, national laws provide additional guidance on how to assess copyright protected works.

2.2. Belgium

2.2.1. Copyright subject matter

Copyright protects "a work" (Article XI.165 of the Code of Economic Law). The concept of a work is not defined in Belgian law. Belgian copyright belongs to the author of a literary work or work of art. In practice,

this is a very broad scope of application that is in line with the interpretation given by the Court of Justice in the *Levola Hengelo* judgment.

All works enjoy the same protection as long as two requirements are met, namely that the work is expressed in a concrete form and that the work meets the requirement of originality. These requirements are not further defined in the Belgian legal texts, so that one must mainly look at how the courts and tribunals interpret them.

Belgian copyright law uses a number of categories of works within which the various creations can be categorised. Thus, there are:

- works of literature
- works of visual art
- sound works
- audiovisual works
- databases
- computer programs (Title VI, Articles XI.294 et seq. CoEL)

A variety of creations can be classified under these categories. Besides the traditional literary and musical works such as books, theatre works, brochures and courses, compositions, scores and librettos, works of visual art include paintings, lithographs, sculptures and photographs, but also blueprints, technical notes, choreographies, oral accounts, scientific articles, caricatures, geographical maps, calendars, works of applied art, industrial drawings and commercial slogans. Special rules apply to computer programmes and databases.[7]

Copyright does not protect ideas, even if they are very original.[8] The subject of protection is only the concrete form in which those ideas are expressed. This does not mean that it is always easy to draw the line between idea and form.[9] No protection is given to a particular genre, fashion, style or technique. The form can be very diverse, as can the medium in which the creation is expressed or shown, such as graphic media (paper) or electronic media (CDs, DVDs, blue rays). Therefore, it does not matter whether it concerns buildings or plans of buildings.

In the context of the Terra Mosana project, works that are to be digitised may be buildings, artworks, photographs or movies. All of them are works that qualify as copyright subject-matter, as long as they are not too abstract, concrete enough and do not merely represent ideas.

2.2.2. Originality

Originality is also the key concept for the application of the Belgian copyright rules. The Belgian interpretation is fully in line with various European directives and case law of the Court of Justice. Following the standard set out above, and particularly in the *Infopaq case*, a photograph, for example, can be protected by copyright if it can be taken by different people in a different way, i.e. if they can make specific choices as regards framing or lighting.

Within the requirement of originality, both an objective and a subjective component can be distinguished.[10] The objective component looks at the presence of a certain form of intellectual labour

[7] F. GOTZEN and M.-Chr. JANSSENS, Wegwijs in het intellectueel eigendomsrecht, Brugge, Vanden Broele, 2019, 43.

[8] Court of Cassation 19 maart 1998, A&M 1998, 229; Court of Cassation 17 februari 2017, IRDI 2017, 135, with note from F. Gotzen.

[9] E.g. Gent Court of Commerce 28 Januari 2016 and 24 October 2016, C4/NIKO, IEFbe 2497.

[10] See *inter alia* Court of Cassation 27 April 1989, Judgments of the Court of Cassation 1988-89, 1006; Court of Cassation 25 October 1989, Judgments of the Court of Cassation 1989-90, 272; Court of Cassation 2 March 1993, Pas. 1993, I, 234; Court of Cassation 10 December 1998, RW 1999-2000, 325; Court of Cassation 11 March 2005, RW 2007-08, 192, with note.

without the need for a significant amount thereof. The subjective component examines whether one can recognise the input of the author in the work and thus whether there is a link between author and work. In the absence of a personal human stamp, no copyright protection can be established.

Copyright may be layered, i.e. there may be several works which may or may not be connected. For example, the plans of a structure may be copyrighted, while the photograph of that structure may constitute another work, namely to the extent that they are the product of originality. Sometimes the first copyright may be exhausted, but that does not mean that the copyright on the second work would be no langer in effect longer be in effect.

Belgian copyright law also uses the term "original work of art". The term refers to "a work of graphic or visual art, such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramic works, glassware and photographs, insofar as this work is a creation of the artist himself, or is a copy that is considered an original work of art". This notion is important when a work is resold, because in such an event a resale right is attached to it.[11]

Certain works are not protected by copyright, notably acts of government[12] and works or performances that are in the public domain. Works are in the public domain when the term of protection has expired. This is certainly the case for older buildings and the blueprints of these old buildings

2.2.3. Protection of portraits

Belgian copyright law contains a specific provision relating to photos that contain a portrait, in that it is not a question of a specific protective right for photos, but of a restriction on the rights of use of the photographer or the owner of a portrait. Indeed, he is not entitled to reproduce the portrait or communicate it to the public without the consent of the person portrayed or, for 20 years after his death, without the consent of his successors in title.[13] This rule may be relevant where pictures that contain a portrait are used for the Terra Mosana project; if that person is still alive, or has passed away less than 20 years ago, the consent of the person in the portrait, or the heirs, is required.

2.3. Germany

2.3.1. Copyright subject matter

The German Copyright Act (*Urheberrechtgesetz)* of 1965 protects works in the literary, scientific and artistic domain (Section 1), provided they are sufficiently original. Section 2(1) sets out a list of works which are protected, which includes: literary works, musical works, pantomimic works, artistic works, including works of architecture and applied art and drafts of such works, photographic works, cinematographic works, and scientific or technical illustrations.

This is an open list—it is exemplary, rather than exhaustive—and is followed with a general clause clarifying that the Act applies to works that are "*persönliche geistige Schöpfungen*": personal intellectual creations. The subject matter of copyright has been elaborated through case law and comprises four cumulative criteria. The work must be:

(1) a personal creation
(2) with intellectual content
(3) expressed in a form which can be perceived through the senses, and
(4) displaying a minimum level of originality.

These criteria, while expressed differently through the CJEU's elaboration of the autonomous notion of the work, are generally consistent with the EU standard (see Part 2.1). The CJEU decision in the case of *Levola Hengelo* appears to impose the additional conditions of objectivity and precision to criterion (3). The European Court's determination that a work must be capable of being identified with precision and objectivity goes above the more subjective German standard of being capable of perception through the

[11] Article XI.175 CoEL.
[12] Article XI.172 CoEL.
[13] Article XI.174 CoEL.

senses. To be eligible for copyright, a work must therefore be expressed in a form which can be perceived through the senses, and also to be clearly and precisely identified in an objective manner.

The types of works at issue in the project are likely to easily satisfy this requirement. The types of works for which 3D digital models could be created will necessarily be perceptible and capable of being objectively and precisely defined.

2.3.2. Originality

There is no express reference to originality in the German copyright legislation; however, the Act limits the sphere of protection to "personal intellectual creations." This statutory expression forms the basis of the originality requirement that has been developed by the courts through case law.

Is there a difference between the CJEU's "author's own intellectual creation" and the German Act's personal intellectual creation? Judge and Gervais write "modern German doctrine combines a mostly subjective search for individuality […] with the requirement of a minimal threshold of creativity"(Judge and Gervais 2009, 382). The emphasis on individuality is consistent with the CJEU's reasoning in *Painer* and, therefore, with the harmonised concept of the copyright work.

A higher level of originality had until recently been required by the courts for works of applied art, based on the fact that these works can also be protected by design laws.[14] This requirement that works of applied art demonstrate artistic quality was abandoned by the Federal Court in the 2014 *Geburtstagszug* case, in light of CJEU jurisprudence. The earlier approach of German courts was inconsistent with the CJEU's approach in the recent *Cofemel v G Star Raw* case. According to this recent case law, the originality standard of "author's own intellectual creation" also applies to unregistered designs. Member States are hence precluded from imposing additional criteria for copyright protection, such as aesthetic value on any category of work.

2.3.3. Protection of photographs

Part 2 of the German Copyright Act includes *sui generis* protection for photographs as a related right. This separate form of protection applies to "photographs and products manufactured in a similar way to photographs" (as distinct to copyright in "photographic works" dealt with in Part 1 of the Act).[15] The courts have found that this applies to photographs demonstrating "personal intellectual effort." This special protection for photographs is relevant to Terra Mosana in two ways: it may cover works to be digitised or otherwise reproduced in project activities, and it may protect the digitisation itself (the project output).

2.4. The Netherlands

2.4.1. Copyright subject matter

Copyright in the Netherlands is governed by the Dutch Copyright Act of 1912 (*Auteurswet*). While the Act does not define the concept of a copyright work, case law and legal doctrine have established that in order for copyright to subsist, a work must:

(1) have an individual character and bear the personal stamp of the creator
(2) be perceptible by the senses, and
(3) not be mostly directed to achieving a technical effect

The Dutch Copyright Act aims to protect "any creation in the literary, scientific, or artistic areas, whatever their mode or form of expression." This language directly reflects the inclusive description of copyright works in the Berne Convention. Article 10(1) of the Dutch Copyright Act sets out a non-exhaustive list of twelve categories of work that are protected under the Act. This list is only illustrative, as the harmonised European standard for works of authorship applies (see Part 2.1.1)

[14] See, for example: Metallbett (Metal Bed) (BGH I ZR 142/01) [2004] GRUR 941.

[15] German Copyright Act Section 72. This differential treatment of photographic works and photographs is permitted under Article 6 of the Term Directive which both harmonises the originality standard for photographic works and allows Member States to protect 'other photographs'.

This expansive approach has resulted in the protection of works including a chemical reaction formula (*Technip Benelux)*, the taste of pralines (*Manfred Spaargaren Confiserie)*, and the recipe for liquorice sweets (*Autodrop*). In the controversial 2006 case of *Kecofa v Lancôme*, the Dutch Supreme Court found that copyright may subsist in a perfume, as it fulfils the conditions of being original and perceivable by the human senses. The recent CJEU decision in the *Levola Hengelo* case, however, presents a challenge to the approach to subject matter previously taken by the Dutch courts (see discussion of this case in Part 2.1.1). While the scent of a perfume was determined to be copyrightable in the Netherlands in *Kecofa v Lancome*, it would be difficult for a scent to satisfy the requirements of precision and objectivity set out by the CJEU in *Levola Hengelo.* These decisions on the eligibility for copyright of scents and tastes adjudicate works at the very edges of copyright subject matter. For the types of works contemplated by Terra Mosana, it can be assumed that buildings, images, paintings, sculptures, graffiti, and photographs fall easily within the scope of copyright subject matter under Dutch law.

Idea-expression distinction

Case law makes clear that copyright does not extend to the protection of ideas, processes, and other abstractions. In *Van Gelder/Van Rijn*, the Supreme Court held that copyright did not subsist in the process of production of figurines (as opposed to the figurines themselves). The Court of Appeal of Amsterdam in *Cyráko/Erobaking* found that the idea of 'erotic patisserie' could not be copyrighted. In both these cases what was at issue was whether protection was sought in the underlying information, process, or concept, or in the work generated from that concept or process.

2.4.2. Originality

While it is not required by statute, it is a well established copyright doctrine that originality is a requirement for copyright protection in the Netherlands (*Screenoprints*, *Van Dale v Romme*). The test of originality developed by Dutch courts has two strands:

(1) the work must have its "own, original character" and,

(2) that the work "bear the personal stamp of the maker."

The meaning of these two requirements was clarified in the *Endstra* case, where the Supreme Court explained that the term "own original character" entailed that the work's form must not have "been derived from another work." The Supreme Court further explained originality entails the work carries the personal stamp of the maker, which is present where work is the result of human creation and creative choices.

In assessing originality, Dutch courts distinguish between the objective and subjective features of the work in question. Objective features of the work, those required to obtain a technical or functional effect, do not contribute to the level of originality in a work. Subjective features, those that reflect the personal tastes of the author, are assessed to determine originality. The more a work is required to meet a technical or functional need, the less likely it will be deemed sufficiently original. However, the selection of technical and functional elements can attract the protection of copyright law if the selection itself demonstrates sufficient originality.

