# *Hard Cases*

## *Big Red* v *Gabibbo*. Fake Plagiarism, Fictional Characters and Derivative Work in Copyrights

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**Abstract**

Moving from the longlasting copyright controversy between the American Western Kentucky University and an Italian private television station, the article investigates the grounding elements for the protection of fictional characters, with a particular focus on the aspects qualyfing a 'distinguishing personality' according to Italian courts.

### I. Preliminary Remarks and Facts of the Case

For many years, a long (and extenuating) copyright controversy has been persisting between the American Western Kentucky University (WKU) mascot 'Big Red' and the Italian satiric reporter 'Gabibbo'. Big Red was allegedly created in 1979 by the – at the time – student Ralph Carey,[1] while Gabibbo was created by the Italian TV author Antonio Ricci, and first appeared on the national television in 1990.[2]

Particularly, it has been debated whether Gabibbo could be considered a form of plagiarism or derivative work of expression, given the significant similarities existing between the two characters.

Since the first subpoena was emitted on 16-17 December 2002 by the Italian

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[1] It should be observed that, at the time of its creation, Big Red was the mere preliminary sketch of a red, Kentuckian puppet wearing gym shoes. Therefore, it was reasonably devoid of any protection as a copyright work. Lately, Big Red officially became the university basketball team mascot and appeared in minor TV advertising campaigns.

[2] As a TV character, Gabibbo screened in multiple Italian shows as guest and presenter; it had been originally performed by Gero Caldarelli and then by Rocco Gaudimonte, while its voice belongs to Lorenzo Beccati. Gabibbo is strongly characterized by its Genoese slang and accent (its name comes from a Genoese word as well) and it appears as a red humanoid figure with no hair, wide mouth, and a minimal outfit (shirt, papillon and cufflinks). Its red colour is connected to its provocative attitude: in its TV shows, it acts as the protector of Italian citizens against abuses and unlawful conducts by public authorities. For a critic overview on the Gabibbo and its public function, see N.J. Molé, 'Trusted Puppets, Tarnished Politicians: Humor and Cynicism in Berlusconi's Italy' 40 *American Ethnologist*, 288-299 (2013).

Tribunal of Ravenna,[3] the dispute has not found any conclusive solution yet, in spite of two judgments issued by the Italian Court of Cassation. In reason of the uncertainty of the issue, relevant elements arise for legal scholars to investigate the legal framework of copyright protection for fictional characters.[4]

As a consequence, the article will be structured as follows: first, an investigation of the main elements emerging from the Italian proceedings – in which the '*Big Red* v *Gabibbo*' problem was addressed – will be conducted (paras 1 and 2). Indeed, an overview of the elements that courts took into account in order to settle the dispute (which provided the main grounds for their decision) is essential to underline the most disputed aspects in the debate on the protection of fictional characters and the distinguishing 'personality' aspects between two apparently similar ones.

Subsequently, some general questions pertaining to copyright law will be addressed (paras II and III): in particular, we will focus on whether Big Red (as a fictional character) should be worthy of protection under copyright law in the first place and, depending on the outcome of this question, we will investigate whether Gabibbo's characteristics are sufficient to mark its 'distinctive nature' from the American figure. Lastly (paras IV and V), the evaluation of these elements will be applied to provide a prospective evaluation on the current state of the art in the protection of fictional characters in Italy after Corte di Cassazione 6 June 2018 no 14635,[5] which allegedly provided a first clear solution to the dispute between Gabibbo and Big Red's creators.

Therefore, before focusing on the underlying theoretical problems, the next sections will provide a brief overview of the main facts of the proceeding that has taken place in Italy, in order to clarify the nature of the main disputed aspects between Big Red and Gabibbo.

[3] See the statement of facts provided in Tribunale di Ravenna 11 December 2007 no 129, available at www.dejure.it.

[4] For many years, Italian case law has been granting protection of a fictional character under copyright law every time originality and creativity elements are present. In particular, fictional characters are protected under Art 2, no 4, legge 22 April 1941 no 633, under the general provision securing artworks created through paint, sculpture, drawing, carving, and similar forms of figurative art techniques, including scenography (literally '*le opere della scultura, della pittura, dell'arte del disegno, della incisione e delle arti figurative similari, compresa la scenografia*'). Under this notion of work of art, notorious comic books characters such as Donald Duck, Gyro Gearloose and Pinocchio were granted copyright protection by the Corte di Cassazione with the decision 20 February 1978 no 810, *Giustizia civile*, I, 1108 (1978), while the Italian Tribunale di Verona, 17 June 1993, *Rivista di diritto industriale*, II, 399 (1993), attributed copyrights to the Italian character 'Topo Gigio' as an original humanized foam mouse puppet. Furthermore, even before the controversy between Big Red and Gabibbo arose, the latest had been already recognized as a 'character provided with original expression and creative identity, acting as protagonist of different stories in which its nature had been kept unchanged' (Tribunale di Savona 16 February 1999, *Diritto industriale*, 387 (2000)).

[5] Corte di Cassazione 6 June 2018 no 14635, *Diritto industriale*, 564 (2019).

## 1. The First Strand of Judgments: Tribunal of Ravenna, Court of Appeal of Bologna, and Corte di Cassazione 11 January 2017 no 503

In 2002 Ralph Carey, the Italian company ADFRA SRL (operating as licensee of CEI Crossland Enterprises Inc), the Western Kentucky University and Crossland Enterprises Inc itself accused (amongst others) the Italian companies RTI, Mediaset and Fininvest of counterfeiting due to their use of the Gabibbo character on Italian television. According to the claimants' positions, such conduct would violate Big Red's copyright.

Against this claim, the Tribunal of Ravenna declared in a 2007 judgment (Tribunale di Ravenna 11 December 2007 no 129) that the two characters were to be considered radically different, and that Gabibbo did not imitate Big Red.

After a thoughtful comparative evaluation, the Tribunal underlined that, in the case at stake, any possibility of counterfeit had to be excluded based on the profound creative differences existing between the two characters. In particular, Gabibbo showed a significant originality due to its functional role as a TV character. Due to its ontological purpose, Gabibbo's creative process showed individualized aspects and characteristics that were not present in Big Red. More precisely, according to the Tribunal Big Red does not have any personality at all, being its very own identity circumscribed to the role of WKU mascot. On the contrary, Gabibbo's attitude and behavior could be diversified and adapted to heterogeneous roles and styles during its public appearances.

