# *Essays*

## Archaeological Data Between Prerogatives of Protection and Requests of Access

Alberto Maria Gambino* and Maria Letizia Bixio**

**Abstract**

The purpose of this paper is to delineate some of the issues arising from the intersection of copyright and the protection of cultural goods, particularly in the framework of archaeology.

When looking at the work of freelance archaeologists with regards to excavation activities, scientific filing and research, it is interesting to reflect on which, among the data produced, is to be considered 'processed data'. It is in fact not always obvious whether copyright can be applied to such data. Can 'raw data', by reason of its extraneousness to copyright prerogatives, be made public and considered as part of the common heritage of a society?

The following analysis will be aimed at substantiating certain issues of entitlement relating to the dissemination of the archaeological documentation produced during the course of said excavation activities, in instances where public and private interest might overlap.

### I. Introduction

The research of an intellectual property scholar – who, to quote Pirandello, is tirelessly *in Search of an Author* – becomes arduous when dealing with a number of questions concerning the protection of cultural goods, particularly in the framework of archaeology.

Which elements of the scientific data produced by archaeologists – and especially by freelance archaeologists, as part of excavation activities, scientific filing and research – are to be considered 'processed data'? In what ways can archaeologists see the 'copyright' on their works (assuming there is any) protected, when the documentation produced is inserted into the archives? Can the 'raw data', by reason of their extraneousness to copyright prerogatives, be made public and considered the common heritage of society?

The following study aims to determine the legitimacy of certain attributions and certain issues of ownership related to the dissemination of the produced archaeological documentation in controversies in which the not always converging public and private interests overlap.

* Full Professor of Civil Law, European University of Rome. The author contributed to paras 2 and 5.

** Copyright Research Fellow, European University of Rome. The author contributed to paras 1, 3 and 4.

## II. An Analysis of the Archaeological Activity: Actors Involved and Work Stages

In order to better understand the focus of the following analysis, it is useful to start by clarifying what cultural goods are comprised in Art 2, para 2, of decreto legislativo 22 January 2004 no 42 (and subsequent amended versions), titled 'Cultural and Natural Heritage Code pursuant to Art 10 of Law 6 July 2002 no 137'[1] (hereinafter the Code). The text comprises 'movable and immovable things that are of archaeological interest'. Therefore, in case of archaeological discoveries that have the potential to become 'cultural goods',[2] one might wonder how their discoverers should be considered. The 'category' of archaeologists, by reason of their training and professional experience, finds a place in Art 9 *bis* of the Code, within the broader *genus* of 'professionals competent to carry out interventions on cultural heritage'.

Thanks to their specific knowledge of archaeological research and to their command of cataloguing methodologies, they put in place a complex series of activities that qualify precisely as 'knowledge of cultural goods'.

Third parties become aware of the cultural good only at later stages. This is indeed possible thanks to the professional mediation of the archaeologist, which is indispensable from the discovery to the elaboration of the data.

The transition from the raw data to the processed data, up until the creation of the final information provided to third parties, is a combination of stages and notions that are all necessary for a logical development of the archaeologist's activity, who is identified as the 'mediator' of knowledge.

During the activity of an archaeologist, three legally relevant moments, consequential but not coincidental, can be identified: 1) the acquisition of the data on the field; 2) the processing of the data or 'study phase'; 3) the publication of the results.

[1] Until 2004, the relevant comprehensive regulation was legge 1 June 1939 no 1089 on the protection of historical and artistic goods. The latter entrusted the Public Administration with the task of identifying which goods shall be defined 'cultural heritage' as part of public and private property, as well as with the task of placing upon them an historical artistic constraint, in order to ensure the goods preservation. In this latter case, the Public Administration was provided with an extremely broad discretionary power. See T. Alibrandi, P.G. Ferri, *I beni culturali e ambientali* (Milano: Giuffrè, 1985), 17. Art 1 of legge 1 June 1939 no 1089 safeguarded all those goods which have an historical and artistic character. Subsequently, with the enactment of decreto legislativo 29 October 1999 no 490, entitled 'Testo unico delle disposizioni legislative in materia di beni culturali e ambientali', a uniform Regulation for the protection of cultural goods was introduced. Such Regulation did not introduce any innovations in the content, but it was a recollection of already-existing provisions. Recently, the matter was addressed in a new Consolidated Law, enacted with decreto legislativo 22 January 2004 no 42 (the so-called 'Codice dei beni culturali') which came into force on 1 May 2004, and which repealed all previous legislative provisions.