Dutch courts have considered recent CJEU decisions on originality and the standard of "author's own intellectual creation." In a 2013 decision, the Supreme Court explicitly compared the criteria of Dutch case law—own original character and personal stamp of the author—with the CJEU's originality standard—author's own intellectual creation—and determined that they had the same meaning (*Stokke*). The originality standard in Dutch law therefore appears to have been essentially unchanged by European harmonisation of the concept of the copyright work.[16]

3. Calculation of the term of protection of copyright protected works

Calculating the term of protection is a crucial step in determining whether a work is within copyright's scope of protection or whether it falls in the public domain. There is no universal copyright term. The

[16] Hugenholtz (2012), p. 54.

duration of protection is determined by the type of work and is calculated with reference to either the lifetime of the author/s, or the date of creation or publication. The term of protection in the EU is governed by a network of community and national laws, and determining the applicable term depends on applying these laws according to rules regarding retroactivity. As such, calculating the duration of copyright may be a complex undertaking.

At the international level, the Berne Convention sets out a minimum general term of protection for copyright works of the lifetime of the author and 50 years after their death (*post mortem auctoris* or *pma*) (Article 7(1)). Other terms apply to cinematographic works (50 years from communication to the public: Article 7(2)), to anonymous or pseudonymous works (50 years from communication to the public: Article 7(3)), and to photographic works and works of applied art (25 years from creation: Article 7(4)). Article 7*bis* of the Berne Convention provides that for works of joint authorship, the term is to be calculated from the date of the death of the last surviving author. The Convention, however, offers no guidance as to how joint authorship is defined or assessed. We address joint authorship below for the EU framework and at Member State level.

The TRIPs Agreement provides that for works other than photographic works or works of applied art, if the term of protection is not calculated with reference to the life of the author, it shall be no less than 50 years from the authorised publication (or if unpublished, the making) of the work (Article 12).

3.1. EU

With the entering into force of the Term Directive in 2007, the term of protection for Member States has been harmonised. However, this harmonised treatment applies to works created on or after 1 July 1995. For works created before 1 July 1995, the law of the Member States applies. Importantly, the Term Directive sets out two rules in this respect: first, the Directive will not have the effect of shortening a term of protection which was already running prior to the 1st of July 1995 (Article 10(1)); second, if copyright has expired in one Member State, but it was still protected in another Member State on 1st July 1995, the copyright is revived (Article 10(2)). For works created before 1 July 1995, we advise to consult a copyright specialist in the relevant Member State to determine the exact length of copyright protection.

For works protected in at least one Member State as of 1 July 1995 or works created thereafter, the term of protection varies according to the type of work. For literary and artistic works (including works of architecture and design), the duration of copyright is 70 years from the author's death. The term of protection is calculated from the 1st of January of the year following the event (Article 8). For example, a 70 year copyright term for a work of which the author died on the 1st of February 1944, would have expired on the 1st of January 2015.

For works where the author is unknown, undisclosed or wishes to remain anonymous, the term of protection runs for 70 years after the work has been published. For pseudonymous works, the same applies unless the pseudonym leaves no doubt as to the author's identity. If the author can be determined, the protection lasts for 70 years from the author's death.

3.1.1. Joint authorship

For jointly authored works, the term of copyright protection is calculated from the death of the last surviving author. For literary and artistic works that are jointly authored, protection would therefore expire 70 years after the death of the last author. Jointly authored works must be distinguished from collectively authored works. Generally, a work is considered jointly authored where two or more authors work together, each bringing their own creativity to produce a single work (to the extent that their contributions are inseparable). Collectively authored works, on the other hand, are created by combining the discrete contributions of more than one author, for example, in an anthology or edited volume that combones separate works. For separate works, authorship remains with the creator of the separate work, and is not considered joint.

Recital 13 of the Term Directive specifies that the question of joint authorship is to be determined by national laws. Consequently, the calculation of the term of protection of copyright works depends on how joint authorship is dealt with in each Member State.

3.1.2. Critical and scientific publications

Where critical and scientific publications do not fall within copyright, Member States may still protect them for a maximum term of 30 years from the date of publication (Article 5 Term Directive). If, however, a critical or scientific publication satisfies the requirements for copyright protection, the general term of 70 years *pma* applies.

3.1.3. Moral rights

Crucially, the Term Directive deals only with economic rights, and does not apply to moral rights (Recital 20). The duration of moral rights is governed by national laws, and varies among Member States. In France, for instance, the important moral rights of integrity and attribution endure in perpetuity, exercisable by the author's heirs (Intellectual Property Code Article L 121-1), whereas in the UK, the right to object to false attribution expires after 20 years *pma* (Copyright, Designs and Patents Act 1988, Section 86). We discuss the duration of moral rights for the Member States relevant for the Terra Mosana project below. For other Member States, we advise to check their duration in the national laws.

In summary, to determine whether a work falls within the duration of protection, it is crucial to know:

(1) the type of work in question
(2) when the work was created and/or published
(3) whether the author is still alive and, if not, the date of their death.

Based on the term of copyright, some works can be readily ruled out of copyright protection: an architectural work such as the Church of Our Lady in Tongeren, constructed from the 13th to the 15th century is clearly outside the duration of copyright. The digitisation, however, of the market places surrounding the church may include more recent copyright works such photographs or sculptures. Research should be undertaken to gather information on works of this type, in order to determine whether they are protected by copyright, or fall in the public domain.

3.2. Belgium, Germany, The Netherlands

The term of copyright protection in the three Member States does not vary much due to the harmonisation through the Term Directive. We therefore treat all Member States at the same time, highlighting specific protection regimes and the term of moral rights.

3.2.1. Anonymous works

As elaborated above under EU law, anonymous works are protected for 70 years from the moment the work has been made available. This is the case for all three jurisdictions. In addition, Germany has established a registry for protected literary, scientific and artistic works that have been published as anonymous or pseudonymous works. The German Patent and Trade Mark Office keeps this register for the sole purpose of ensuring the regular duration of copyright protection.

In Belgium, persons who make anonymous works available, also enjoy some form of protection. For works that have not been published before, the person who makes the first publication or disclosure enjoys special protection equivalent to that of an author's property rights for a period of 25 years .[17]

3.2.2. Moral rights

As moral rights are not addressed by the Term Directive, national laws apply. However, in all three Member States, moral rights last for as long as economic rights last. This means that in Belgium, Germany and the Netherlands, the duration of moral rights for authors is 70 years *pma.* After the death of the author, these rights are exercisable by the heirs. In the Netherlands and Belgium, Article 25(2) of the Dutch Copyright Act and Article XI.171, para. 2 van het Wetboek van Economisch recht specifies that moral rights can only by exercised by the individual designated in the author's will. If no one is designated, the rights will lapse.

[17] Article XI.166 CoEL.

3.2.3. Joint authorship

There are minor differences in the national approaches to determining whether a work has been jointly authored. According to the Belgian Code of Economic Law, a person is a co-author when he has made a creative contribution to the creation of a work, which means that he has his own contribution that meets the requirement of originality. [18] If the copyright is undivided, its exercise is regulated by agreement. If there is no agreement, none of the authors may exercise the right separately, subject to a court ruling in the event of disagreement. [19] If the work is a joint one, where the individual contribution of each author is clearly identifiable, the authors may not collaborate with any other person in the context of this work, unless otherwise stipulated. [20]

The German Copyright Act states that for a work to be considered jointly authored, it must have been created by several persons jointly (though not necessarily simultaneously), so that their respective contributions cannot be separately exploited. Jointly authored works require consent from all authors for exploitation or alteration, but this consent cannot be unreasonably refused. While rules about joint authorship are not set out in the Dutch Copyright Act, the courts have taken the approach that a work will be considered jointly authored where each author cannot distinguish a substantial part of the work as theirs alone.

3.2.4. Online term calculators

The website developed as part of the Europeana Connect project makes available resources and decision-making tools for determining the term of a copyright work and determining whether a work is protected in the public domain. The Europeana Connect project developed best practice guidelines and supported the implementation of the large-scale digitisation of cultural heritage in the Europeana project. The flowcharts require the user to have the relevant information about the category of work, whether the work has been published, the nationality of the author, and the date of the author's death.

[18] Bergen 2 October 1997, JT 1998, 168; Antwerp District Court 30 juni 2011, IRDI 2011, 365.

[19] Article XI.168 of the Code of Economic Law.

[20] Article XI.169 of the Code of Economic Law.

DELIVERABLE 1.3.2. Guidelines concerning intellectual property

4. Regime of economic and non-economic rights in copyright law

If a work has been identified as falling within the scope and duration of copyright, a series of exclusive economic and non-economic rights apply. This deliverable describes these rights in the European and relevant national contexts. It also outlines the various exceptions to copyright; circumstances in which the rightholder's authorisation is not required. Knowing about these rights and exceptions is essential to the Terra Mosana project, as they determine which actions in the course of the project will require authorisation from the copyright holder, and which will not.

4.1. Introduction

In copyright law, authorship of an eligible work gives rise to two categories of rights: economic rights and non-economic or moral rights. Economic rights, such as the rights of reproduction, adaptation, distribution, and communication to the public, protect and regulate the copyright holder's ability to commercially exploit a work. These rights are subject to certain limitations or exceptions. Moral rights, on the other hand, are aimed at safeguarding the personal interests of the author, and their connection to the work. The two core moral rights are the right of integrity, which gives the author of the work the ability to object to the alteration of the work under certain conditions, and the right of attribution (also referred to as the right of paternity) which grants the author the right to be acknowledged as the creator of the work. Additional moral rights protected in some jurisdictions include the right to withdraw the work from circulation, the right of access to the work, and the right to determine when and where to make the work public (the right of disclosure).

4.2. Authors and copyright holders

Before discussing the uses of copyright works which require authorisation, here we address the question of *whose* authorisation is required. Generally speaking, copyright vests in the author or authors when a work is created.[21] The author is, therefore, the first owner of the copyright in the work (see Part 3.1.1 on joint authorship). For old buildings, however, this brings an additional complexity because they are usually not the product of one author, but of several. Buildings could have been altered in course of their history and can also contain several styles. If a building can be the subject of copyright protection, the same applies to a photograph of that building. Whereas in the first case the copyright is vested in the architect, in the second case it will be in the photographer, provided, of course, that the requirements of copyright are met. Cities as such may also enjoy copyright protection if the design of the city itself meets the requirements of copyright protection. However, this is not the case when a city is the result of spontaneous development, as is the case for many cities in Europe.

When it is has been determined who the author is, it is crucial to note that the author of a work is not necessarily the copyright holder. Certain rights protected by copyright may have been transferred or licensed to third partie. As such, it is essential to identify not only the author, but the rightsholder in order to seek appropriate authorisation where works that Terra Mosana wishes to digitize fall within the scope and duration of copyright protection. This may involve tracing the transfer of rights from the author to their heirs or other parties. In certain circumstances, it may not be possible to determine the authorship or ownership of copyright in a work. This uncertainty may arise, for example, where a work is published anonymously or where the name of the author is not attached to the work. In this case, provisions regarding orphan works may apply (see Part 4.5.1.2).

[21] In certain circumstances, copyright may be vested in the employer of an employee who creates a work, or the commissioner of a work.

4.3. Economic rights

Copyright's economic rights include the rights of reproduction, adaptation, distribution, and communication to the public, protect and regulate the copyright holder's ability to commercially exploit a work, subject to limited exceptions.

4.3.1. EU

At the European level, copyright's exclusive rights are primarily set out in the InfoSoc Directive. This Directive sets out a framework of legal rules aimed at aligning European copyright law with international norms and reducing disparities between Member States. Harmonization efforts have been geared towards ensuring that certain exclusive rights are protected in all Member States, as well as limited mandatory exceptions. The Infosoc Directive also sets out a list of additional exceptions which Member States may opt to implement. The scope for differences in protection, therefore, lies primarily in these optional exceptions.

4.3.1.1. Reproduction right

The right to reproduce the work is at the heart of copyright law. This right is set out in Article 9 of Berne Convention as the author's "exclusive right of authorizing the reproduction of these works, in any manner or form."[22] In Europe, the reproduction right is harmonized by Article 2 of the InfoSoc Directive, which grants copyright owners the exclusive right to authorise reproduction of the copyright work: direct or indirect, temporary or permanent, by any means or form, in whole or in part. For instance, a making a photograph of a painting, an engraving of a photograph, or even making a computer programme based on a manual are deemed reproductions and might amount to copyright infringement, if these acts are not authorised by the copyright owner.