In other words, the Tribunal appreciated a substantive difference between Big Red and Gabibbo's 'personality': whereas the first character had no (or a weak) identity, the second one's was well-portrayed and defined. According to the Tribunal, the sole connection between the two characters was their external resemblance (humanoid form and red colour); nevertheless, this aspect was insufficient to establish copyright protection in favor of Big Red, as both elements were not original in nature, instead recurring in other existing figurative works.

In addition, Gabibbo was deemed to present an original creative contribution by its authors, expressed in terms of an innovative reorganization of existing (graphical) elements into a new work of art provided with an original personality. This was – indirectly – demonstrated by the appreciation that Gabibbo enjoys from the general public.

The Tribunal conclusions were confirmed by the Court of Appeal of Bologna.[6] According to the appeal judgment, Big Red's features were in no way dissimilar from other existing mascot and moppets; besides, Big Red did not present any original characteristics in its representation, as it was constituted by ordinary lines and non-original graphical solutions. As a consequence, and even before addressing the allegedly derivative nature of the Gabibbo, the Court of Appeal

[6] Corte d'Appello di Bologna 13 May 2011 no 609, available at www.dejure.it.

questioned whether Big Red could enjoy copyright protection in the first place.

In its judgment, the Court maintained that fictional characters shall be afforded copyright protection as long as they can be qualified in terms of complex and autonomous works of human intellect. In order for this requirement to be fulfilled, their personality must present original features, even beyond their external appearance: name, qualities, habits, ways of speaking and behaving in a social context are all relevant elements to appreciate a character's personality.[7] Considering the comprehensive relevance of these aspects, the Court of Appeal excluded once again the plagiarist nature of Gabibbo, acclaiming its original personality as emerging from its way of acting and behaving.

Lastly, the first series of lawsuits involving the '*Big Red* v *Gabibbo*' case ended with the intervention of the Court of Cassation. Upon request, the Court qualified the claimants' inquiry for review inadmissible: in the judges' opinion, once the Bologna Court declared that Big Red was devoid of creative nature (and consequently of protection under copyright law), any additional examination of the counterfeit claim should have been omitted. It should be noted that, in addition to this statement, the Court of Cassation further noted that

> 'even if Big Red was afforded copyright protection, no counterfeit would have been present, considering the elements of diversification qualifying the Gabibbo character'.[8]

## 2. *Big Red* v *Gabibbo* 'Round 2': Tribunal of Milan, Court of Appeal of Milan, and Corte di Cassazione 6 June 2018 no 14635

After the 2017 decision, the counterfeit lawsuit received a first – partial – response, yet the dispute with regards to the plagiarism claim, brought by Ralph Carey in front of the Tribunal of Milan in 2012, was far from being solved: Carey claimed that the creation of Gabibbo constituted a violation of his moral rights as author of Big Red and asked for compensation. In plain contrast with the grounds set for the decision in front of the Tribunal of Ravenna, the Milanese Tribunal qualified Gabibbo's creation as a form of 'derivative plagiarism' (lit '*plagio evolutivo*'), as Art 18 of the Italian Copyright law protects both the work contemporary fashion and its incremental modifications, adaptations, and innovations that does not constitute original activity on their own. As a consequence, the respondents were condemned to provide Carey compensatory damages and to give notice of the plagiarism to the general public.[9]

[7] In addition, the Court noted that the imitative nature between two characters shall be evaluated considering the overall impression that they cause to an average observer; yet, the comprehensive sum of individual formal elements (such as the shape of the figure) are sufficient to exclude any plagiarism.

[8] Corte di Cassazione 11 January 2017 no 503, *Foro italiano*, I, 530 (2017).

[9] In particular, in its judgement the Tribunale di Milano 16 February 2012 no 4145,

According to the Tribunal of Milan, a comprehensive overview of the external characteristics of the two characters was sufficient to appreciate their identical origin, given the common presence of all the most prominent features of their appearance: in the Tribunal view, the two figures were to be considered essentially identical, considering the size proportion of the body and the head, and the length of the limbs. In addition, the two characters' facial expression – with its wide-eyes and the enormous mouth – was corresponding, further stressing the similarity between the two characters. According to the judgment, any impartial observers (seeing and knowing both the characters) could indeed appreciate the presence and influence of Big Red in the Gabibbo's figure.

Nevertheless, in its decision the Tribunal conceded that fictional characters can still be considered as novel products of inventive activities – despite their physical appearance – due to their original and detailed psychological characteristics that contribute to create a distinguishable and autonomous personality.

In light of these considerations, we shall observe first and foremost that such significant differences are indeed present between Big Red and Gabibbo: whereas the former behaves as (and actually is) a mere mascot – cheering for its team, and suffering in case of loss – Gabibbo was created as an extremist and crude commentator, arguing on the latest news, unveiling public figures' bad habits and protecting citizens' rights. As a direct consequence of these features, Gabibbo emerges as a profoundly autonomous character despite its external appearance and essentially due to its communicative attitude, which is widely acknowledged as original and creative by the general public.

Therefore (despite its similar appearance), Gabibbo should have been considered worthy of autonomous protection under the abovementioned Art 4 of the Italian copyright law, based on those same requirements that the Tribunal of

available at www.dejure.it,

'Ascertains that the creation of the character Gabibbo is a form of evolutionary plagiarism of Big Red, created by Ralph Carey;

Establishes the subsequent violation of Carey's moral rights and its co-paternity over Gabibbo;

Issues an injunction to RTI, Ricci and Copy against any perpetuation of the conducts that constitute violation of Carey's rights;

Mandates RTI, Ricci and Copy to give public notice of Carey's co-paternity of Gabibbo for one month, at the beginning of each episode of the TV show *Striscia la Notizia*;

Commands for the co-paternity of the Gabibbo to be communicated in any commercial product reproducing its resemblances (photographs, puppets, etc.) and, in any case, anytime the Ricci-Copy paternity is mentioned;

Adjudges that plaintiff recovers from RTI, Antonio Ricci and Copy SPA an amount of two hundred thousand euros;

Commands for the judgement to be published on *Il Corriere della Sera*, *La Repubblica, Il Quotidiano nazionale* and *Il Giornale* (the major Italian journals) at the expenses of the respondents, and on their personal web-pages;

Condemns RTI, Antonio Ricci and Copy SPA to refund the claimant of all the expenses related to the judgment, in a maximum amount of nineteen thousand three hundred and forty-eight euros'.