[2] Concerning the notion of 'good', see the commentary by A. Pontrelli, 'sub Art 10', in A.M. Angiuli and V. Caputi Jambrenghi, *Commentario al codice dei beni culturali e del paesaggio*, in R. Villata ed, *Le nuove leggi amministrative* (Torino: Giappichelli, 2005), 61.

Normally, there are several actors at play in the various stages of an archaeological excavation, even if in practice, the same subject performs at least the first two stages. Among the principal actors are: 'the referent of scientific research' (a natural or legal person), that directs and coordinates the scientific activity (eg University, Superintendence, Institutions); the author of the documentation; and the people responsible for the different stages, who do not necessarily coincide with the previous actors.

All the above-mentioned actors are usually connected by a special interlocutor, namely the Archaeological Superintendence. This is a governmental territorial agency coming under the supervision of the Ministry of Cultural Heritage and Activities and Tourism that deals with archaeological heritage preservation activities.

The somewhat blunt wording of Art 88, para 1, of the Code entrusts the Superintendence with the exercise of the powers entitlement on the archaeological dig, the duties of coordination and scientific direction, and makes it a legal representative with respect to all stages of the executive archaeology activities.[3]

After having introduced the parties concerned to acquire a better understanding of their roles, it is now necessary to examine more in detail the work stages of the archaeological activity.

The protagonist of the first stage and author of the documentation is the archaeologist on the field, who carries out both material and intellectual duties.

In particular, in the first stage of the research the archaeologist employs his knowledge to fulfil a series of duties ranging from the choice of the exact location where to start the digging activities (which presupposes a preventive study and research to reconstruct the historical presence in that specific spot), to the drafting of field files on the movable finds discovered, graphic and photographic readings, the drafting of the excavation journal, as well as the final report which also includes the forecast for the conservation and valorisation measures to be adopted in relation to the recovered archaeological discoveries.

Because of the rather objective and technical tasks needed for the data interpretation, such activities would not seem to leave much room for the author's creative freedom. Nevertheless, a copyright component can be found when considering the degree of autonomy an archaeologist can exercise in choosing and undertaking a given intervention plan (preliminary research, drafting of the excavation journal, historical reconstruction).

Furthermore, an additional peculiarity characterising the activity of an

[3] See G. Alpa and V. Mariconda, *Codice civile, Commentari Ipsoa* (Milano: Ipsoa, 2013), 2487. Art 826 of the Civil Code provides that artefacts of historical, archaeological and artistic interest, found in whatever way, belong *ex lege* to the State and are part of its inaccessible cultural heritage. With regards to archaeological artefacts, the law in force affirms that they are part of a series of activities which are necessarily reserved to the State; save where the right to carry them out is entrusted to public or private entities by way of concessions (Arts 88 and 89 of the Code, decreto legislativo 22 January 2004 no 42).

archaeologist strengthens the relevance of the so-called *intuitus personae*: the significant uniqueness and unrepeatability of the process of gathering information. This makes the presence of a specific archaeologist decisive, both during the excavation activity and the production of a detailed scientific documentation of what was recovered.

By contrast, the excavations commissioned by the Superintendence to – for instance – a University follow a different set-up. In these circumstances, the archaeologist (professor or researcher) will generally follow the instructions provided to him and will answer to the commissioning entity, which will give him a set of guidelines, and the means and equipment to implement them. Therefore, in such instances the figure of the archaeologist unequivocally loses some of his autonomy.

Moving on to the second phase, one can observe a submissive handover between the field archaeologist and the archaeologist working as a Superintendence official. The latter will be in charge, in a somewhat impersonal manner, of the translation of the data collected in the cataloguing facilities, and of the drafting of the 'final archaeological report' (not to be confused with the 'final excavation report').