Accordingly, acts of digitisation fall under the concept of reproduction: they constitute acts of copying the original work and transposing it to a digital medium. Copyright owners must therefore authorize any act of digitisation of protected works. The reproduction right covers both direct and indirect reproductions. This means that if the digitisation is carried out, for instance, from a 3D model of a copyrighted sculpture, the act of digitisation still requires the authorization of the author of the original work, i.e. the sculpture. Even where only parts of a copyrighted work are digitised, the author's authorisation is required (Article 2 InfoSoc Directive) The CJEU case law shows, however, that it not any part requires authorization. Only the parts of the work that reflect the authors' own intellectual creation will deserve protection.

When applying this to the Terra Mosana project, it is clear that many of the acts carried out in its scope will fall under the broad scope of the right of reproduction.

4.3.1.2. Communication and making available to the public

While often mentioned together, there are actually two distinct rights incorporated in the communication and making available to the public. The difference between an act of communication and making available is that the first involves a transmission of a work to a recipient(s), whereas the latter involves the transmission to a place, where the public will access it according to their needs.

The exclusive right of communicating or authorising the communication of copyrighted works is explicitly intended to apply to communication and transmission on the Internet. A communication act involves a chain of technological processes, which starts with the placement of the work in the medium to communicate (e.g. a server) and ends with the public accessing the work. Article 3 and recital 23 of the Infosoc Directive provide that a key element is whether a public that otherwise would not have access to the work, gains access because of the intervention made. The word "public" implies a relatively large, or

[22] This definition was subsequently incorporated into the TRIPs Agreement: TRIPs Art 9. The WCT and WPPT reference the Berne Convention definition of reproduction, with the Agreed Statement concerning Article 1(4) of the WCT stating "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."

undetermined number of people. The CJEU has in many cases acknowledged that even if an act of communication to the public takes place, not necessarily it will be an act of infringement. To be deemed an infringement, the act of communication must target a "new public," which does not include the public present in the first act of communication made by the author or with his/her consent.

To assess whether the act of communication targets a new public, one needs to have in mind the author's original expectations when the first communication was made. It is a subjective test, and therefore carries different interpretations. In any case, for the context of Terra Mosana, digitizing works and communicating them online to the public will most likely make the work available to a "new public". It was probably not the author's initial intention to have the work digitized and accessible online. Any act of digitisation and further communication of protected works to the public may, therefore, infringe the authors' right of communication to the public if carried out without his/her consent.

Article 3 of the Infosoc Directive also comprises the exclusive right to make the work available to the public and authorise the making available by others. This subdivision of the right of communication to the public refers to acts that allow members of the public to access the works from a place and at a time individually chosen by them. For instance, this is the case with online "video-on-demand" services, streaming, uploading works online and peer-to-peer transmissions, where specific persons will be able to access the works where and when they so desire. It is a more restricted act, but it covers a large amount of possibilities. For the Terra Mosana project, digitizing copyrighted works and uploading them onto an online database, in a way that will allow the public to access them from places and times individually chosen by them, will certainly amount to an act of making available to the public.

4.3.1.3. Distribution Right

The exclusive right of distribution of a copyrighted work accords to authors the exclusive right to authorise or prohibit the distribution of the original and copies of their works, by sales or otherwise (Article 4 InfoSoc Directive). It covers both the original works and copies thereof, both physical and digitised.

An act of distribution implies the transfer of ownership, including sales, donations, loans, and other transfers of ownership. The CJEU has acknowledged that an act of sales, however, encompasses a series of smaller acts, i.e the agreement to sell, the sale and the delivery. According to the Court, any of these acts, if taken place in a jurisdiction where the work is protected, will amount to an act of distribution, and ultimately infringement, if carried out without the author's consent. Based on the interpretation carried out in the case of *Donner* (C-5/11), if a work is no longer protected in a specific EU country where the sale occurs, but the delivery takes place in a country where copyright is still running, then there will be an act of infringement in the country of delivery.

In this regard, supposing Terra Mosana will engage in acts of distribution of copies of copyrighted works, it is crucial to have the author's consent prior to initiating any agreement to sell/transfer ownership of copies of the digitised work. The right of distribution, however, does not cover an act of lending/rental, which is covered by a specific Directive.

In the EU, the distribution right is limited by the principle of exhaustion. After an initial lawful sale or other transfer of ownership of a copy of the work - that is, with the author's consent - in the EU or the EEA, the author loses further control over the subsequent stages of trade for that specific work. Following the transfer of ownership, the right holder cannot prevent further distribution. However, there is only an exercise of the distribution right and therefore exhaustion if there has been an actual transfer of ownership of the object. Furthermore, there must also be a transaction to a member of the public. In the *Art & Allposters* case (C-419/13), however, the CJEU clarified that where the distributed work is a modified version of the original work—in that case, the work originally in a poster format was transferred to a canvas—, the distribution right regarding the modified work is not exhausted, and new authorisation is required to make the modified work available to the public. Hence, where Terra Mosana partners change the physical medium on which the work is displayed (transferring a photograph on a digital medium), distribution regarding the digital medium requires authorization from the copyright holder, even though rights in the physical medium have been exhausted.

In any case, even if the distribution right is exhausted, the Resale Right Directive guarantees a certain minimum amount of royalties over subsequent sales that will be due to the authors, or their successors in title. Such right is often named Droit de Suite and the minimum royalties are set in Article 4. Member States shall have the authority to establish the minimum amount of sales to which the resale right shall apply. Therefore, if Terra Mosana partners resell a digitized work, even for copies of the work, it is recommended to check the national laws of the concerned Member State. If the price is higher than 3.000,00 euros, the resale right will inevitably apply.

4.3.2. Belgium

4.3.2.1. Reproduction right

Belgian law makes a distinction between the reproduction right in the narrow sense and the reproduction right in the broad sense.

The reproduction right in the narrow sense means that the author of a literary or artistic work has the exclusive right to reproduce this work "*in any manner or form, either directly or indirectly, temporarily or permanently, in whole or in part, or to have it reproduced*".[23] The reproduction right covers the making of (material) copies of a work, irrespective of the way in which those copies are made and irrespective of the form the copy takes. This primarily concerns cases of slavish copying where reproductions are made on identical carriers. However, changes to the body of the work can also constitute an infringement of the reproduction right.

The reproduction right in the broad sense also includes a number of component rights.[24] The author (copyright owner) has the right to grant permission to adapt the work (the so-called adaptation right) or to translate it (the so-called translation right).[25] He also determines the fate of his work or copies thereof (the so-called designation right). It also includes the right to authorise the rental or lending (the so-called rental and lending right). However, there is an important exception to this in Belgium. It also includes the so-called distribution right, which will be dealt with in a separate section below.

4.3.2.2. Communication and making available to the public right

The author shall have the right to communicate his work to the public by any means. Under this form of exploitation, the public acquires knowledge of the work in a non-tangible form.[26] In order to remove any doubt about digital application, the definition further clarifies that "making available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them" falls within the scope. Unlike acts of reproduction, communications are not subject to the principle of European exhaustion. Since this aspect is harmonised by European law and the Court of Justice has ruled that the concepts of 'communication' and 'to a member of the public' must be interpreted autonomously and uniformly, a Member State may not unilaterally broaden the concept. Therefore, reference can be made to the European case law on this matter.

4.3.2.3. Distribution right

The distribution right is the exclusive right to put copies of the work into circulation. It includes the right of an author to reproduce his work or have it reproduced and the exclusive right to authorise the distribution to the public, by sale or otherwise, of the original of his work or of copies thereof.[27] This distribution right is subject to a substantive limitation called 'European exhaustion' (see above).

4.3.3. Germany

An author's economic rights are generally described in Section 15 of the German Copyright Act, and specific provisions are contained in Sections 16 to 24. The creation of digital copies of works, and making

[23] Art. 165, § 1, first par. of the CoEL.
[24] Art. 165 of the CoEL.
[25] Article 165, § 1, par 2 of the CoEL.
[26] Article XI.165, § 1, par 4 of the CoEL.
[27] Article XI.165, § 1, par 5 CoEL.

these available to new and broader public involves the core rights of reproduction, communication and making available to the public, and distribution. The rightsholder's authorisation must therefore be sought for these activities, unless a relevant exception applies.

4.3.3.1. Reproduction right

The author has an exclusive right to reproduce the work "whether on a temporary or on a lasting basis and regardless by which means of procedure or in which quantity they are made" (Section 16(1)). This clearly applies to the creation of copies through digitisation and therefore, to the central activity of the Terra Mosana project.

4.3.3.2. Right of communication and making available to the public

According to Germany law, communication is considered public where it is "intended for a plurality of members of the public"(Section 15(3)). As described above in Part 4.3.1.2, the Terra Mosana project's aim is explicitly to make works available to a new and broader public. The digitisation and communication of protected works to the public, would infringe an authors' rights if carried out without her authorisation, or the application of a relevant exception (See Part 5.3).

4.3.3.3. Distribution right

Section 17 of the German Copyright Act defines the distribution right as the right to "offer the original or copies of the work to the public or put it into circulation."

4.3.4. The Netherlands

The economic rights of the author are established in Article 1 of the Dutch Copyright Act and further specified in Articles 12 to 14. Terra Mosana's digisation of works, and the creation of virtual environments to facilitate access to cultural heritage involves the reproduction, communication and making available to the public, and distribution of works. As such, prior authorisation for each of these activities must be sought from the relevant rightsholder, unless an exception to the rights applies.

4.3.4.1. Reproduction right

The right of reproduction, established in Article 1 as an exclusive right of the author, includes:

> "reproductions of a work in a modified form, such as translations, arrangements of music, dramatizations and other adaptations" (Section 10(2))
>
> "the fixation of the whole or part of the work in any article allowing the work to be heard or seen" (Section 14); and

The digitisation of works of cultural heritage falls easily within this definition of reproduction.

4.3.4.2. Right of communication and making available to the public

Section 12 specifies that an author's exclusive right to "disclose the work to the public" (Section 1) includes the "disclosure to the public of the whole or part of the work" as well as the "rental or lending of a work." Terra Mosana intends to digitise works and create virtual environments specifically to make these works available to the public.

4.3.4.3. Distribution right

The distribution of a work, in whole or in part, is an exclusive right of the copyright holder established by Section 12. Distribution of a copyright work, therefore, requires prior authorisation from the rightsholder, unless an exception may be relied upon (See Part 5.4).

In summary, determining whether a particular use of a copyright protected work falls within the scope of protection offered by copyright is crucial for Terra Mosana partners, in order to avoid infringing other's copyright. Copyright being territorial, one needs to choose the jurisdiction in which the copyright work

will be used. Within that jurisdiction, it is important to assess the scope of the right that one may interfere with. For the purpose of digitisation, the rights of reproduction, communication to the public, making available and distribution may be relevant.

4.4. Non-economic or moral rights

The term moral rights refers to a suite of rights aimed at safeguarding the personal interests of authors of copyright works, and ensuring their ongoing personal connection to the work. Unlike copyright law's economic rights, moral rights do not require users of the work to seek prior authorisation for certain acts. Rather, they provide a legal basis for authors to object to certain treatment of their works by others. For the Terra Mosana project, while moral rights considerations do not entail that prior authorisation is required, they are nonetheless important considerations and should inform best practice. These considerations centre on the core moral rights of attribution and integrity.

In light of the overarching aims of Terra Mosana, it is recommended that authors are acknowledged wherever possible. The project centres on the goal of increasing access to cultural heritage of the Meuse-Rhine region. Attributing authorship enhances the value of this access, offering additional information and context for the works in question. This acknowledgement could take various forms: credits at the end of a film, a list of works and authors on a website, or text posted where 3D models can be accessed. Regarding the integrity right, it is important to identify any aspects of the process of digitisation and dissemination of cultural heritage that the project involves and to assess whether they may infringe this right by altering or distorting authorial works.