Milan considered as pivotal in order to qualify it as a form of derivative plagiarism.

In line with this position, the judgment of the Tribunal of Milan was then reversed by the city Court of Appeal:[10] in the view of the appellate Court, the Tribunal decision did not acknowledge the fact that Big Red was, in itself, lacking any creative nature, and therefore should have been deprived of any copyright protection.

In addition, the Court considered any claim of 'derivative plagiarism' to be inexistent as well: Big Red and Gabibbo are, in the Court's view, overall different. On the basis of such diversity, the creation of Gabibbo does not constitute neither a form of 'traditional' plagiarism (ie the mere reproduction of an already existing work) nor a 'derivative' one: the degree of originality that Gabibbo represents is sufficient to establish it as an autonomous work of art. According to the Court, the peculiar personality of Gabibbo, and the distinctive role it has in its shows, are so representative of an original identity that they compensate for the external resemblance between the character and Big Red, underlining a profound difference in the 'spirit' that prompted the creation of the two characters.

Thus, the Court of Appeal decision established the highly creative nature of Gabibbo, which represents an essential condition to consider the character worthy of copyright protection on its own.

Against this background, during the last stage of the trial, the Court of Cassation intervened again and reverted the Court of Appeal's decision regarding derivative plagiarism: despite excluding the presence of a traditional plagiarism and of a counterfeiting conduct, the Court stated that Gabibbo's creation constituted a derivative plagiarism activity, violating Big Red's copyright. Therefore, it ascertained a violation of Carey's moral and patrimonial rights.[11] According to the highest Court, the Court of Appeal merely excluded the 'traditional' plagiarism and qualified Gabibbo as an autonomous work, without properly engaging with the 'derivative plagiarism' assessment.

In the view of the Court of Cassation, when copyright is involved it is not

[10] Corte d'Appello di Milano 9 January 2004 no 525, available at www.dejure.it.

[11] The Supreme Court underlined that the engagement of the authors in a creative elaboration of a work protected by copyrights, even resulting in an original work – that can enjoy copyright protection as an autonomous product – may integrate a violation of copyright law whether it is conducted without any consent from the author of the original work, therefore violating their rights (Corte di Cassazione 5 September 1990 no 9193, *Repertorio del Foro italiano*, 1990; Corte di Cassazione, 27 October 2005 no 20925, *Foro italiano*, I, 2080 (2006)). When such an event occurs, the outcome constitutes the by-product of a derivative work: it enjoys autonomous protection under Art 4 of legge no 633/1941, but it is a non-authorized, re-elaborated, version of the original piece. Consequently, its creation does not constitute a counterfeit – which requires a substantive reproduction, with minor details, of any relevant characteristics of the original piece without any original contributions.

As a derivative work, any unauthorized use of the product – meaning, without the consent of the creator of the original one – entitles the author of the original work to claim compensation in terms of a fixed percentage of any profit arising from the derivative's work commercialization or usage (Corte di Cassazione 3 June 2015 no 11464, *Diritto industriale*, 556 (2015)).

sufficient to evaluate plagiarism and counterfeiting in a literal fashion to exclude any form of unlawful influence between two works. In particular, the original product enjoys specific protection also against any re-interpretations: a derivative plagiarism is integrated if a new product, despite modifying and re-elaborating the original one does not show a sufficient degree of creative and individual activity. In such cases, the new product is in violation of the original's author copyright under the Italian law.[12]

As a consequence of the Court of Cassation decision, the Court of Appeal of Milan has been mandated to revise its judgment and to consider whether, in the case at stake, Gabibbo constituted a re-elaborated or rather an inspired-version of Big Red. In both cases counterfeit, or 'traditional' plagiarism (since they are both based on the mere reproduction of the original) is already excluded.

It must be noted, though, that the Court of Cassation – in operating such assessment – did not consider that the derivative plagiarism issue had already been addressed by the Court of Appeal in its previous decision: in radically excluding the existence of a plagiarism (both in its traditional and 'derivative' nature), the Court underlined the presence of a high-degree of originality in the creation of the Italian Gabibbo. As a result, the Court noted that it could have been argued – at most – that Gabibbo was inspired by Big Red, but this would not have been sufficient to deprive it of its uniqueness.

After providing a general overview of the main history behind the case, it is now possible to indulge on the theoretical issues these facts pose for legal professionals. Due to the geographical and jurisdictional aspects of the case, the Italian law will represent our primary benchmark in conducting this analysis; still, a major role in envisaging the true meaning of some notions is played by US courts decisions, which will be referred as interpretative proxies.

## II. Determining Counterfeit and Plagiarism Between Regulation and Case Law

On a preliminary note, it should be observed that – according to Italian legge 22 April 1941 no 633 – any work of art that can be traced to the fields of literature, music, figurative arts, architecture, drama and cinematography, is susceptible to copyright protection (regardless of its mode of expression).[13] In addition, national case law has stressed that any work shall be creative, original and novel

[12] Corte di Cassazione 6 June 2018 no 14635 n 5 above.

[13] In accordance with such a broad view, the Italian Council of State ('Consiglio di Stato') affirmed that there is no 'free zone' in the realm of copyright, in which authors and their works are devoid of protection. In the Italian legal framework, the protection of copyright has an inner-expansive capacity, and it dynamically expands according to the characteristics of the modes of expression encompassing art in every form (Consiglio di Stato 15 July 2019 no 4993, available at www.dejure.it).

in order to be protected by copyright.[14] Therefore, any judges investigating a potential plagiarism case shall, first and foremost, verify if the allegedly plagiarized work presents proper originality and novelty (Corte di Cassazione 12 March 2004 no 5089).[15]

The notion of 'creativity' mentioned by Art 1 of Italian copyright law does not coincide with an ideal concept of creation in terms of absolute novelty and originality. On the contrary, it refers to a personal and individual expression of a work that pertains to the abovementioned arts. A creative effort – even a minimal one – is enough to legitimize copyright protection as long as it comes with a clear manifestation in the exterior world. In addition, creativity does not refer to the abstract idea behind protected work, but rather to the concrete form of the idea's expression: this way, the same idea can constitute the basis of many works which are distinguished from one another in light of the authors' creative effort.[16]