Such stage perhaps better fits into the protection of cultural heritage, which is upon the State full responsibility,[4] and becomes an expression of the public commitment taken by the Ministry of Cultural Heritage in light of Art 17 of the Code. This includes ensuring that these activities take place and the overview of their coordination, with the aim of employing common methodologies of data collection, exchange, access and processing at the national level, along with a network that can integrate the databases of other States, regions and local governments. Hence, the main actor during the excavation is deprived of any editorial freedom and limits himself to deliver the data collected to the Superintendence, in order to enable it to perform its duties.

Although universities and other institutions can have a say in defining the programs concerning the cataloguing methodologies, in general it is the Ministry responsibility to define such activities, even when excavations are entrusted in

[4] With relation to cultural 'goods' or 'objects', such protection (of cultural heritage) was the first function to be recognised over time. It consituttes the inspiring motive of Law 1089/1939. See G. Sciullo et al, *Diritto e gestione dei beni culturali* (Bologna: il Mulino, 2006), 53. See also S. Valentini, 'Le funzioni amministrative nella tutela dei beni culturali', in V. Caputi Jambrenghi ed, *La cultura e i suoi beni giuridici* (Milano: Giuffrè, 1999) 413. In the Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) 1024/2012 OJ L159/1 there is a specific definition: 'Cultural object' means an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Art 36 TFEU.

concession. Indeed, the Superintendence, despite not having a direct contact with the cultural good (1st stage), has full decision-making powers on the cataloguing activity (2nd stage) and dictates the timeframe and modalities of work. For instance, the Superintendence, as the owner of the results obtained, has the power to decide which collected data to catalogue or to exclude, whether to mention the name of the archaeologist signing the documentation on the first filing of the cultural goods, which information can be make available to all and which can be obscured.[5]

In the third and final stage (publication), the actors involved can either be the ones mentioned above or unrelated third parties. As a matter of fact, the publication can well constitute a detailed scientific activity, but if it does not necessarily imply an elaboration of the data collected, it can also end up being the mere reproduction of the journal or of the final excavation report.

In this case, from a substantive law viewpoint the inclusion of certain findings in the field documents could lead to assign such contributions a copyright protection on the basis of their minor creative character, which the Italian Copyright legge 22 April 1941 no 633[6] considers the core of the copyright protection as expression of the subjectivity of the author.[7]

However, the publication could also represent the final outcome of the research commissioned to the university, thus the result of the work of one or more archaeologist. In this situation, the research could be regarded as a collective work as defined by Art 7 of the Copyright Law. It could also become an independent work if qualified as the result of a researcher's drafting. This would happen if the researcher is alien to the commissioning entity, if he writes *ex novo* his own scientific study starting from the excavation data (files, journal, reports) retrieved in the archives open to the public, and if he is likely to obtain a moral and economic entitlement to the work.

## III. The Archaeological Activity Between Protection and Valorisation: A Systematic Framework

After having briefly outlined the archaeological activity in its subjective and objective connotations, this paper shall focus on framing such activity in the

[5] With reference to the above-mentioned administrative and technical discretion, see among others S. Benini, 'La discrezionalità nei vincoli culturali ed ambientali' *Il Foro Italiano*, III, 326 (1998); A. Rota, *La tutela dei beni culturali tra tecnica e discrezionalità* (Padova: CEDAM, 2002).

[6] Concerning the Italian copyright law see a comment in C. Galli and A.M. Gambino eds, *Codice commentato della proprietà industriale e intellettuale* (Torino: UTET, 2011).

[7] Specifically, the Superintendence activity is limited to the archiving of the excavation results. The author of the documentation (archaeologist) or third parties (scholars and researchers) can request access to the documentation for study purposes, to draft *ex novo* intellectual works that are the result of their creative activity. Such works, which could be qualified as scientific researches, will be susceptible to being published in an independent way. It should be noted that, for reasons of protection and excavation safety, there could be data of the documentation to which access will be denied and which will therefore remain unreleased.

wider context of the measures dealing with cultural goods. As it is well known, the State has the function of protecting the cultural goods besides owning them. In fact, the State shall make sure that the artefacts of artistic and historic interest are safely preserved. Nevertheless, starting from the second half of the twentieth century, in order to fully implement Art 9 of the Constitution,[8] the State duty to protect cultural goods was integrated with the principle of valorisation of cultural goods.[9] The latter is detailed at Art 6 of the Code, as: 'the exercise of the functions and the regulation of the activities aimed at promoting the understanding of cultural heritage' and 'in guaranteeing the best conditions of use and public use of the cultural heritage'. The function of 'valorisation' has enabled and facilitated the full development of culture, which could not have been fully achieved through the activities of mere protection and preservation.[10]

When considering the regulatory changes concerning cultural goods, one can notice a dynamic evolution of the role of the public authority. This became central in the transformation process from 'data' to 'information'. It stems from the notion of 'valorisation', which implies that society is given the full possibility to acknowledge the cultural good.