4.4.1. International and EU

While norms of intellectual property protection are well-established in international law, moral rights remain largely exempt from recent efforts to standardise substantive international copyright norms. As a result, while these minimum standards for moral rights protection are set out in the Berne Convention, substantial national differences remain, which apply to the formulation of the rights and their duration. For example, while moral rights expire with the death of the author in the UK and USA, they last in perpetuity in France and Spain (on the duration of moral rights see Part 3.2).

While moral rights protection is governed by national laws, the international framework provides the basis for moral rights protection in national contexts, and sets out some core standards. The Berne Convention has, since 1928, explicitly protected two moral rights: the right of integrity and the right of attribution. The relevant article 6*bis* of the Convention provides that

> (1) Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and 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.

The right of attribution contained in Article 6*bis*(1) Berne Convention encompasses two situations: recognition (the right of an author to be identified as the author of their own work); and misattribution (the right to prevent someone else being named as the author of the work). There is some disagreement regarding whether Article *6bis* extends also to a situation of false attribution; whether an individual has the right to disclaim authorship of a work not created by her. The national implementation of the right of attribution are discussed below in more depth.

The right of integrity in Article 6*bis* is concerned with notions of the author's honour and reputation. Where modifications or alterations negatively impact the authorial interests related to their honour and reputation, they are considered an infringement of the right. Actions that infringe an author's moral rights can include interpretations, additions, deletions, or changes made that negatively impacts the honour or reputation of the author. For example, the publication of a book with an offensive jacket cover. Its exact scope differs from one jurisdiction to the other. Its interpretation even often is still evolving, as is seen in national case law addressing the right of integrity, as discussed below.

The core standards of moral rights set out at the international level are also relevant to the EU context. This is because moral rights have not yet been the object of European harmonization; none of the

copyright harmonization Directives have applied to moral rights. However, Recital 19 of the InfoSoc Directive states that moral rights are governed by the legislation of the Member States and the provisions of the Berne Convention, the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT).[28] This statement indicates that on moral rights matters, both national rules and international norms should be considered.

As moral rights are excluded from EU harmonization in copyright (see also Recital 28 of the Database Directive and Recital 21 of the Term Directive), there is the possibility of substantial difference in moral rights laws between EU Member States on issues including waiver, term of protection, and the approach taken to balancing the rights of the author against the rights of third parties, and the public interest.

4.4.2. Belgium

The moral rights can be found in Article XI.165, § 2 of the Code of Economic Law.

4.4.2.1. The right of attribution

Authors have the right to be recognised as the author of a creation. They can oblige third parties to publish the work under the name of the author. In that case, the author's name must appear on the work. According to Belgian law, the attribution right can also be exercised in a negative sense: the author can decide to use a pseudonym or to distribute his work anonymously.

4.4.2.2. The right of integrity

According to the Belgian Court of Cassation, the right of integrity includes the right to oppose any modification of the work without having to prove any harm to one's interest.[29] It makes no difference whether the alteration is made by adding, shortening or in any other way. Belgium therefore applies a broad interpretation, unlike Germany and the Netherlands. In addition, it is up to the author to oppose any distortion, mutilation or alteration of the work. Not only by making material changes to the work, but also by undermining the creative intent of the work, authors may always oppose such acts if they could be prejudicial to their honour or reputation.[30] The creative intent of a work is undermined, for example, when a work is exploited in a context other than that intended by the author. This cannot be waived. The author does not have to additionally prove that he has suffered damage.[31] This interpretation of the integrity right is noteworthy also for the digitisation of content, as a different context (in this case the digital format) may under certain circumstances infringe the right of integrity.

Case law has introduced notions such as 'abuse of right' and 'balancing interests with other rights' as a corrective mechanism.[32] For example, it is assumed that an exploiter of copyright-protected works can make certain changes to the works to be exploited by him without the consent of the authors concerned or their rightful rightholder(s), and that the authors or their rightful rightholder(s) cannot oppose this in all reasonableness and fairness. Pursuant to Article XI.165, § 2, paragraph 7 of the Code of Economic Law, authors may always oppose, regardless of what they have contractually agreed, any material changes made to their work that may be prejudicial to their honour or reputation.

4.4.2.3. The right of divulgence

Article XI.165, § 2, paragraph 3 of the Code of Economic Law explicitly grants the author the right "to publish the work". This right includes the right to decide when the work is ready for publication.[33]

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[28] The WCT does not explicitly address moral rights, however, the WPPT stipulates that performers shall have the moral rights of integrity and attribution (Article 5).

[29] Cass. 8 mei 2008, A&M 2009/1-2, 102, noot F. GOTZEN.

[30] Court of Cassation 8 May 2008, A&M 2009/1-2, 102, with note by F. GOTZEN.

[31] Court of Cassation 8 May 2008, A&M 2009/1-2, 102, with note by F. GOTZEN.

[32] Liège Court of Commerce 13 January 2003, A&M 2003; Brussels Court of Commerce 3 May 2013, ICIP 2013, 602.

[33] Brussels Court of Commerce 29 May 2008, A&M 2009, 106; Brussels Court of Commerce 14 November 2014, A&M 2015, 278.

4.4.2.4. Exercise, transfer and waiver

According to the Code of Economic Law, moral rights are inalienable. More so, the global waiver of the future exercise of that right is null and void. Only the author can exercise his moral rights, but they continue to exist in any case after the author's death. Unlike property rights, however, they are not transferred by the author's death. Therefore, they cannot enter the patrimony of the heirs, legatees or other legal successors of the author. They continue to exist after the death of the author, but can only be exercised by the persons designated in Article XI.171(2) of the Code of Economic Law. These persons, namely the heirs or legatees of the author or a specific person designated by the author for this exercise of the moral rights, may only exercise the moral rights in the name of the author. When exercising the moral rights, they must act in accordance with the will and the views of the deceased author and in his best interests. If the exercise of the moral rights belongs to several persons, they must exercise these rights jointly.

Under Belgian law, it is not possible for an author to transfer his moral rights in their entirety, or certain prerogatives thereof, to a specific person, whereby this person may then exercise these rights as he sees fit, in his own name and for his own account, in the place of the author. However, moral rights may be contracted, but the author may only contract for the exercise of his moral rights to the extent that the acts which he thereby authorises with regards to his work are clear and comprehensible and he can therefore foresee their scope and consequences for his work.

Insofar as the works to be digitised are covered by copyright protection, Terra Mosana must also acknowledge the moral rights of the authors and not infringe them.

4.4.3. Germany

The key moral rights provisions are set out in Part 1 of the German Copyright Act:

- The right of disclosure (Section 12)
- The right of attribution (Sections 13, 39)
- The right against distortion and alterations (Section 14, 39)
- The right of access to the work (Section 25), and
- The right of withdrawal for changed convictions (Section 42)

4.4.3.1. The right of attribution

Section 13 of the Copyright Act sets out a broad right of attribution. It stipulates that authors have the right to be recognised as authors of their work, and to determine the form that this attribution should take—this entails that the author may choose the title and how they wish to be identified. This right can only be exercised in relation to the author's work; there is no right that protects against false attribution. As the author-work relationship is the focus of protection, the right of attribution only applies to the author's relationship with their own work. The association of the author's name with other works falls outside the scope of protection of moral rights in Germany. As discussed above in Part 4, it is recommended that the authors of all copyright works digitised or otherwise reproduced in the scope of Terra Mosana be identified and acknowledged.

4.4.3.2. The right of integrity

The right of integrity, as enacted in the German legislation, is the right to prohibit the distortion of any other derogatory treatment of the work which is capable of prejudicing the author's legitimate or personal interests in the work (Section 14). This is an expansive formulation of when an alteration will constitute an infringement. While most jurisdictions have adopted the Berne Convention language of "honour and reputation," the standard under German law is whether the "distortion" or "impairment" of the work is apt to endanger the legitimate intellectual or personal interests of the author in the work. The level of authorial protection is, therefore, somewhat higher than Berne. Given the broad interpretation of the integrity right in Germany, it is impotent to exercise caution when making alterations to a copyright work.

Distortion has been interpreted to mean an interference with the intellectual substance of the work. As a general rule, all substantive modifications with the work's material form infringe the right of integrity. This applies to both an "original" and any copies. The case of *Unikatrahmen* determined that acts carried out in relation to reproductions of original works could infringe the right of integrity, as the integrity right

is geared towards protecting the work in an intangible sense. Like the Belgian and Dutch concept of the integrity right, it can also apply to non-material interference with the work. This aspect of the integrity right was addressed in the case of *Hundertwasser*, where the Federal Court of Justice held that the addition of customised frames to paintings could infringe their integrity, as they displayed the works "in a context that differs from the one originally intended or envisioned by the author." Another case, *Gartenanlage*, found an impairment where a sculpture in a garden bed was placed on the grounds; according to the Berlin Higher Regional Court, the sculpture altered the overall effect of the garden.

This context-based interpretation of the integrity right raises questions regarding digitisation. Digitisation, and the creation of a virtual model of a work, arguably displays a work in a context that differs from that intended by the author. On the other hand, it may be argued that the creation of a digital model is akin to a photograph, and should thus be considered a reproduction only, one that does not alter the context intended by the author. If any digital alteration of the work is intended for a work falling within the duration of moral rights, it is recommended that the author be identified and consulted where possible. Authorisation needs to be sought for alterations to a work, either from the author or her heirs. This authorisation should take the form of a written contract, and should be as specific as possible.

The integrity right also applies to works that have *previously* been altered or distorted as compared to the original. This aspect of the right of integrity is of particular relevance to the Terra Mosana project as it entails that the reproduction and dissemination of an altered work can amount to an infringement, because it aggravates the effects of the wider dissemination of earlier distortions of the original work. The 1997 case of *Freiburger Holbein-Pferd* clearly illustrates this application. The case concerned a public artwork, a concrete sculpture of a horse, created by the artist Werner Gürtner in 1936. The sculpture was placed on a traffic island on Holbeinstraße in the city of Freiburg im Breisgau several years later (and became known as *Holbeinpferd* or Holbein Horse). Beginning in the 1980s, the sculpture has been subject to various interventions from local residents, being whitewashed, painted with zebra stripes and the colours of local football teams, and transformed into Pegasus and a unicorn. Following the artist's death, a photographer who had documented the various treatments of the Holbein Horse produced a series of postcards and a book of images of the sculpture. These images included one that the photographer had digitally altered to show the horse dressed in a Santa hat and boots. Gürtner's heirs claimed these actions infringed the right of integrity.

The Mannheim District Court found that the various transformations of the Holbein Horse clearly infringed the integrity right, as the physical distortions altered the effect of the work. The photographer's altered image, showing the horse in a Santa costume, also infringed the right of integrity by displaying the work in a distorted form. The images of prior distortion by others were found to infringe the moral right of integrity. The right of integrity was in this case interpreted as the right of the author to control how the work appears to the public. While the photographer was not involved in the various physical distortions of work, the dissemination of images of the altered work participated in and amplified the effect if the initial breach. The harm suffered by the author was increased by the photographer's actions. The court's decision was informed by a balancing of interests—the personal financial interests of the photographer were outweighed by the artist's heirs' strong claim to the work's integrity.

To avoid infringing the integrity right in this way, the Terra Mosana project should pay attention to works which may have been altered, for example works which have been vandalised, when digitizing them. Where they fall within the duration of moral rights, works in an altered state should not be reproduced and disseminated without authorisation.

4.4.3.3. Exercise, transfer and waiver

Under German law, moral rights are non-transferable, and may be exercised only by the author during their lifetime. Following their death, their heirs are entitled to exercise moral rights for 70 years following their death (see Part 3.2.2 on the duration of moral rights). Moral rights may be waived, but these waivers must be limited and specific. Blanket waivers, and waivers of the "core of the moral right" are not permitted. If a waiver is sought after the death of the author, all heirs must agree, consent by one heir alone is insufficient. While waivers of moral rights are possible, and could be requested in cases where authorisation or adaptation of a copyright work is sought, it is not recommended that Terra Mosana adopts a blanket policy of seeking waivers of moral rights.