Such an approach is consistent with the necessary balance that copyright law entails between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society competing interest in the free flow of ideas, information, and commerce. This complex balance has been thoughtfully addressed under the EU and US legal framework. The US Supreme Court has noted on a number of occasions that while copyright aims to give authors an incentive to create and share their

[14] According to most judgments issued on the topic, the threshold to establish creativity is quite low: it is sufficient to verify the existence of any original work of authorship. This is true with particular reference to creative works displaying a significant technical nature: since the vast majority of choices is indeed dictated by the existent realm of technical solutions that might lead to the desired outcome, in such cases the author has just a minor discretion on the modes of expression of their work (Tribunale Bologna 14 October 2013 no 12773, *Repertorio Foro italiano*, 12 (2013)). This position has been further specified by clarifying that creative and original nature are present also in those works that are created from simple ideas and notions already present in the general knowledge of those who are experts operating in a certain field. In such cases, though, these ideas and notions shall be formulated and organized in a personal way, making them autonomous from what it is already existing. The concrete relevance of such autonomising effort must be ascertained by evaluating the facts, which are susceptible to be challenged in court exclusively on the basis of lack of rightful grounding and motivation (Corte di Cassazione 12 January 2007 no 581, *Foro italiano*, I, 3167 (2007)). In addition, the Italian Court of Cassation further observed that even an incomplete work (or a work that did not reach its complete form, as envisaged by its author) might present creativity and subjectivity (Corte di Cassazione 19 October 2012 no 18037, *Massimario Foro italiano*, 12 (2012)).

[15] Corte di Cassazione 12 March 2004 no 5089, *Foro italiano*, I, 2441 (2004). In stressing the pivotal character of this preliminary evaluation, Italian judges also underlined that the evaluation of the judge on this aspect cannot be appealed as long as it offers reasonable grounding and motivations, without presenting any logic or legal errors (Corte di Cassazione 8 September 2015 no 17795, *Diritto industriale*, 33 (2016)).

[16] Accordingly, Art 9.2 of the TRIPS states that 'Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'. See also Art 1 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122 17 May 1991, and Art 2 no 8 and 9 of the Italian copyright law. See also Tribunale di Bologna 24 February 2015 no 2463, available at www.dejure.it.

works, it also strives to provide subsequent authors with sufficient 'breathing space' to make their own additive contributions. The copyright system is predicated both on the existence of certain rights to protect authors from unfair competition, and on significant gaps in those rights that give other authors freedom to 'breath' and develop their creativity.[17]

The reasoning of various Italian judges followed this approach, underlining *ex multis* that it is possible for a new work to be inspired by another existing one, as long as its mode of expression is sufficiently diverse and creative to exclude any counterfeiting activity. Similarly to different paintings portraying the same subject with artists using different modes of expression that provide each work with an autonomous character and creativity, so it might happen for works protected by copyright law. An original work could also be crafted by moving from a minor, secondary aspect of an already existing one, when such feature is transformed and developed in a distinct and original new context; in such cases, the new original manifestation of the (already existing) idea is sufficient to entitle its creator of the authorship and qualify their work as original in nature.[18]

Lastly, Italian judges clarified that it constitutes a violation of the author's copyright when the original work is copied or reproduced in its entirety (abusive reproduction) and when a counterfeit – presenting both differences and similarities – is realized.[19] As for cases concerning partial reproductions, then context and expressivity – in line with an aspect that has been widely stressed by American legal and liberal arts scholars[20] – have the lion's share, since meaning is strictly derived from context (eg sampling an existing segment of music might change what that music expresses, making the end product expressive in the general sense nonetheless).[21]

With regards to the *Big Red* v *Gabibbo* case, the essential topic to be considered pertains to the notion of plagiarism, which is not expressly defined

[17] See M.A. Lemley, 'The Economics of Improvement in Intellectual Property Law' 75 *Texas Law Review*, 989 (1997). In case law, see *MGM Studios INC* v *Grokster LTD* 545 US 913, 933 (2005); *Sony Corp. of Am.* v *Universal City Studios INC* 464 US 417, 479 (1984). On the issues arising from the lack of harmonization in the early days copyright protection for fictional characters – with a particular focus on the US system – see D. Feldman 'Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection' 78 *California Law Review*, 687 (1990).

[18] Corte di Cassazione 28 November 2011 no 25173, *Annali italiani del diritto d'autore*, 589 (2012).

[19] Corte di Cassazione 28 October 2015 no 22010, *Annali italiani del diritto d'autore*, 736 (2016); Corte di Cassazione 5 July 1990 no 7077, *Corriere giuridico*, 931 (1990). In these judgements, the Court clarified that no counterfeit is present when the resemblance between two works is due to their common inspiration by a third, original previously existing work. Recently, see also Corte di Cassazione 2 March 2015 no 4216, *Annali italiani del diritto d'autore*, 678 (2016).

[20] *Ex multis*, S. Fish, 'Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases', in S. Fish ed, *Is There A Text In This Class?* (Cambridge Mass.: Harvard UP, 1980), 268-292.

[21] T.G. Schumacher, 'This Is a Sampling Sport: Digital Sampling, Rap Music and the Law in Cultural Production' 17 *Media, Culture And Society*, 253-268 (1995); D. Hesmondhalgh, 'Digital Sampling and Social Inequality' 15 *Social & Legal Studies*, 53 (2006).

under Italian copyright law, being merely qualified under Art 171 legge no 633/1941 as the activity of 'reproducing someone else's work for any purpose or in any way, without having the proper rights to do so'.[22] It can be deduced, therefore, that a plagiarizing activity is always based on the unlawful reproduction – *rectius*, appropriation – of the creative aspects of another work (considering the work in its entirety or its specific parts) by means of a 'parasitic' conduct.

In order to distinguish between (lawful) inspiration from an existing work and (illegal) appropriation in terms of plagiarism, case law and legal scholars developed a set of guiding principles to be used in the comparison between two pieces. Primarily, it is widely acknowledged that a preliminary evaluation of the characteristics of the plagiarized work is necessary: the 'original' piece shall be, in fact, creative and original on its own. This aspect shall be determined particularly in relation to the original work exterior appearance – since, as we already underlined, the idea is not, *per se,* worthy of protection under copyright law.[23]

Concerning the 'plagiarizing' assessment, Italian scholars and case law stressed some pivotal aspects in order for plagiarism to be ascertained:

a) The two pieces shall not present any significant 'semantic divide': the author of the plagiarizing work must have reproduced the original work creative elements, replicating its exterior form and characteristics. If, on the contrary, the new work is inspired by the same idea/concept as the old one, but the essential elements characterizing its exterior manifestation are different, then plagiarism should be excluded.[24]

[22] 'è punito (…) chiunque, senza averne diritto, a qualsiasi scopo e in qualsiasi forma (…) riproduce, trascrive, recita in pubblico, diffonde, vende o mette in vendita o pone altrimenti in commercio un'opera altrui'.