This transition[11] resulted in the current wording of Art 1 of the Cultural Heritage and Landscape Code, where valorisation and protection are referred to as actual duties of the State:

> 'In application of Art 9 of the Constitution, the Republic shall protect and valorise cultural heritage in order to preserve the memory of the national community and its territory, as well as promoting the development of culture'.[12]

[8] For further information see R. Chiarelli, *Profili costituzionali del patrimonio culturale* (Torino: Giappichelli, 2010), as well as A. Pizzorusso, 'Diritto della cultura e principi costituzionali' *Quaderni costituzionali*, 317 (2000). See also F. Merusi, 'Article 9', in G. Branca ed, *Commentario della Costituzione. Principi fondamentali. Arts 1-12* (Bologna: Zanichelli, 1975), 434.

[9] In the Cultural Heritage Code, the valorization of the good has an ancillary character with respect to the protection of the good, see G. Pastori, 'Le funzioni dello Stato in materia di tutela del patrimonio culturale (art. 4)' 1 *Rivista di diritto e arti online*, 2004.

[10] The role of the public authority underwent a transition from the 'mere guarantor of the physical preservation of a cultural good' to that of 'promoter of the valorisation of the cultural good'. The valorisation is considered as a possible factor for the intellectual development of the society as a whole, as well as an element of its identity. See G. Pitruzzella, 'Art 148', in G. Falcone ed, *Lo Stato autonomista* (Bologna: il Mulino, 1998), 492; see also G. Sciullo, 'Il codice dei beni culturali e del paesaggio: principi dispositivi ed elementi di novità' *Urbanistica e appalti*, 763 (2004). V. Grippo, 'La tutela delle opere d'arte e dei beni culturali', in A. Clemente et al eds, *Trattario di Diritto Civile, Proprietà intellettuale, Mercato e concorrenza* (Milano: Giuffrè 2017), 557-560.

[11] We are witnessing a revolution where an exclusively aesthetic criterion (which included only the most beautiful works among those deserving protection) is replaced by a historicist one (which aims at protecting a larger typology of cultural goods as representative of a given historical period). See M.S. Giannini, 'I beni culturali' *Rivista Trimestrale di diritto pubblico*, 14 (1976).

[12] A similar goal characterises international systems: C. Forrest, *International Law and the Protection of Cultural Heritage* (London-New York: Routledge, 2010); M. Frigo, *La circulation des*

Among the principal valorisation activities are the organisation and provision of technical expertise and financial resources to achieve the above-mentioned knowledge and promotion objectives.[13] In this respect, the whole archaeological activity[14] (particularly the phases of study and publication of findings) can theoretically be included in the duty of valorisation of cultural goods when it is aimed at improving their accessibility and scientific knowledge.[15]

## IV. Characterisation of the Relationship Between the Archaeologist and the Public Administration and Limitations to the Acknowledgement of Authorship on the Data

The following attempt to characterize the contract between an archaeologist and the public administration intends to identify some of the peculiar characteristics of this legal relationship, consequently addressing the commitments existing between the two entities.

Considering that the contract between the archaeologist and the public administration can be of different types, the one that seems to better define the relationship between the two is the casual independent work performance contract (Arts 2222 of the Civil code), as it foresees that the archaeologist has an obligation to carry out a certain activity, with no relationship of subordination. On the other hand, given that the actors involved in the commissioning of an excavation are highly qualified, the contractual form between the two parties could also be associated to the 'contract for supply of intellectual services', regulated by Art 2230 of the Civil code.[16]

More precisely, a 'supply of intellectual services' consists in making available a professional's expertise and specific intellectual resources with a view to achieving a useful result for the commissioning entity.[17]

*biens culturels: determination de la loi applicable et methodes de reglement des litiges* (Leiden: Brill, 2016). For a specific analysis on the importance of protecting 'cultural diversity' see L. Bellucci, 'The Notion of 'Cultural Diversity' in the EU Trade Agreements and Negotiations: New Challenges and Perspectives' *The Italian Law Journal*, 433 (2016).