Terra Mosana's primary aim is to facilitate access to cultural heritage, enabling as many people as possible to access, experience, and learn about these works, respecting the integrity of copyright works as much as possible, recognising authors, and presenting them to the public as intended has inherent value. Rightsholders who do not want the work to be disseminated in this way may oppose this process through an integrity right action. Whether the court will find this justified is decided on a case-by-case basis. It is recommended that where a work falls within the term of moral rights protection, Terra Mosana should try to seek authorisation from authors for digitisation. If the rightsholder declines to provide authorisation, a decision will need to be taken about how important the work is for the project, and whether the project is willing to take the risk that the author or heirs may bring an action.

4.4.4. The Netherlands

Article 25 of the Copyright Act of 1912 sets out the moral rights of authors. As well as the core rights of attribution and integrity, there is an additional right to make alteration to a work, even after the transfer of copyright (economic rights), provided that those alterations are permitted by business ethics (Article 25(4)).

4.4.4.1. The right of attribution

The right of attribution is protected as the right to oppose a work being made public without mention of the author's name or other indication as maker, unless such an objection is unreasonable (Article 25(1)(a)). The attribution right also extends to the right to object to the disclosure of the work under another's name, and the right to object to the alteration of the title of the work or the authorial designation in as far as these appear on the work or are made public in connection with it (Article 25(1)(b)). It is recommended that the authors of all copyright works digitised or otherwise reproduced in the scope of Terra Mosana be identified and acknowledged.

4.4.4.2. The right of integrity

The right of integrity is enacted in two ways:

- The right to object to any modifications of the work unless the modification is such that any objection to it would be unreasonable (Article 25(1)(c)); and
- The right to object to any distortion, mutilation or impairment of the work which could prejudice the honour or good name of the author or to their dignity as maker (Article 25(1)(d)).

Dutch courts generally adopt a broad concept of the integrity rights of the authors, accepting that changes not only to the physical embodiment of the copyright work, but also changes in its positioning or spatial context of the work may infringe this right. Infringement has been found in cases involving alteration of the intended colour of a building (*Politie Regio Limburg Zuid et al. v. Snelder*) and the substitution of one typeface for another on the design of a stamp (*Struycken and Unger v Riet*), both clear examples of physical distortion. Most Dutch case law on the right of integrity, however, has addressed changes in the placement and physical context of a work. This will apply only where other circumstances indicate that the objection is not unreasonable, such as contractual agreements as to the placement of the work, or misrepresentation of the intended location of the work. An artist's objection to the alteration of the height at which his painting was installed, was found to be reasonable, on the basis that it had a material impact on the way it was viewed (*Van Soest v De Meerpal*). Changing the colour of the carpet in a theatre from red to blue was also found to be an impairment to the painting on the ceiling, which had been designed to "form an artistic unity" with the surroundings (*Verbeek v Groningen*). The 2009 case of *Hauck v. Stokke* made clear that, like copyright, moral rights do not attach to those aspects of a work that are determined by functionality. Alteration of these elements therefore does not infringe the integrity right.

The concept of reasonableness plays a key role in the judicial application of moral rights, and courts will balance the interests of the artist against other parties in the case of alteration (where reasonableness is required by legislation), but also where distortion, mutilation, or impairment of the work is claimed. A distortion, mutilation, or impairment of the work is presumed to be prejudicial to the reputation of the author, in the absence of due cause. The authorisation of the reproduction or alteration of a work by the author may, for example, be interpreted as an implied waiver of the moral rights, which may be infringed in the course of the agreed reproduction or alteration.

4.4.4.3. Exercise, transfer and waiver

Moral rights subsist automatically, and authors are not required to assert them or comply with other formalities. In Dutch law, moral rights are unassignable. They may only be exercised by the author and their heirs. However, in order for moral rights to be exercised *pma,* an heir must be designated in a testamentary disposition, see Part 3.2.2).

Authors may waive their right to attribution contained in Article 25(1)(a). Waiver is also possible for rights under 25(1)(b) and (c) to the extent that it addresses an alteration to the work and its title. Waiver is not permitted in relation to Article 25(1)(d), which relates to the distortion, mutilation or impairment of the work which is prejudicial to the honour or good name of the author or to their dignity as maker. As noted above, it is possible for courts to construe an implied waiver from other agreements pertaining to the work. For Terra Mosana, therefore, authorisation of a reproduction of a copyright work for project purposes would likely be read as an implied waiver of the moral right against any alteration or change in presentation that digitisation necessarily entails.

As noted above, while waivers of the right of attribution and, to a lesser extent, the right of integrity are possible, it is not recommended that they be sought as a general rule for Terra Mosana. Respecting the integrity of copyright works, recognising authors, and presenting works to the public as intended has inherent value to the project.

In summary, certain use of copyright works may interfere with the moral rights of the author. Moral rights are not harmonized at EU level, and only to a limited degree at the international level. Nevertheless, many jurisdiction protect the right of attribution and integrity, which both are relevant for the Terra Mosana project. While authorization does not need to be sought before the use of the work, Terra Mosana project partners need to be aware of the interpretations of these rights in the different jurisdictions. Where digitization has the potential to interfere with the right of integrity, starting a dialogue with the heirs of the author would be recommended.

5. Exceptions that may be applicable to the digitisation and digital sharing of cultural content

When a work that Terra Mosana partners want to use in the context of the project 1) is covered by copyright subject matter, 2) fulfils the originality requirement and 3) the use thereof falls within the scope of the rights of copyright, authorization needs to be sought from the rightholder, unless an exception applies. Exceptions in copyright are specific to particular works, particular rights and the type of third party that wishes to make use of such an exception.

At the international framework, Article 9(2) of the Berne Convention sets out a three-step test for copyright exceptions, requiring that for an exception to the right of reproduction to be valid, three cumulative conditions must be met. The exception must:

1. Apply only in certain special cases,
2. Not conflict with a normal exploitation of the work or other subject-matter, and
3. Not unreasonably prejudice the legitimate interests of the rightholder.

While Article 9(2) applies only to the right of reproduction, this test has been extended to any of the exclusive rights associated with copyright, through its incorporation into the TRIPS Agreement (Article 13), WCT (Article 10), and WPPT (Article 16). National exceptions to copyright are, therefore, meaningfully constrained by these principles. This discussion initially covers the European framework, then considers the implementation of this framework at the national level in Belgium, Germany, and the Netherlands, focusing on the exceptions most relevant to the Terra Mosana project, those that touch on the digitisation and digital sharing of cultural heritage.

5.1. EU

Unlike in common law jurisdictions, there is no open-ended exception of 'fair use' or 'fair dealing' under the European framework. Rather, there are a limited set of mandatory exceptions and a series of optional exceptions that may be implemented by Member States. This approach may offer a higher degree of certainty about the scope of the exclusive rights, but is less flexible than the UK and US systems. At the European level, exceptions are primarily set out in the InfoSoc Directive, but are also established in other copyright Directives. The Berne Convention three-step test is explicitly incorporated into the Computer Programs Directive (Article 6(3)), the Database Directive (Article 6(3)), the InfoSoc Directive (Article 5(5)), and the Digital Single Market Directive (Recital 6).

This section outlines the mandatory and optional exceptions set out in EU Directives most applicable to the Terra Mosana project. Later sections examine whether and how these have been implemented at the national level in Belgium (Part 5.2), Germany (Part 5.3), and the Netherlands (Part 5.4).

5.1.1. InfoSoc Directive

Article 5 of the Directive contains a closed list of exceptions and limitations, but leaves it to Member States to implement them through national laws. This allows for variation in national approaches, which we also find.

There is one important mandatory exception included in the InfoSoc Directive. According to Article 5(1), all Member States must implement an exception for acts of reproduction that are temporary, transient or incidental and which are an integral and essential part of a technological process. This exception covers, for example, copies generated during web browsing, in computer memory (RAM), or in proxy servers. The CJEU has clarified that this exception includes copies on a user's computer screen and copies in the internet cache of the hard drive of that computer, made by a user when consulting an internet site (Case C-360/13). Since works that are digitised within the Terra Mosana project are not meant to be transient, they will not be able to benefit from this exception.

Other exceptions are optional and therefore depend on the Member State whether and how exactly they have been implemented. There are considerable differences in the implementation thereof. It is therefore necessary to verify their scope in the national jurisdictions. We discuss relevant exceptions for Belgium, Germany and the Netherlands below. The optional exceptions foreseen by the InfoSoc Directive concern:

- Specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage (Article 5(2)(c))

- Use for the sole purpose of illustrating for teaching or scientific research, as long as the source is indicated (Article 5(3)(a))

- Use of works, such as works of architecture or sculpture, made to be located permanently in public places (Article 5(3)(h)). This is known as the panorama exception, or the right of panorama.

- Incidental inclusion of a work or other subject-matter in other material (Article 5(3)(i))

- Use of an artistic work in the form of a building, or a drawing or plan of a building, for the purposes of reconstructing the building (Article 5(3)(m))

5.1.2. Orphan Works Directive

This Directive sets out the permitted uses of 'orphan works'— those works that satisfy the requirements of copyright protection, but for which no author can be determined or contacted. This situation can arise in various scenarios: where a work is published anonymously, where an author is known but cannot be located, or where an author has died and their heirs cannot be identified. These works have been identified as challenges to mass digitisation and reutilisation projects that aim to reproduce and re-use copyright works, generally for the purpose of cultural heritage preservation and access.[34] As such, the Directive is aimed at facilitating the work of projects such as Terra Mosana, which focus on the digitisation of cultural heritage.

The Directive stipulates that a work held in a public library, educational establishment, museum, or archive may be considered an orphan work if, despite a diligent search, no rightsholders can be identified or contacted (Article 2(1)). The conditions of a 'diligent search' are set out in Article 3, which requires that appropriate sources be consulted, with Member States responsible for determining the appropriate sources. Generally this will involve investigating the provenance of the work, and checking an array of national and international registers, sources, and archives. While the Orphan Works Directive was explicitly aimed at supporting efforts of mass digitisation such as the Europeana project, the requirements of diligent search may present a major practical and financial burden.

The Orphan Works Directive may be a useful instrument for Terra Mosana, as the project will deal with many works held by public collections. For works whose authors or rightsholders may not be easily identified, the orphan works exception would facilitate their inclusion in the project. However, as the 'diligent search' requirements may be onerous or imprecise, relying on the orphan works exception may also involve weighing risks and benefits.

If orphan work status can be ascertained, the Directive allows certain uses of the work by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions, and public service broadcasters established in Member States (Article 1(1)). Terra Mosana partners need to verify in the national implementing laws of the Member State in which they operate whether they fall under the scope of institutions that benefit from the rules set out in the Directive. Museums and cultural heritage institutions should, however, as a general rule benefit therefrom.

Article 6 of the Orphan Works Directive sets out mandatory exceptions to the right of reproduction and making available to the public for libraries, archives, and similar organisations for works held in their

[34] See: van Eechoud, M., Hugenholtz, P. B., van Gompel, S., Guibault, L., & Helberger, N. (2009). Harmonizing European Copyright Law. The Challenges of Better Lawmaking. Kluwer Law International, p. 266-267.

collections (Article 6(1)). This section further provides that those organisations permitted to use orphan works must do so

> "only in order to achieve aims related to their public interest missions, in particular the preservation of, the restoration of, and the provision of cultural and heritage access to, works and phonograms contained in their collection" (Article 6(2))

It also requires that where authors or rightsholders have been identified, their name must be indicated in any use of an orphan work (Article 6(3)).

5.1.3. Digital Single Market Directive

One of the aims of the recent Digital Single Market Directive[e] is to address cross-border inconsistency and uncertainly about disseminating cultural heritage content in digital environments and across borders within the EU (Recitals 3, 30). The Directive introduced a mandatory exception for preservation copies. Accordingly, Member States must implement an exception that permits cultural heritage institutions (publicly accessible libraries, educational establishments and museums, archives, and film or audio heritage institutions) to

> "make copies of any works […] permanently in their collections, in any format or medium, for the purposes of preservation of such works" (Article 6).

In making copies, cultural heritage institutions may rely on third parties acting on their behalf and under their responsibility, including third parties based in other Member States (Recital 28). Crucially, both this exception, and that set out in Article 6 of the Orphan Works Directive, apply only to works that are permanently in the collection of a cultural heritage institutions.