[23] Copyright law does not protect ideas – given that similar or identical ideas can emerge from independent activities and individuals' work – but, rather, the expression of an idea, ie the physical manifestation of a specific idea that is susceptible to be evaluated in its originality, creativity, and form.

[24] This aspect has been stressed by Italian case law analysing the problem of plagiarism in the area of musical works: in case a fragment of poetry is present and used in different songs, plagiarism is not present as long as the fragment presents a different ontological significance in terms of 'semantic divide' between the two tracks. According to theories of aesthetics, a major characteristics of poetry consists of using typical elements from the 'vulgar', popular language and enriching them by adding contextual and rhetorical meanings. Even the same words and text, therefore, are susceptible to assume different meanings given their use in a particular context; similarly, any artistic work can produce and offer a new perspective on the world and society by using already existing (reinterpreted) elements and signs. This aspect marks a major divide between art and science (Corte di Cassazione 19 February 2015 no 3340, *Rivista di diritto industriale*, II, 263 (2015)).

The capacity of using the same system of words and signs with different meanings is well expressed by the studies conducted on parodies and satirical works: even by referring to the same register, characters and (sometimes) story of an existing work, satirical pieces revert and modify their meaning in such a profound way, that they emerge as autonomous creative activities (Tribunale di Milano 15 November 1995, *Giurisprudenza italiana*, I, 2, 749 (1996)). As the US case law has underlined, it would be unfairly reductive to qualify a satirical work as a mere derivative reproduction of the original piece: the diversity of the artistic message is sufficiently

b) The investigation concerning plagiarism shall take into account any differences existing between the two works concerning their essential characteristics: minor details are not sufficient to qualify the plagiarizing work as original (Corte di Cassazione 15 June 2012 no 9854; Corte di Cassazione 10 March 1994 no 2345; Corte di Cassazione 10 May 1993 no 5346).[25] In other terms, plagiarism cannot be excluded based on minor, ostensible and illusory differences between two pieces of art.

c) The existence of a potential risk of confusing the two works does not constitute *per se* an essential element in order to ascertain a plagiarism case.[26]

d) The plagiarism assessment shall be the result of a general, synthetic, evaluation: the overall impression that two works create on spectators – and not their analytic similarities or differences – constitutes the benchmark to evaluate whether plagiarism is present.

e) The judicial assessment regarding the plagiaristic nature of a work of art cannot be challenged in court as a 'point of law', as long as the assessing judge provides any rationale for their decision (Corte di Cassazione 26 January 2018 no 2039).[27]

On the basis of these general proxies, legal scholars and case law further defined the difference existing between what constitutes plagiarism and what shall be qualified as a counterfeit. It shall be noted that such difference is particularly significant also in other jurisdictions: for example, in the United States counterfeiting

characterizing to establish the original nature of the parodistic work. Considering any parody as a 'literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule' (*Campbell v Acuff-Rose Music INC* 510 US 583 (1994) – quoting *The American Heritage Dictionary* (Boston: Houghton Mifflin, 3rd ed, 1992) 1317), the US Supreme Court acknowledged that 'parodic works, like other works that comment and criticize, are by their nature often sufficiently transformative to fit clearly under the fair use exception'. Id (recognizing that parody 'has an obvious claim to transformative value' (*Mattel INC* v *Walking Mountain Productions* 353 F.3d 792 (9th Cir 2003)). Given that, under the US fair use doctrine, copies made for commercial or profit-making purposes are presumptively unfair (*Sony Corp. of America* v *Universal City Studios INC* 464 US 417, 449 (1984)), a parody or satire is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original (*Rogers* v *Koons* 960 F.2d 301 (2nd Cir 1992)). This sort of criticism itself fosters the creativity protected by the copyright law (*Warner Bros INC* v. *American Broadcasting Cos. INC* 720 F.2d 231 (2nd Cir 1983)); still, in order for a work to be qualified as parodistic, its audience must be aware that there is an original and separate expression underlying the parody, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody (*Harper & Row Publishers INC* v *Nation Enterprises*, 471 US 562 (1985)).

[25] Corte di Cassazione 15 June 2012 no 9854, *Diritto industriale*, 459 (2013); Corte di Cassazione 10 March 1994 no 2345, *Foro italiano*, I, 2415 (1994); Corte di Cassazione 10 May 1993 no 5346, *Rivista di diritto industriale*, II, 296 (1993).

[26] Corte di Cassazione 27 October 2005 no 20925 n 11 above, embracing an approach developed in the field of trademarks regulation.

[27] Corte di Cassazione 26 January 2018 no 2039, *Nuova giurisprudenza civile commentata*, 983 (2018).

is considered a form of industrial property infringement, whereas plagiarism does not necessarily implies a breach of copyright and its related rights.[28]

In assessing the distinction between the two notions, it has been clarified that a counterfeiting conduct is present whenever someone unlawfully exploits the author's original work for economic purposes: this might happen by abusively reproducing the piece – and eventually selling the copies – in its identical fashion or including minor differences from the protected work. Therefore, the focus of counterfeit is the violation of the creator's economic right.

On the other hand, plagiarism is integrated when authorship is violated, since the plagiarist qualifies themselves as the author of a work created by someone else. Plagiarism constitutes an unlawful appropriation and attribution of both the creative elements and the authorship of a piece of work. The violation it creates is twofold, impacting both on the author's economic and moral rights.