[13] Although a 'Ministry of Culture' (with the competence of guiding and shaping culture) no longer exists, the kind of information which is transmitted today is far from being neutral, as it may be argued that its quality is often used to 'orientate' culture.

[14] See M. Berducou, 'Introduction à la conservation archaèologique', in N.S. Price et al eds, *Historical and Philosophical Issues in the Conservation of Cultural History* (Los Angeles: Getty Conservation Institute, 1990), 247-259.

[15] About the valorization through the access to the informative data, see G. Sciullo, n 12 above, 763.

[16] See G. Oppo, 'Creazione intellettuale, creazione industriale e diritti di utilizzazione economica' *Rivista di diritto civile*, I, 1-45 (1969).

[17] See V.M. De Sanctis, 'Problemi giuridici in tema di disciplina delle opere letterarie e artistiche create su commissione' *Il diritto d'autore*, 153 (1967). The information-gathering essay accurately explains the two opposite views on the debate concerning the acquisition of rights for works created pursuant to a commissioning agreement The Author clarifies how 'the

The contract for the supply of intellectual services is characterised by the autonomy[18] given to the professional, thus distinguishing it from a subordinated work contract. Nevertheless, in the case of the commission of an excavation, the person in charge often does not have a full organisational and technical autonomy while the commissioning entity does not guarantee complete freedom from its direct supervision.

Such entity puts at the disposal of the archaeologist all the necessary tools and bears all costs for the fulfilment of these activities. In general, the commissioning entity also bears the risks in case there is a preliminary agreement on the remuneration of the actors involved regardless of the outcome of the excavation.[19]

In spite of this, the activities carried out by the professional do not result in a subordinate relation with respect to the commissioning entity, due to the fact that the professional does not follow precise orders. Accordingly, the archaeologist has a wide margin of discretion in choosing how to best organise his activity within the general guidelines and broad indications provided, in light of the results that were commissioned to him.

There are two kinds of obligations in a contract for the supply of intellectual services: those relating to the means and those concerning the result. The contractual services under consideration would seem to have a mixed nature. On the one hand, the study and project phase and the excavation activity would

issue related to copyright does not arise in the case of works created pursuant to a commissioning agreement'. What matters for the commissioning entity is the 'ownership' of the work and not the 'intangible' intellectual property right on such a work. De Sanctis clarifies that 'the potential original entitlement of rights by the commissioning entity can never include the author's personal rights, but only economic exploitation rights'. See also T. Scovazzi, B. Ubertazzi and L. Zagato eds, *Il patrimonio culturale intangibile nelle sue diverse dimensioni* (Milan: Giuffrè 2012). M. Graziadei and B. Pasa, 'Patrimoni culturali, tesori nazionali: il protezionismo degli Stati membri dell'UE nella circolazione dei beni culturali' *Contratto e impresa/Europa*, 121 (2017). In fact, the idea of an original acquisition of rights on the part of the commissioning entity, replacing the latter with the author for what concerns economic exploitation rights, can be only accepted in the context of a dualistic vision of copyright. See also G. Oppo, n 18 above, 1-45. Oppo argues that, by concluding a contract for the creation of an intellectual work, the author has already given its consent for the work to be directed to the public and has consequently already dealt with the 'diritto di inedito' (under Italian Law the 'Diritto all'Inedito' is the discretionary right of an author to decide whether to publish his work or not) on its work.

[18] See F. Santoro Passarelli, 'Opera (Contratto di)', *Novissimo Digesto italiano* (Torino: UTET, 1965) XI, 982; G. Giacobbe and D. Giacobbe, 'Il lavoro autonomo. Contratto d'opera', in P. Schlesinger and Francesco D. Busnelli eds, *Codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2009), 12.