For the purpose of the Terra Mosana project, it will have to be assessed whether the partner making copies for their collections fall within the list of establishments mentioned in the Directive and the relevant national law, similar to the Orphan Works Directive. Since the deadline for Member States to implement the Digital Single Market Directive is 7 June 2021, one will have to wait for the exact terminology in national laws. But as far as Terra Mosana partners are museums or heritage institutions, making copies of works in a digital format for the purpose of preservation is likely to fall within the realm of the exception, if the works concern permanently held items. Any adaptation or modification of the work, however, that goes beyond changing the format of the work, may not be within the scope of the exception.

5.2. Belgium

It is important to note that exceptions to an author's property rights only apply in relation to "works lawfully made public". According to the Court of Justice, the permitted exceptions to an author's property rights may not be applied in relation to works that constitute an illegal/unauthorised source.[35] This means that works used within the Terra Mosana project must have been accessed legally, which is usually the case for cultural heritage works. Also, in contrast to European law, the Belgian legislator has not opted to include the three-step test from Article 5(5) of the Infosoc Directive in Belgian copyright law. Nevertheless, Belgian law foresees several exceptions included in European law.

5.2.1. Temporary copies

The Code of Economic Law provides that the author may not oppose technical acts of reproduction which meet the following cumulative conditions[36]:

- are temporary
- are transient or future in nature
- constitute an integral and essential part of a technological process;

[35] CJEU 21 October 2014, C-348/13, BestWater/Michael Mebes and Stefan Potsch, 18.

[36] See M.-C.- JANSSENS, "Commentaar bij artikel XI.189 WER", in F. BISON and HK. VANHEES (eds.), Het Belgisch auteursrecht. Commentary of articles of law, Antwerp, Larcier, 2018, 209 et. seq.

- this process may have as its sole purpose either (i) the transmission in a network between third parties by an intermediary or (ii) a lawful use of a protected work;

- have no independent economic value. The latter condition implies, inter alia, that no additional profit can be made by carrying out those acts over and above that derived from the lawful use of the protected work, and that the temporary acts of reproduction do not lead to a modification of the work. For example, a reproduction 'in cache' that remains accessible for days, weeks or months does not meet the conditions of 'transient or incidental'.[37]

Since works that are digitised within the Terra Mosana project are not meant to be transient, they will not be able to benefit from this exception. However, where transient copies are made for the purpose of creating new works, these would be allowed under this exception.

5.2.2. Panorama exceptions

Belgian copyright law contains two so-called panorama exceptions. Firstly, there is the exception according to which an author or his successor in title may not oppose the reproduction and communication to the public of a copyright protected work which has been lawfully made public and which is exhibited in a place accessible to the public, when the aim of the reproduction or of the communication to the public is not the work itself.[38] Furthermore, if his work has been lawfully communicated to the public, the author cannot oppose the reproduction and communication to the public of works of visual, graphic or architectural art which were created in order to be permanently placed in public places, if the reproduction or communication is made from the work as it is there and if that reproduction or communication does not prejudice the normal exploitation of the work and does not unreasonably prejudice the author's legitimate interests.[39] This is the Belgian version of the so-called panorama exception.[40] In this case, the works must have been 'made' to reside permanently in a public place. The law does not specify what "public places" are. It appears from the parliamentary preparations that art in private spaces and the interiors of buildings do not fall under the exception. The art collections of public museums are not covered either.

Both exceptions will not apply if the reproduction or communication is detrimental to the normal exploitation of the work. This means that the copyrighted works themselves are not the object of the reproduction or communication to the public. In the case of facades of architectural works that are part of a city and therefore visible to the public, the panorama exception will apply and enable reproduction and communication to the public. It is very unlikely that the digitisation of such works would interfere with the normal exploitation of the work.

5.2.3. Orphan works

An orphan work is a work that in all likelihood (still) falls under the protection of copyright, but of which the rightholder is not known or cannot be found. This exception can be used if it appears that the author or rightholder of the photos used for digitisation is not known or cannot be found. In this case, it is required that a careful investigation has been carried out as to who the author or rightholder is and where she is to be found, and that this investigation has been registered.[41] The conditions for this are very strict and difficult to fulfil in practice within the framework of the Terra Mosana project. The possibility of exploiting orphan works in ways prescribed by law is reserved for publicly accessible libraries, educational establishments and museums, archives, film and sound heritage institutions and public service broadcasters to achieve ends in the public interest. As mentioned above, where Terra Mosana partners are museums or cultural heritage institutions, they are likely to fulfil the conditions. Universities, however, may not fulfil this condition.

[37] Brussels Commercial Court 5 May 2011, IRDI 2011, 265 (Google/Copiepresse).
[38] Article XI.190, 2° CoEL.
[39] Article XI.190, 2/1° CoEL.
[40] See art. 5.3(h) InfoSoc Directive.
[41] Art. XI.245/1 CoEL.

5.2.4. Teaching and research

The Code of Economic Law contains a number of exceptions to copyright for education and research. By way of illustration, in the case of teaching and for the purpose of scientific research - and provided that no profit-making objective is pursued - a large number of acts of reproduction and even acts of communication to the public may be permitted.[42]

Article XI.191/1, § 1, paragraph 3 permits reproductions of works that have been lawfully made public, on any medium and using any method, if this reproduction is for the purpose of illustration in teaching or for scientific research. There are no restrictions here as to the size of the work reproduced. This means that works can be copied in their entirety. However, the general rule from the three-step test must be observed. This states that the use may not prejudice the normal exploitation of the protected work. Also, the source, including the author's name, must be mentioned unless this is impossible. This means that Terra Mosana partners can copy protected works for the purpose of education and research.

In addition, two ways of communication of works are allowed without limitation of scope. The first is "free performances within the framework of school activities or during a public examination, which take place both inside and outside the premises of the educational establishment". Belgian law does not provide for a compensatory allowance. In addition, Article XIK.191/1, § 1, 4° CoEL allows works to be "communicated via internal networks". In this case, however, strict restrictions apply. This exception only applies

- for the benefit of institutions of education and research that are officially recognised or established by the government for this purpose;
- for a use in the framework of the normal activities of these institutions;
- provided that the communication is made by means of a secure transmission network;
- provided that the requirement for source indication is complied with.

In addition to making copies, universities that are members of the Terra Mosana project can also make protected works available to their students if the conditions above are fulfilled. Presenting the digitized versions of works will also fall under this exception. However, educational institutions will have to compensate rightholders for acts of reproduction and making available. The compensation scheme for the permitted forms of reproduction and communication is based on the payment of a lump sum per registered pupil/student[43], which is collected and distributed by the publicly appointed company Reprobel.[44]

5.3. Germany

Chapter 6 of the German Copyright Act sets out a series of limitations and exception to copyright's exclusive rights, many of which directly reflect the provisions in the InfoSoc Directive and Orphan Works Directive.

5.3.1. Temporary copies

The mandatory exception for temporary copies set out in the Article 5(1) of the InfoSoc Directive is implemented by Section 44(a) of the Copyright Act, which essentially transposes the language of the Directive. It provides that temporary acts of reproduction are admissible, on the condition that they are a transient or incidental part of a technical process and have no independent economic significance. This exception applies to copies made in computer memory, or on servers, and is not primarily relevant for the making of digitized copies, as they will not be transient.

[42] Article XI.191/1 CoEL.

[43] Royal decree of 31 July 2017 on the remuneration for the use of works, databases and services for illustration in teaching or for scientific research, Official Gazette 16 August 2017.

[44] Royal decree of 28 September 2017 ordering a company to ensure the collection and distribution of remuneration for the use of works, databases and services for illustration in education or for scientific research, Official Gazette 4 October 2017.

5.3.2. Teaching and research

Section 60f sets out an exception to the exclusive right of reproduction that applies to archives, museums, and educational establishments, which do not serve any commercial purpose. This exception applies only for the purposes of making available, indexing, cataloguing, preservation and restoration (Section 60f(1)). Where alterations are technically required, these are also permitted (Section 60e(1)).

For the purpose of scientific research and teaching, the German Copyright Law limits the amount of a work that can be reproduced, distributed and be made available to the public to a maximum of 15% of the work (Sections 60a(1) and 60c(1)). In addition, these acts are only permissible for non-commercial scientific research and teaching at an educational establishment, and where addressing only a limited circle of scientific scholars, teachers and students. Video or audio recordings of the performance of a work are not covered by the exception.

5.3.3. Panorama exception

This exception is well established in German law, dating from 1876 in federal legislation. As such, there has been meaningful consideration of the exception, and its scope and justification in German law. The rationale underpinning this exception is the public interest in the freedom of the streetscape – works located permanently in public places have been, in a sense, dedicated to the public, and become a kind of common property. The exception German law is limited as compared to Belgium or the Netherlands. A work in a public space can only be reproduced in a two-dimensional form (paintings, graphics, photography, film). It does not permit, for example, the three-dimensional reproduction of a sculpture.

The German Copyright Act limits the copyright protection of "works located permanently on public ways, streets and places." It therefore extends only to the facades of buildings (s59(1)). Reproductions may not be carried out on a building (s59(2)). The key issues that determine the scope of this exception at the national level are how the concepts of public, permanence and site-specificity are defined.

The notion of 'public' as it applied to this exception was explored in the 2003 case of *Hundertwasser-Haus*. In this case, the Federal Supreme Court found that Section 59 of the Copyright Act applies only to photos *taken* from a public place, not a private house. The claimant, artist Friedrich Hundertwasser, was involved in the concept and design of the *Hundertwasser Haus*, a well-known work of architecture designed in an expressionist style, incorporating undulating floors, a forested roof, and colourful facade (protected under copyright as a work of architecture, claimant as joint author). The defendant had distributed framed photographic prints of the *Hundertwasser Haus*. This image was taken from a private apartment in the building opposite the *Hundertwasser Haus* (an elevated perspective). The defendant claimed an exception to the right of reproduction under Section 59(1).

The freedom of panorama was held to be limited to the view visible from a public place. It does not justify the reproduction of the back, side, or court yard of buildings that front onto a public street, or public place. Freedom of panorama does not extend to aerial photographs that are not visible from a public way, street, or place. Images of a protected work are privileged by Section 59(1) only if they show the work viewed from the public street, way, or place. If the view is fixed from a place not accessible to the public, it does not fall within the exception. The 2017 case of *AIDA Kussmund* also addressed the meaning of "public ways streets and places." This case concerned a design painted onto a boat on a harbour. The Federal Court clarified that "public ways, streets and places" includes any place under the open sky accessible to the general public (i.e. harbours).

Other recent cases have involved interpreting the meaning of permanence: the panorama exception applies to works located 'permanently' on public ways, streets, and places. A 2002 case concerned the work *Wrapped Reichstag,* by Christo and Jeanne Claude, created by wrapping Berlin's Reichstag building in fabric for two weeks in the summer of 1995. In this case, a vendor of postcards printed with an image of the *Wrapped Reichstag* sought to defend himself from claims of unauthorised reproduction, relying on the panorama exception. The Federal Supreme Court upheld the Appellate Court's finding that the work was not a work placed permanently in meaning of Section 59 of the Copyright Act, noting that exceptions and limitations to an author's rights in their work are construed narrowly as a matter of principle.

The Court's reasoning in this case focused on the question of the author's intention: whether the artists intended for the work to be made available to the public on a permanent or temporary basis. Permanence is not determined based on the duration of the works existence (ie. while *Wrapped Reichstag* was installed for the duration of its existence in a public place, this did not amount to permanence), the decisive factor is whether the work is installed in a public place in the sense of an exhibition limited in time (permanent exhibitions satisfy the requirements of the exception):

> "This interest is aimed at the possibility of reproducing public streets and places such as on postcards, paintings or engravings, in illustrated books or in films, without the consent of the entitled parties having to be obtained if this space contains works protected by copyright. However, where a reproduction is made of works of fine art temporarily presented in public places in the context of an exhibition, there is no occasion for a corresponding limitation of copyright powers." (IIC 2003, 573)

The guidance of the intention of the artist in determining as to whether a work is permanent, has some limits. The Higher Regional Court of Cologne has held that a work of art installed in the same place for the last five years is considered 'permanent', regardless of the intention of the artist and the modalities of the installation. The *AIDA Kussmund* case also addressed the question of permanence, with the court determining that permanence did not require the work to be stationary, rather that the work was destined to be in some public place for a prolonged period of time, even if it moved around.