Operating in an intermediate role between these two poles, the Italian case law has developed a notion of 'counterfeiting plagiarism' (lit '*plagio-contraffazione*'). Such concept is used to define those situations in which an original work is both reproduced for economic purposes and the reproducer contextually qualifies themselves as the original creator of the new piece.[29]

Lastly, derivative plagiarism is present when an original work is developed and modified without the author's consent, and then the result of such elaboration embeds a creative element qualifying it as worth of copyright protection[30] while still maintaining some characteristic elements essential to the originality of the plagiarized work.[31]

Derivative plagiarism creates harm to the exclusive right – enjoyed by every author – of developing one's work (granted by Art 18 of the Italian copyright law): therefore, any third party's elaborations and modifications of a piece of work shall be authorized by the author of the original piece.

However, a thin line exists between derivative plagiarism and creative development of existing works: as already highlighted, copyright law is meant to protect the expressive elements of the author's piece while guaranteeing subsequent authors the necessary discretion and space to make their own contributions by adding to, re-using, or re-interpreting the facts and ideas embodied in the original work. Even if subsequent authors may not compete with the copyright owner by offering their original expression to the public in terms of a substitute for the copyright owner's work, they are still free – and fostered – to compete with their own expression of the same facts, concepts,

[28] B.L. Frye 'Plagiarism is Not a Crime' 54 *Duquesne University Law Review*, 133 (2016).

[29] See Corte di Cassazione 5 July 1990 no 7077 n 19 above; Tribunale di Milano 4 July 2017, no 7480, available at www.dejure.it.

[30] See Art 4 Italian copyright law, legge no 633/1941.

[31] See Corte di Cassazione 17 January 2001 no 559, *Foro italiano*, I, 1182 (2001), and Corte di Cassazione 10 March 1994 no 2345 n 25 above, considering the specific case of the elaboration of a literary work in order to develop a theatrical script as a form of derivative art.

and ideas.[32]

Accordingly, expressive distinction is the central element in the complex balance between the authors' interest in preventing the exploitation of their writings and society competing interest in the free flow of ideas, information, and commerce.[33]

Despite the (virtual) clarity of these concepts, in practice it is arduous for judges to mark a clear divide between counterfeiting conducts and creative elaborations, and it is not by chance that a Tribunal discretionary evaluation can be challenged in court only on the basis of a lack of motivation.[34]

## III. Is Big Red Worthy of Protection Under Italian Copyright Law?

In light of the different elements emerging from the abovementioned legislation and case law, it is now possible to investigate and compare the two figures of Big Red and Gabibbo in order to make some considerations regarding the validity of the plagiarism claim. In conducting this analysis, we deem a statement of the Bologna Court of Appeal[35] worthy of particular attention: the Court underlined that Big Red could not be qualified as a creative work in the very first place, since its essential characteristics (red humanoid shape, disproportionate enormous head and wide mouth) are shared amongst other – already existing – figures and puppets.

Despite the existence of similarities in their outward appearance, Big Red and Gabibbo are also very different as Big Red usually displays the letters 'WKU' (that is the acronym for the Western Kentucky University) on its chest, wears trainers or other sorts of gymnastic shoes and acts as the mascot of the basketball

[32] R.A. Reese 'Transformativeness and the Derivative Work Right' 31 *Columbia Journal of Law & the Arts*, 101 (2008).

[33] *Warner Bros. INC* v *American Broadcasting Cos. INC* n 24 above, 240, qualifying the idea-expression distinction as 'an effort to enable courts to adjust the tension between these competing effects of copyright protection'.

[34] Corte di Cassazione 10 March 1994 no 2345 n 25 above. It should be noted that some critical advancements emerged in the field of criminal law as well: the Italian court underlined that the protection of authors' rights shall be granted only when a physical manifestation of an idea (so-called *corpus mechanicum*) is present in the external world, and that the requirements of originality and creativity shall be evaluated with regards to such *corpus*, both in cases of original and derivative plagiarism (Corte di Cassazione 24 October 2016 no 44587, *Rivistra trimestrale di diritto penale dell'economia*, 674 (2017)). In addition, and with regards to the distinction between protecting economic and moral rights involved in practice, the Court of Cassation explained that the joint safeguard that these two different types of rights enjoy stems from the inner characteristics of copyright law: since copyright law aims at protecting an author's creation as a good, its scope of action cannot be constrained to the commercial exploitation of such creation; an original work shall be protected even if its outside the market (eg an unpublished manuscript), as long as it is a concrete form of original expression (Corte di Cassazione 19 October 2012 no 18037 n 14 above).

[35] Corte d'Appello di Bologna 13 May 2011 no 609 n 6 above.

team of the university, cheering for its team and interacting with the public of the university events (mainly students and teenagers) without speaking. On the contrary, Gabibbo wears a papillon and wristbands and acts as reporter and presenter in TV shows; consistently with its role, it frequently interacts with the general public – which is constituted both by adults and teenagers.

The Court of Appeal of Milan underlined in its decision that many fictional characters in the entertainment, advertisement, and television industries are visually similar to Big Red: consider, among others, the Looney Tunes Gossamer (ever since 1946), Barbapapa's characters, and even Pacman. The affinities amongst these characters are essential to exclude that a plagiarism evaluation could be based exclusively on their mere external appearance.

As it should logically follow from such consideration, the mascot originality should be appreciated on the basis of its psychological characteristics. Accordingly, Big Red appears devoid of any creative nature, since its silent and joyful attitude is not different from many existing figures. Against this background, the Court deemed Big Red's way of interacting with the spectators (with gestures and cheering) original and different from other, already existing, similar characters – without providing, though, a solid comparative evaluation – and therefore accorded its creator moral rights and copyrights over its 'creation'.

The Court of Cassation, in its decision Corte di Cassazione 11 January 2017 no 503,[36] expressed a much more robust perspective, stressing the absence of a significant difference between Big Red and similar, previous, works, in line with the first reconstruction operated by the Tribunal. Furthermore, the Court observed that, since the multiplicity of akin characters is sufficient to categorize the field as a 'crowded art',[37] resemblance amongst them is physiological; as a consequence, details play a pivotal role in defining their individual and original nature. Even a minor detachment from what already exists might be deemed sufficient to establish copyrights in favor of the author.

If this approach is embraced, then both Big Red and Gabibbo should be considered worthy of copyright protection: Big Red does present original aspects as compared to its predecessors, while Gabibbo is different from Big Red. Therefore, there is neither plagiarism nor counterfeiting between the two characters, or between Big Red and other existing figures.

[36] n 8 above.