[19] P. Greco, 'I diritti sulle opere dell'ingegno', in F. Vassalli ed, *Trattato di diritto civile italiano* (1974), XI-XIII, 256. In order for the work of art to belong to the employer it is necessary that the creating activity of the authors be carried out in view of a certain outcome set in advance by the employer. When the very object of a contract is an activity aimed at the acquisition by the employer of the original ownership of certain rights (which according to general principles would normally be owned by the person conducting the creating activity), such rights are to be assigned directly to the employer. This rule is justified by the socio-economic function of an employment-based relationship: the employer hires the employee and pays him because he expects to appropriate the outcome of that work.

fall under an obligation of means (with a predominance of the intellectual component); on the other hand, the obligation of data delivery comes closer to an obligation of result. In both cases, the contractual type stipulates that the commissioning entity shall qualify as the holder of the to the results.

Therefore, the question is whether it shall be the Superintendence or rather the Ministry of Cultural Heritage and Activities and Tourism to acquire the full ownership of the results achieved by the archaeologists, consequently also on the final reporting work (even in the case of a work of intellect).

This gives rise to two main critical issues: first, whether the result of the excavation has a creative character or not;[20] a second concern relates to the limitations that the legal system implements regarding the acquisition of intellectual property rights, at least on the archaeological data.

Regarding the first issue, a distinction can be made between the raw data (which means all the files and technical reports, the transcriptions of the stratigraphic succession that has been identified, images and reliefs) and the processed data (eg the final excavation report together with the schemes that are essential for a better understanding of the information). Such reworked version may involve a certain editorial and content-related originality, which could potentially make the writings eligible for copyright protection.[21]

Moving on to the second issue, a number of substantial restraints can be found in relation to the recognition of the authorial rights to the archaeologists in charge of the excavation mission.

Primarily, certain limitations are expressed at Art 2222 of the Civil Code which regulates excavation contracts. The article clarifies that, the work performed and the results achieved by the archaeologist are the exclusive property of the commissioning entity, since the author of the documentation cannot use those results for any other purposes. Furthermore, these contracts often clarify that the archaeologist is neither allowed to inform third parties (institutions or persons) about the results of the excavation activities, nor to divulge it through publications without the specific consent of the commissioning entity, and in any case by stating that the work was carried out on its behalf.

The described contractual limitation could theoretically be waived if the parties agree to do so; however, some of the provisions of legge 633/1941 on copyright have a definite scope. For instance, Art 5 exempts any texts of the official acts of the State and of the Public Administration, be it Italian or foreign, from the scope of the copyright legislation. In an effort to limit the object of copyright protection, the legislator excluded those forms of expression that seem to be only abstractly protectable. By reason of their particular cultural (or

[20] See M.J. Madison, 'Beyond Creativity: Copyright as Knowledge Law' 12(4) *The Vanderbilt Journal of Entertainment and Technology Law*, 819 (2010): 'creativity is the undisputed 'what' of copyright'.

[21] See R. Franceschelli, 'Il diritto d'autore', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 2nd ed, 2009), XVIII.

social) function, they are unlikely to have any expressive character and normally consist of mere sources of information (eg judgments, ministerial reports, parliamentary proceedings etc). A further justification for such a provision relies on the fact that the State and the Administration official acts pursue public interests, thus private law principles such as copyright cannot apply. By contrast, Art 11 of the Italian Copyright Law admits *ex lege* the acquisition of copyright. Copyright protection lasts only for 20 years and belongs to the State or Public Administrations that commissioned the creation of works under their name, on their behalf and at their expense. Such right is deemed to be applicable also to collections of official acts (but not to individual acts which are subject to the regime of free use under Art 5).

According to a widespread doctrinal and jurisprudential thesis, the acquisition *ex* Art 11 of legge 633/1941 is comprehensive of all rights to utilise intellectual property (there is a certain similarity with the cases covered by Arts 12-*bis* and *ter*, 38, 45, 88 and 89 of legge 633/1941,[22] namely with all those circumstances in which the work is realized whilst in a subordinate or autonomous work relationship in the event of a commission).

Such a provision relies on the attribution of authorship to those (natural or legal persons) whose personal intellectual effort is reflected in the work. Thus, the public administration which commissioned the work can only be the author of the results achieved to pursue its broader objectives, such as the protection and valorisation of the cultural good.[23]

Therefore, at a closer look, the Ministry legitimately draws to itself the outcomes of an excavation. This is possible as they are considered official acts belonging to the public administration (*ex* Art 5 of the Italian copyright law) thus *in nuce* not susceptible to be granted any authorial protection. Additionally, they are anyway considered a commissioned intellectual work *ex* Art 11 of the Italian Copyright Law, therefore susceptible to be attributed *ex lege* to the State through the legal entity of the Ministry of Cultural Heritage and Activities and Tourism.