5.3.4. Orphan works

Section 61 of the German Copyright Act implements the Orphan Works Directive, providing the reproduction and making available of orphan works is permissible for works in the collections of libraries, educations insituttions, museums, and archives. This exception may be relied upon by institutions only where they are

> "acting to fulfil their tasks which are in the public interest, in particular if they preserve and restore holdings and make them accessible, if this serves cultural and educational purposes" (s61(5))

A list of specific sources which must be consulted to satisfy the diligent search requirement is set out in an Annex to the Copyright Act (per Section 61a):

1. For published books:

a) the catalogue of the German National Library and the library catalogues and key word lists kept by libraries and other institutions;

b) information supplied by publishers' and authors' associations, in particular the Register of Books in Print (VLB);

c) existing databases and registers, Writers, Artists and their Copyright Holders (WATCH) and the ISBN (International Standard Book Number);

d) the databases of the relevant collecting societies, in particular those collecting societies entrusted with asserting rights of reproduction such as VG Wort's database;

e) sources bringing together several databases and registers, including the Joint Authority File (GND), Virtual International Authority Files (VIAF) and Accessible Registries of Rights Information and Orphan Works (ARROW);

2. For newspapers, magazines, trade journals and periodicals:

a) the German ISSN (International Standard Serial Number) – Centre for Regular Publications;

b) indexes and catalogues of library holdings and collections, in particular the catalogue of the German National Library and the Newspaper Database (ZDB);

c) depositories of officially deposited obligatory copies;

d) publishers' associations and authors' and journalists' associations, in particular the Register of Newspapers in Print (VLZ), the Register of Books in Print (VLB), Banger Online, STAMM and pressekatalog.de;

e) the databases of the relevant collecting societies, including those collecting societies entrusted with asserting rights of reproduction, in particular VG Wort's database;

3. For visual works, including artistic works, photographic works, illustrations, design and architectural works, as well as their drafts and other such works contained in books, magazines, newspapers or other works:

a) the sources referred to in nos. 1 and 2;
b) the databases of the relevant collecting societies, in particular of the collecting societies for artistic works, including the collecting societies entrusted with asserting rights of reproduction, such as VG BildKunst's database;
c) the databases of photographic agencies;

4. For cinematographic works, as well as for visual media and audio and visual media on which cinematographic works have been recorded, and for audio media:

a) the depositories of officially deposited obligatory copies, in particular the catalogue of the German National Library;
b) information provided by producers' associations;
c) information provided by the film boards of the Federation and *Länder*;
d) the databases of institutions and national libraries active in the field of cinematographic and audio heritage, in particular the Association of Film Archives, the Federal Archive, the Foundation of German Film Archives, the German Film Institute (www. filmportal.de database and catalogue), the DEFA Foundation and the Friedrich Wilhelm Murnau Foundation, and the catalogues of the State Libraries in Berlin and Munich;
e) databases with relevant standards and identifiers such as the ISAN (International Standard Audiovisual Number) for audio-visual material, the ISWC (International Standard Music Work Code) for musical works and the ISRC (International Standard Recording Code) for audio media;
f) the databases of the relevant collecting societies, in particular for authors, performers and producers of audio media and cinematographic works;
g) the performance of co-authors and other information on the work's packaging or in its opening or closing credits;
h) the databases of other relevant associations representing certain categories of rightholders, such as associations of film directors, screenwriters, film music composers, composers, theatre publishing houses, theatre and opera associations;

5. For holdings which have not been published or broadcast:

a) current and original owners of the work piece;
b) national registers of estates (Central Database of Estates and Kalliope);
c) finding aids in the national archives;
d) museum inventory lists;
e) credit agencies and telephone books.

If the relevant sources listed here for a work are consulted, and no rightsholder can be identified and/or located, then the work may be established as an orphan work. If a relevant work has several rightsholders and despite a diligent search, they have not all have been identified or located, permission from one is sufficient (Section 61(3)).

The orphan works exception will apply to works held in the collections of cultural heritage institutions, including those that may be on loan, for example, to a church. It also applies to uses of archival and documentary materials, such as photographs and maps that may be drawn on in the creation of three-dimensional virtual environments.

5.4. The Netherlands

Exceptions to copyright are set out in the Dutch Copyright Act (Articles 15-25a). The list of exceptions listed in the act is non-exhaustive.

5.4.1. Temporary copies

The mandatory exception for temporary copies is set out in Article 13(a). It provides temporary acts of reproduction are admissible, if they are a transient or incidental part of a technical process for the purpose of transmission in a network or other lawful use and have no independent economic significance. This exception applies to copies made in computer memory, or on servers.

5.4.2. Teaching and research

Article 16 provides an exception for the reproduction or the making public of literary, scientific, or artistic work for the non-commercial purpose of illustrating teaching. As the exceptions as implemented in the Netherlands concerns only teaching and not research, it is therefore not relevant to Terra Mosana, which is not directed towards the purpose of teaching.

5.4.3. Panorama exception

The Dutch Copyright Act implements a narrower right of panorama than set out by the InfoSoc Directive (see Part 5.1.1). The relevant provision in Article 18 stipulates that is not an infringement of copyright to reproduce or make public images of certain works "as they are situated". This provision applies to drawings, paintings, works of architecture and sculpture, lithographs, engravings and other graphic works, and works related to a work of architecture (such as plans and models), where the work has been made to be permanently situted in public places. Article 18 further stipulates that in the preparation of a compilation, no more than a few works by the same author may be copied.

There is scant case law on the panorama exception in the Netherlands, but there has been some indication as to how the courts interpret the meaning of certain key elements of the exception. Parliamentary documents explain that the exception is intended to apply to works in public streets, as well as places freely accessible to the public, but not to works placed in a museum, school, theatre, in the lobby of a business, or in a garden not open to the public (Kamerstukken II 2002/03 28482-3). In the 2005 *Codemasters* case, the Arnhem District Court determined the Article 18 exception did not apply to a mural painted inside a football arena, relying on the fact that there was not unlimited public access to the arena, and that an admission fee is usually charged. Private places that are visible from public roads and waterways, such as private houses, are however, covered by Article 18 (*De Groene Leguaan v Friesland Bank*). The exception further applies only to works made to be permanently situated in public places. It therefore excludes works that are part of a temporary exhibition, but applies to works such as graffiti, even if it only exists for a short duration. The exception may be relevant for works in the Terra Mosana project that still fall under copyright. It applies to architectural works and permanently installed public artworks such as sculptures. Article 18 also likely applies also to works permanemtly located in government buildings, town halls, and churches.

Permitted reproductions must present the work in context, meaning it must be shown as part of the public space. The work may form the focus or main idea of the image—the inclusion of water, trees and sky satisfied the requirement for architectural works in *De Groene Leguaan v Friesland B*ank. Parliamentary documents indicate that close-ups or cropped images of the work that exclude its surroundings are not covered by the Article 18 exception (Kamerstukken II 2002/03 28482-3). This requirement will be easily satisfied for works reproduced in a digital virtual environment, as intended by Terra Mosana, but care should be taken to ensure that images of copyright works should not be framed or digitally altered so as to remove or distort their surroundings if this exception is being relied upon.

5.4.4. Orphan works

The Orphan Works Directive (see Part 5.1.2) is implemented in Article 16o of the Dutch Copyright Act, which permits cultural heritage institutions (including libraries, museums, educational establishments, and archives) to reproduce works in their collection where the rightsholder cannot be identified or located after a 'diligent search'.

Compared to some other Member States, including Germany, the Netherlands adopts a more flexible approach to the diligent search requirement. The Decree Careful Investigation Orphan Works 2014 sets out the sources that must be consulted for the diligent search requirement to be satisfied for different

categories of works. These lists include only general indications of sources rather than specific databases that must be consulted. For example, for works of visual art, a diligent search would require consulting, among other sources, “databases of creators of visual works,” and “databases of relevant collective management organisations”. Article 2 of the Decree provides:

In any case, the following sources will at least be consulted for the following categories of Works

a) for published books:

   i. the national library collection of the Koninklijke Bibliotheek, referred to in Articel 1.5, second paragrapgh of the Higher Education and Research Act and catalogues of public libraries and libraries of universities;

   ii. databases of associations of publishers and writers;

   iii. databases and registers of writers, artists and their copyright holders;

   iv. the international standard database number for books and other databases cataloging printed books;

   v. databases of the relevant collective copyright management organizations, organizations which manage reproduction rights in particular; and

   vi. databases and registers containing virtual international keyword lists and accessible registers of information about rights and orphan works;

b) for newspapers, magazines, newspapers and magazines:

   i. the sources mentioned under a, parts 1 and 5;

   ii. the periodical publication database of the international standard serial publication number; and

   iii. databases of associations of publishers, authors and journalists;

c) for visual works, including works of art, photography, illustrations, design, architecture, sketches of the latter works and other such works included in books, newspapers, newspapers and magazines or other works:

   i. the sources mentioned under a and b;

   ii. databases of associations of creators of visual works;

   iii. databases of the relevant collective copyright management organizations, for visual arts in particular and including organizations managing reproduction rights; and

   iv. where applicable, image or photo agency databases;

d) for audiovisual works and phonograms:

   i. the media archive maintained by an institution designated by Our Minister under the Media Act 2008;

   ii. databases of associations of producers or of other relevant associations representing a specific category of rightholders in these works;

   iii. databases of cinematographic or audiovisual heritage institutions and public libraries;

   iv. databases with relevant standards and identification codes such as international standard number for audiovisual material, international standard code for musical works and international standard code for sound recordings;

v. databases of the relevant collective copyright management organizations, in particular for authors, performers, phonogram producers and audiovisual producers; and

vi. information on the packaging of the work, including credits or employee lists.

The general and open ended language of the Decree entails there is little certainty about the specific requirements of a diligent search.[45] While this list of sources should be consulted, it falls to the institutions themselves to determine the extent of a diligent search, based on an assessment of risk.

5.4.5. Conclusion

In summary, there are several exceptions to copyright protection that may be relevant to the use Terra Mosana project partners may want to make of the copyright works. In particular, the panorama exception, orphan works and archiving, research and teaching are included in many national systems as exceptions to copyright, be it within the specific and sometimes diverging scope defined in the national law. Partners should seek legal advice in the relevant jurisdiction as to whether the use will benefit from the exception or not.

[45] See: Schroff, S., Favale, M. & Bertoni, A. The Impossible Quest – Problems with Diligent Search for Orphan Works. IIC 48, 286–304 (2017), who suggest that the enactment of the diligent search requirement in Dutch law is focused less on giving guidance as to how to carry out this search and more on ensuring compliance with European requirements.

DELIVERABLE 1.3.3. Manual of best practices

6. Dissemination of the output generate through the Terra Mosana project

Terra Mosana partners may want to make available the outcome generated through the project, like the 3D models of archaeological, architectural and other cultural sites, to third parties. When they do so, they should regulate the use of the product by third parties on the basis of license agreements, particularly when the outcome is protected by an intellectual property right.

Determining whether the works generated by Terra Mosana fall under IP protection depends on the specific works produced. If we consider the most commonly generated works within the Terra Mosana project, and in relation to the digitization of cultural heritage in particular, copyright protection is available for photographs, film, 3D models of architectural sights, several parts of video games, several parts of mobile apps or digitized maps where these works are original. In section 2, we have discussed the requirements for copyright protection. But potentially also database rights can be relevant to the collection of data, where substantial investments have gone into obtaining, verifying and presenting that data. In order to verify whether IP rights exist in a work, and which rights exactly, the advice by an IP professional would be required.

When the product generated by Terra Mosana partners is IP-protected, making these works available to third parties should take place according to the conditions set out in a license agreement. A license is an agreement in which the owner of an IP right (the licensor) grants permission to use the IP right to a third party (the licensee), within the limits of the contract. There are different types of licenses and agreements. They differ depending on what type of creative work is at issue – photographs, software programmes, digital versions or models of a literary, architectural or artistic work or a multi-media work require different rights and conditions. The concrete terms of a license need to be determined on a case-by-case basis, with the help of an IP licensing specialist.