[37] The notion was developed particularly by the United States Patent and Trademark Office to pinpoint those fields, where many different patents are present. In particular, the US Manual of Patent Examining Procedure, §904.02 states: 'in crowded, highly developed arts where most claimed inventions are directed to improvements, patent documents, including patent application publications, may serve as the primary reference source. Search tool selection in such arts may focus heavily on those providing patent document coverage'. The 'Crowded Art Theory' has been lately embraced by the EU Court of Justice (see Case T-80/10 *Bell & Ross* v *OHIM – KIN*, Judgment of 25 April 2013, available at www.eur-lex.europa.eu) and by Member States legal scholars (see eg C. Balboni, 'Un saluto alla *Crowded Art*' *Notiziario Ordine dei consulenti in proprietà industriale*, 12 (2010)).

However, it should be noted that a similar (but not identical) result would be achieved even if a more rigorous notion of copyright were to be accepted, in clear opposition to the Court statement. In this case, both Big Red and Gabibbo would be unworthy of protection, thus there could not be any plagiarism between Big Red and Gabibbo either.

After the Court of Cassation judgment, the Court of Appeal of Milan has been requested to evaluate whether a specific form of derivative plagiarism is present in the case at stake. Therefore, the Court does not have to investigate anymore the absence of a 'traditional' plagiarism or of a counterfeit conduct.

## IV. What Has yet to Come After Judgment no 14635/2018?

We already mentioned that the Court of Cassation, with its 2018 judgment, took a clear stand on the inexistence of a 'traditional' form of plagiarism, as well as with regards to the absence of a counterfeiting conduct. After doing so, the litigation was referred back to the Court of Appeal of Milan, in order for the judge *a quo* to explore a potential issue of derivative plagiarism (that is, to verify if the new piece is a creative re-elaboration of the original work, therefore lacking originality).

The Court of Appeal will be in charge of evaluating whether relevant differences are present between Big Red and Gabibbo, considering both their external appearance and their artistic and semantic identity.

With regards to the expected outcome of this assessment, an analysis of the previous set of judgments on the case (eg the one issued by the Bologna Court of Appeal) seems to offer relevant elements in favor of the absence of a case of derivative plagiarism, given the psychological and attitudinal differences between the two figures. It should be further noted that the arguments set by the Bologna Court of Appeal are significant in term of judicial precedent and statement of facts (investing also Mr Ralph Carey as respondent in both controversies) concerning common aspects that are present in the case at stake. The Court of Milan has, therefore, the duty to harmonize its evaluation with the already decided (uncontested) aspects that the Court of Bologna in order to avoid any judicial conflicts.

Taking into due account the Court of Bologna reasoning, the Court of Milan must consider, first and foremost, how Big Red has been deemed radically devoid of any creativity and originality, and how such factor was confirmed by Corte di Cassazione 11 January 2017 no 503,[38] thus constituting *res iudicata*.

On a minor note, it is worth observing (for a purely intellectual purpose) that the 2018 ordinance emitted by the Court of Cassation was based, amongst other elements, on two interviews rendered by Gero Cardarelli (who impersonated

[38] n 8 above.

the character of Gabibbo for many years) and Antonio Ricci. In particular, the Court held that these two interviews should be examined by the Court of Appeal as extrajudicial confessions when assessing a potential derivative plagiarism.

Concerning this, it is above all clear that any declarations rendered by Mr Cardarelli are not susceptible to constitute a confession according to Art 2730 of the Italian Civil Code. He was indeed a third party not involved in the litigation, therefore ontologically unable to operate a confession. In relation to the Antonio Ricci's interview, Art 2730 requires specific conditions to be met in order for a confession to be valid under Italian law; particularly, the confession shall be the result of a so-called *animus confitendi*: the confessed person must be declaring the existence of a fact that is unfavorable to their position, and they must willingly and consciously express such declaration. If these conditions are missing (eg the confession is operated as result of a provocation, or unconsciously), the confession has no probative value in court.

Regardless of any investigation concerning this aspect, it is reasonable to ascertain that the interviews will not play an essential role in the case at stake, since the essential comparison to assess the existence of a derivative plagiarism involves the characteristics of the two works.

## V. Conclusions

On the basis of the different aspects highlighted throughout our analysis, it is now possible to operate a concise overview of the state of the art regarding the '*Big Red* v *Gabibbo*' saga.

Corte di Cassazione 11 January 2017 no 503, clearly stated that Big Red is devoid of any copyright protection;[39] on the contrary, the Court of Appeal of Milan[40] qualifies it as a complex piece, to be accorded protection within the 'crowded art' framework of existing – similar – characters.

Regardless of the acceptance of one of these two alternatives, a careful examination of the relevant case law on this topic unveils that the hypothesis of derivative plagiarism – when the position of Gabibbo is considered - should be excluded in both cases. In particular:

- Both Big Red and Gabibbo resemble previously existing characters;
- Gabibbo is radically different from Big Red: the psychological and attitudinal features of the former are sufficient to ground a 'semantic divide' between its character and the WKU mascot;
- The Italian legal system (in accordance with positions embraced also in other jurisdictions, such as the US) acknowledges that a transformative activity, moving from an established background of existing characters, can be worthy of copyright

[39] It is relevant to pinpoint that the Court of Cassation has expressly precluded any re-assessment of this aspect to the Court of Appeal.

[40] Corte d'Appello di Milano 9 January 2004 no 525 n 10 above.

protection as long as its ultimate outcome is original and creative.

With regards to the latter, the boundaries and limits set by the US 'fair use' doctrine come into relevance. Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances without permission from the author or owner. In particular, these circumstances are related to limited and 'transformative' purposes, such as commenting upon, criticizing, or parodying a copyrighted work. Section 107 of the 1976 Copyright Act provides the statutory framework for determining whether the use made of a work represents a fair use and identifies certain practices or activities that may qualify as fair use, clarifying that such list should be interpreted as merely exemplificative: they do not constitute a *numerous clausus*.[41]

According to the fair use doctrine, to determine whether a specific use under one of these categories is 'fair' courts are required to consider the following factors: a) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;[42] b) the nature of the copyrighted work;[43] c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;[44] and d) the effect of the use upon the potential market for or value of the copyrighted work.[45] In addition, a court may also consider other unnamed factors in weighing a fair use question: the evaluation of a fair use claim operates on a case-by-case basis, and the outcome

[41] For an empirical analysis of how fairness has been assessed by US courts, see B. Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005' 156 *University of Pennsylvania Law Review*, 549 (2008).