Clearly, the archaeologist who wishes that its creative contribution[24] to the

[22] See, in C. Galli and A.M. Gambino, n 6 above: P. Auteri, 'sub Art 12 bis and ter', 2894-2902; D. Mula, 'sub Art 38', 3003-3009; B. Bettelli and A. Lazzareschi, 'sub Art. 45', 3022-3029; B. Tassone, 'sub. Art 88 and 89', 3290-3304.

[23] In this respect, what is most discussed in Doctrine concerns the acknowledgment of a moral right upon the actual authors of the work (according to Messina G. and De Sanctis V.M. such right would still originate within the Authority). By contrast, others affirm (P.G. Marchetti and L.C. Ubertazzi eds, 'Sub Art 11', *Commentario breve al diritto della concorrenza* (Padova: CEDAM, 2016), 1510) that the provision should be interpreted pursuant to secondary law. Accordingly, the rights of economic exploitation on the works created by an employer belong derivatively to the employer or commissioning entity. See also S. Giudici, 'Sub Art 11', in C. Galli and A.M. Gambino, n 6 above, 2884.

[24] Some doubts arise from A. Musso, 'Diritto d'autore sulle opere dell'ingegno letterarie e artistiche', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 2008), 24, 'an absolute creative character – in spite of the most exasperated romantic theories – is not configurable, on the part of human mind, not even in the most

research is acknowledged can only refer to the contractual agreement. Through the contractual provision requiring the author of the documentation to be cited, they could be granted the acknowledgement of a certain authorship on the work (which could even be the simple mention of his name).[25]

## V. Free Access and Public Use

Having analysed the authorial prerogatives and their limitations, this section examines whether there are obligations or legitimate claims of publications of the results of the research, both in the technical-didactic and in more elaborated forms, so to make such documentation available in an open access version.

Decreto legislativo 25 May 2016 no 97 introduced a reorganisation of the regulation on the right of access and the obligation of disclosure, transparency and dissemination of information by public administrations. Inspired by the British Freedom of Information Act, it aimed to provide the public with an open access to such documents. However, the practical implementation of the Decreto has been significantly slowed by bureaucratic and procedural uncertainties.[26]

Thanks to the requirement of 'transferring to the National Archives the documents stored by state administrations' provided by Art 41 of the Code, it is currently accessible the documentation dating back to more than forty years. According to Art 122 of the Code, such documentation shall be freely available to anyone and without the need to justify the request of access.

The consultation for historical purposes of the current archives (created less than 40 years ago) is regulated by Art 124 of the Code, and requires that institutions shall set particular rules concerning their archives, without prejudice to the provisions of legge 7 August 1990 no 241 on the right of access to administrative documentation, based on general guidelines determined by the Ministry. Legge 241/90, modified by legge 4 August 2015 no 15 defined the right of access as the right of data subjects to inspect and take copies of administrative documents. The legal basis of the right relies on the principle of transparency of the administrative activity, which is also contemplated by Arts 97 and 98 of the

celebrated of the masterpieces (…) the requirement of the minimum of creativity implies that 'we certainly cannot demand' brilliant 'achievements to attribute royalties, (but) on the other hand an indiscriminate protection in favor is not even acceptableof every 'creative' coin'. See also M. Bertani, *Diritto d'autore europeo* (Torino: Giappichelli, 2011), 128: the author refers to the test of the non-triviality of the expressive form with respect to the works of the same kind (the so-called criterion of non-triviality).

[25] P. Greco, n 19 above, 257, argues that when a work is created pursuant to an employment agreement having as its object the creative activity, and the work is remunerated as such, the economic rights rest with the employer. The author can only enjoy the moral rights on such work.

[26] M. Ciurcina and P.G. Grossi, 'Beni culturali: brevi note sui dati e sul loro uso pubblico alla luce delle recenti modifiche legislative', in M. Serlorenzi ed, 'Archeofoss. Free, Libre and Open Source Software e Open Format nei processi di ricerca archeologica. Records of the VII Workshop (Rome 2012)' *Archeologia e Calcolatori*, IV, 35-44 (2013).