In this guide, we will present the main licensing models and which aspects are usually incorporated in such agreements. Since the products directly generated within the Terra Mosana project should be made available to third parties under open access and in accordance with the rules applicable to public sector information (if applicable), the creative commons licensing model will typically be relevant and useful. For products that are developed further outside of the project's scope, commercial licenses may be an option. This is also relevant where third parties wish to use the project's output to further develop a commercial product. Also for such situations, a commercial IP license should be considered.

6.1. Public sector information

Where Terra Mosana partners constitute public sector bodies according to the old and new Directive (in force as of 17 July 2021) on the re-use of public sector information, their ability to license the IP rights they hold or to impose limits on the re-use of such information may be restricted. A public sector body, according to Article 2 of the new Directive, essentially includes bodies governed by public law, including public undertakings. According to the Directive, they shall make their documents available in any pre-existing format or language and, where possible and appropriate, by electronic means, in formats that are open, machine-readable, accessible, findable and re-usable, together with their metadata. The re-use shall be free of charge.

Certain documents are excluded from the scope of the Directive and do not have to be made available free of charge for open re-use. According to Article 1.2, documents for which third parties hold intellectual property rights are excluded; documents held by cultural establishments other than libraries, museums and archives; and documents held by educational establishments and research performing organisations. It should be decided on a case-by-case basis whether a specific institution involved in the Terra Mosana project is covered by the Directive and whether the specific information falls within or outside the scope of the implementing laws of this Directive at the national level.

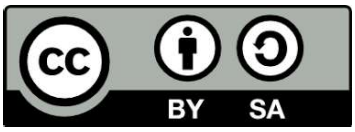
What should also be kept in mind when considering licensing conditions, such as creative commons terms as discussed below, are national policies and relevant actions that Member States have introduced, following Article 10 of the Public Sector Information Directive. Accordingly, Member States are required to support the availability of reserach data, by making publicly funded research data openly available ('open access policies'), following the principle of 'open by default' and compatible with the FAIR principles. Since the research carried out as part of the Terra Mosana project is publicly funded, such open access policies may apply to the results thereof. In that case, research data shall be re-usable for commercial or non-commercial purposes in accordance with Chapters III and IV, insofar as they are publicly funded and researchers, research performing organisations or research funding organisations have already made them publicly available through an institutional or subject-based repository.

6.2. Creative Commons licenses

It is possible to make copyright-protected content available for others to use by using Creative Commons (CC) licenses. Works made available under a CC license can be freely distributed. Even though use and distribution of the work are free of charge, users have to abide by the conditions specified in the license. This licensing model is particularly interesting for Terra Mosana partners who make their works publicly available on the Internet.

The decision to use a CC license can only be made by the right holder, and it is important to keep in mind that CC licenses are irrevocable. There is a Creative Commons tool and flowchart which enable Terra Mosana partners to determine which license is best suited to them, and the conditions under which they want to share their creative content. If a partner is uncertain about whether to use a Creative Commons license, or which license is best suited, it is advisable to consult an IP professional.

When making works available under CC, Terra Mosana partners should distinguish between the four main types of Creative Commons licenses, which impose different sets of conditions on users. These conditions are typically indicated with the following signs when accessing the licensed work:

Creative Commons license[46]	Conditions
	Attribution: Licensees must give appropriate credit or attribution to the creator. The work may be copied, distributed, displayed, performed, used for commercial purposes and even used to derive other works from it, as long as the creator is given credit.
	Share-Alike: Licensees may distribute work derived from licensed content, but they must distribute the derived work under licensing terms identical to those posed on the original work.
	Non-commercial: Licensees may copy, distribute, display and derive other works as long as it is done for non-commercial purposes only. Non-commercial works are not intended for or directed toward commercial use or monetary compensation.
	No Derivative: Licensees may copy, distribute and display verbatim copies of the work, but they cannot make derivative works based on it.

Creative Commons provides useful information on the different licensing conditions.

[46] Creative Commons, About CC Licensing, available at https://creativecommons.org/about/cclicenses/ (22 December 2020).

Applying a CC license to a work is straightforward and simply requires communicating the license chosen to people using the work to which the license is attached. This can be done by including a statement on the work itself or on the website making available the work, in the "Information" or "IP" menus. A statement could look like "© 2021. This work is licensed under a CC BY-NC 4.0 License" and a link to the license, which can be found on the CC website.

6.3. IP licenses

For some of the output generated within the project's scope, there may be an interest from third parties who would like to use the material in order to develop a commercial product based on the material. In order to grant third parties the necessary IP rights and to determine the conditions under which they can use the material, Terra Mosana partners should consider signing a licensing agreement. In order to do so, it must be clear who the owner of the IP is; whether that are all Terra Mosana partners jointly, or whether the IP involved only belongs to one partner. The grant agreement or specific follow-on agreements regarding specific output generated will determine the ownership over the relevant IP.

The process of making IP available for others to use is known as "licensing out". Licenses can apply to specific IP rights, such as the right to reproduce and distribute a copyright work, or to all the IP rights attached to a product such as a mobile app—copyright, patents, trademarks, and design rights. Examples of such licenses are software licenses, which are granted to third parties who want to work with the software developed for the app, copy it or adapt it. For many products generated within the Terra Mosana project, however, an IP license regarding the copyright work will be most relevant.

Given the potential complexity of licensing out IP, it is highly recommended that legal advice be sought when negotiating licensing agreements. We present several key considerations that Terra Mosana partners should take into account when deciding which rights they want to license, what territorial and material scope, which limitations should apply, etc. General contract aspects, such as duration of the license, termination of the license, warranties and disputes, are not addressed here, but should be included in the agreement as well.

6.3.1. Rights

Copyright licenses for using ditigal versions of maps, architectural works or a software programme will include the rights of use and reproduction, modification, making derivative works and/or the distribution of such works. The license shall specify which rights are exactly included. In case of software licenses, the owner of the IP rights therein should be mindful of whether they hold the rights to enter into further licensing agreement and under what conditions. This is particularly important when open-source software has been used.

The rights granted can be limited to a concretely defined field of use. This means that the licensee can use the IP only in the defined field (e.g. offering cultural or touristic services), while Terra Mosana partners retain the exclusive right to exploit or license the same IP in a different field (e.g. gaming).

6.3.2. Compensation

Where the parties agree that the licensee has to pay royalties for the use of the IP, the license will need to determine whether a lump-sum is payable or if royalties are to be calculated on the basis of an appropriate unit. This will very much depend on the type of product that will be developed. If digital versions of maps or architectural sights are to be used in an online environment for education or musea, a lump-sum payment may seem feasible. If the third party will develop a commercial app to do geo-tracking, a calculation of royalties based on downloads may be an option. In case of the latter, the license should then also include an obligation on the part of the licensee to keep accurate records, to submit reports that identify the basis for calculation (such as number of downloads) and establish fixed dates for payment.

6.3.3. Exclusivity

When granting commercial licenses, one needs to determine whether the third party is able to obtain a non-exclusive, exclusive or sole license. Non-exclusive licenses grant the licensee the right to use the

licensed product or technology, and the licensor retains the right to grant further licenses and to use the product or technology themselves. Exclusive licenses grant the licensee exclusive use of the product or technology, meaning the licensors themselves cannot use the licensed IP. Sole licenses grant the licensee use of the IP, and the licensor agrees to not grant additional licenses but retains the right to make use of the IP themselves.

For the purposes of the Terra Mosana project, the partners involved should keep the option to use the IP themselves as well. Therefore, a non-exclusive or sole license may be suitable options.

6.3.4. Territorial scope

License agreements are often limited to specific countries or regions. When considering the territorial scope, both the location of the users and the further distribution of the product to be commercialized should be considered. In a multi-territorial context such as the Terra Mosana project itself, multi-territorial licenses will be likely.

6.4. End-user license agreements

End-user licenses could be necessary where users will have to download an application to access and use the work. As mobile apps can be protected by various IP rights, users must be authorized to download, install and use an app. This authorization can be made through an End-User License Agreement (EULA). An EULA is a contract between the developer or vendor of a mobile app and the user of the application. It authorizes a user to download, install and use the app, and may also impose various restrictions on the app's use, such as copying, modifying or disassembling the app. The EULA for Microsoft's Office 365 app,[47] for instance, authorizes a user to use and install copies of the application but imposes restrictions, including the following:

- Users may not work around technical limitations in the software.
- Users may not reverse engineer, decompile or disassemble the software, except to the extent permitted by law.
- Publish the software for others to copy.

Once drafted, the EULA can be linked on the app's profile page or the developer's web page. It should also be included within the app itself.

In summary, creative commons licenses are likely to be the most useful tool for making the output of Terra Mosana partners publicly available. Important to remember, however, is that such licenses are irrevocable. Where third parties want to develop commercial versions of the product, individual IP licenses should be considered. Licensing professionals will be able to advice about the specific terms that should be included in such contracts, depending on the work at issue, the use that will be made of it, the territories, etc.

[47] Microsoft, End User License Agreement for Microsoft Dynamics 365 Business Central for Android (Tablet and Phone), 17 August 2018, available at https://www.microsoft.com/en-us/download/details.aspx?id=56670 (22 December 2020).

7. Abbreviations

BGH	Bundesgerichtshof (German Supreme Court)
CJEU	Court of Justice of the European Union
pma	*Post mortem auctoris* (after the death of the author)
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty

8. References

8.1. Legislation

8.1.1. International

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), available at https://www.wipo.int/treaties/en/ip/berne/
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
WCT	World Intellectual Property Organisation Copyright Treaty
WPPT	World Intellectual Property Organisation Performances and Phonograms Treaty

8.1.2. European

Computer Programs Directive	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), OJ L 111/16, 5 May 2009, (replacing Council Directive 91/250/ EEC of 14 May 1991 on the legal protection of computer programs, OJ L122/42, 17 May 1991)
Database Directive	Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20, 27 March 1996
Digital Single Market Directive	Directive 2019/790/EU 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, OJ L 130, 17 May 2019
Information Society (InfoSoc) Directive	Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22 June 2001

Orphan Works Directive	Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, 27 October 2012
Public Sector Information Directives	Directive 2003/98/EC of the European Parliament and the Council of 17 November 2003 on te re-use of public sector information, OJ L 345, 31 December 2003;; will be repealed by Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the reuse of public sector information, OJ L 172/74, 26 June 2019
Rental Right Directive	Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376/28, 27 December 2006 (replacing Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L346/61, 27 November 1992)
Resale Right Directive	Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001on the resale right for the benefit of the author of an original work of art, OJ L 272/32, 13 October 2001
Term Directive	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ No. L 372/12, 27 December 2006 (replacing Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290/9, 24 November 1993), as amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265/1, 11 October 2011

8.1.3. Belgium

Titel XI van het Wetboek van Economisch Recht	28 Februari 2013 – Wet tot invoering van het Wetboek van economisch recht (C – 2013/11134 Belgisch Staatsblad 19975)

8.1.4. Germany

German Copyright Act	Urheberrechtsgesetz vom 9. September 1965 (BGBl. I S. 1273), das zuletzt durch Artikel 4 des Gesetzes vom 26. November 2020 (BGBl. I S. 2568) geändert worden ist

8.1.5. Netherlands

Dutch Copyright Act	Auteurswet, BWBR0001886
Kamerstukken II 2002/03 28482-3	Tweede Kamer, Memorie van toelichting, vergaderjaar 2001–2002, 28 482, nr. 3

Decree Careful Investigation Orphan Works 2014	Besluit van 16 oktober 2014 houdende nadere regels over het uitvoeren van een zorgvuldig onderzoek in verband met de Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken (Besluit zorgvuldig onderzoek verweesde werken), Staatsblad van het Koninkrijk der Nederlanden 2014, 399.

8.2. Cases

8.2.1. European Union

Art & Allposters	Case C-419/13, *Art & Allposters International BV v Stichting Pictoright* [2015] ECR 27.
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