Constitution, setting out the principle of good administration, and by Art 21 of the Constitution affirming the right to information.

Providing access to administrative documents represents a general principle of the administrative activity, aimed at encouraging the participation of society as a whole and at ensuring the impartiality and transparency of the administrative action.

Recently, the principle of free access to the archives for anyone, without the need to justify the request, was reaffirmed in Circular No 1/2016 of the Directorate-General for Archaeology and within the so-called 'Guidelines for preventive archaeology'. An implementing Decree is expected to be adopted in relation to the latter, which has not been signed yet due to the reform of the public procurement code and of the replacement of legge 12 April 2006 no 163 with the decreto legislativo 18 April 2016 no 50.

The Circular states that the documentation concerning the excavation data shall be immediately published in digital format according to the modalities set out by the Ministry of Cultural Heritage and Activities and Tourism, on a freely accessible information platform. Additionally, the publication of the interpretative summaries shall in principle be carried out both on paper and digital format, within twenty-four months from the conclusion of the field studies.

In the same Circular there are numerous insights in favour of an open access to administrative documents for scientific, historical and statistical purposes. For example, with regard to the final publication of the results of the excavation, it is possible to mandate the public officer responsible for the preliminary study on behalf of the Superintendence to present a motivated proposal to the Superintendence for the assignment of further elaboration, or of specific studies to particular experts in specific fields who did not take part in the digs.

The related studying activities, or the ones consequential to the research conducted on the field, are planned by the Superintendence with the collaboration of the coordinator of the archaeological excavation. If the master plan for the publication of the excavation results or the related time schedule are not respected, it is the Superintendent's responsibility to take the necessary measures to ensure a correct and timely publication of the excavation results, after having consulted the archaeologist responsible for the study. Furthermore, in the case of excavations of particular relevance, the preventive reports and the preliminary excavation reports shall be published, in a geo-referenced form, on the Directorate-General for Archaeology,[27] which could additionally host the final publications.[28]

There is no doubt that the limitations in the managing and circulation of the cultural good should be overcome for the sake of its valorisation. Indeed, it

[27] See https://tinyurl.com/ygydogpe (last visited 30 December 2019).

[28] It should be noted that each regional Superintendence has its own current archive and has decision-making autonomy concerning the publication of reports on the area, and to the citation of the authors of the excavation documentation.

is necessary to ensure the public enjoyment of the cultural good, so that it can manifest its cultural character and perform its function of promotion of culture provided for in Art 9 of the Constitution.

Nevertheless, together with the free use of the documentation, also the access to the data is useful in order to improve the enjoyment of cultural goods. There is no doubt that for an archaeologist a discovery missing the information relating to the discovering context appears deprived of a large part of its potential to disseminate information. Therefore, it is only through the access to the informative data on the cultural good (delivered to and kept by the Superintendence) that is possible to fully perform the activity of valorisation. In this respect, it is unreasonable that the data produced through the archaeological activity, which are usually not replicable unless there exists the continuous possibility to consult them, remain unpublished or inaccessible. In fact, they are of central importance, as they represent the instruments through which the scientific community can pursue the reconstruction of the interpretative process and the formulation of new historical interpretations. For the sake of the objectives mentioned at the beginning of this paper, the access to cultural goods and to their related data serve as a key to ensure that the State's cultural heritage is effectively 'destined to the enjoyment of the society as a whole' (Arts 2 and 4 of the Code).[29]

[29] As laid down in the Paris Convention of 1972, the objective should not be the goods as such, but rather the Cultural Heritage of Humanity, of which such goods constitute a material evidence. See A.L. Tarasco, *Il Patrimonio culturale, concetto, problemi, confini* (Napoli: Editoriale Scientifica, 2019), 34; See also U. Leanza, 'La protezione dei beni culturali e il concetto di patrimonio comune dell'umanità', in G. Marini et al eds, *Scritti in onore di Angelo Falzea* (Milano: Giuffrè, 1991), I; Id, 'Le nuove frontiere della protezione internazionale del patrimonio culturale, materiale ed immateriale', in A. D'Atena ed, *Studi in onore di Pierfrancesco Grossi* (Milano: Giuffrè, 2012), 221.