[42] Courts look at how the party claiming fair use is using the copyrighted work and are more likely to find that non-profit educational and non-commercial uses are fair. This does not mean, however, that all non-profit education and non-commercial uses are fair and all commercial uses are not fair; instead, courts will balance the purpose and character of the use against the other factors below. Additionally, 'transformative' uses are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work.

[43] This factor analyses the degree to which the work that was used relates to copyright's purpose of encouraging creative expression. Thus, using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item). In addition, the use of an unpublished work is less likely to be considered fair.

[44] Under this factor, courts look at both the quantity and quality of the copyrighted material used. If the use includes a large portion of the copyrighted work, fair use is less likely to be found; if the use employs only a small amount of copyrighted material, fair use is more likely. That said, some courts have found the use of an entire work to be fair under certain circumstances, whereas in other contexts, using even a small amount of a copyrighted work was determined to be not fair because the selection was an important part – or the 'heart' –of the work.

[45] Courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner's original work. In assessing this factor, courts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread.

of any given case depends on a fact-specific inquiry. The flexible consideration of such elements is necessary to balance the original author's profit with the consumers' interest for new contents to be developed and diffused on the market, even if they are built – up to a legitimate extent – on previous ideas and concepts.[46]

It should be noted that some of the requirements mentioned by the US Copyright Act present relevant similarities with the Italian copyright regulation; therefore, they could be considered as conceptual proxies in determining how to interpret them. In particular, the nature of the copyrighted piece shall be assessed by considering first and foremost the originality of the allegedly plagiarized work: it is pivotal, to evaluate how much and to which extent the existing copyrighted work has been exploited to create the new one. Moreover, the effect of the use upon the 'original' work potential market shall be determined by specifically verifying if the existence of the new piece reduces the original one's market or, on the contrary, if it fosters it by disseminating information about its existence to a new, wider public (Tribunale di Milano 13 July 2011).[47]

Still, a wide range of differences between the two rules exist, such as, *ex multis*, the exhaustive list of exceptions and factors that US courts are supposed to take into account in providing a 'fair use' evaluation, which are not present in the Italian regulation. Consequently, it is disputable whether the use of this tool in the Italian context *via* analogy is actually appropriate.[48]

Furthermore, previous US case law has often underlined that even if a character appears in different versions overtime – eg due to the evolution of its design – it will be still worthy of copyright protection as long as its essential and 'unique' aspects are maintained.[49] New elements shall be provided to further specify the so-called 'character-delimitation test',[50] which appears to be more rigorous than the current Italian approach.

Lastly, considering the Italian courts perspective, the fact that the fair use assessment should operate on a case-by-case basis is particularly relevant, since it makes it clear that – under specific conditions – even the creation of an opera, which is profoundly similar to an already existing one, might be considered

[46] On this specific aspect, see J.P. Liu, 'Copyright Law's Theory Of The Consumer' 44 *Boston College Law Review*, 397 (2003). Regarding the EU framework, see L. Guibalut and N. Helberger 'Copyright Law and Consumer Protection' *Report for the European Consumer Law Group* (February 2005).

[47] Tribunale di Milano 13 July 2011, *Aida*, 1541/1 (2013).

[48] Cf R.L. Okedi, *Copyright Law in an Age of Limitations and Exceptions* (Cambridge: Cambridge University Press, 2017), 235.

[49] *DC Comics* v *Towle* 802 F.3d 1012 (9th Cir 2015); cfr. T.P. Lim 'Beyond Copyright: Applying a Radical Idea-Expression Dichotomy to the Ownership of Fictional Characters' 21 *Vanderbilt Journal of Entertainment & Technology* Law, 95 (2018); K. Alphonso 'DC Comics v. Towle: To the Batmobile!: Which Fictional Characters Deserve Protection Under Copyright Law' 47 *Golden Gate University Law Review*, 5 (2017).

[50] For an overview of the US debate on the topic, see A.J. Thomas and J.D. Weiss 'Evolving Standards in Copyright Protection for Dynamic Fictional Characters' *Communications Lawyer*, 9 (2013).

original and creative. For instance, this might happen if a new piece created in order to pay homage, or to refer to, the author's original piece ultimately develops into something different. In the field of visual arts, a concrete example of this process is represented by the so-called 'appropriation art', that is the use of pre-existing objects or images with little or no transformation applied to works of art. This has been permitted under copyright law as long as the new work re-contextualizes whatever it borrows to create the new piece (see Tribunale di Milano 28 November 2017).[51]

This topic proves to be particularly significant with an eye to the future, since the problem of setting clear boundaries between plagiarism and creative incremental elaboration is susceptible to reach an even higher degree of relevance with the spread of emerging technologies for copying and distributing existing contents on the Internet. For instance, peer-to-peer file sharing technologies, coupled with audio and video editing systems, constitute a clear example of how digital technology and online distribution allow users developing their ideas over existing works at virtually no cost and with a major creative outcome. These technological changes are significant for copyright because they enable more people to produce a new range of copyrighted material, and to develop original, creative ideas moving from existing frames or pieces of copyrighted work.[52] It is not coincidental that this issue has been at the centre of the scholarly and professional debate in recent times, particularly regarding the role that the European Parliament and Council Directive (EU) 2019/790 of the 17 April 2019[53] must play in striking the balance between internet users and content creators' rights in the digital environment.[54] In light of the advent of discussion boards, blogs, social networking sites, photo-sharing sites, and other user-generated content, the fair use doctrine – and, more generally, an evolutionary interpretation of the copyright legal framework, is nowadays more important than ever. New ways to interact with copyrighted material – often by copying portions of it – make it pivotal for courts to be able to properly highlight the major differences (even) between apparently look-a-like product, in order not to curb innovation and properly reward authors' creative effort,[55] such as in the case of the creation

[51] Tribunale di Milano 28 November 2017, no 11942, available at www.dejure.it.

[52] See Peter S. Menell, 'An Analysis of the Scope of Copyright Protection for Application Programs' 41 *Stanford Law Review*, 1045 (1989); see also M. Sag, 'Copyright And Copy-Reliant Technology' 103 *Northwestern University Law Review*, 1607 (2009).

[53] European Parliament and Council Directive (EU) 2019/790 of the of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.

[54] See *ex multis* M. Senftleben et al, 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform' 40 *European Intellectual Property Review*, 149 (2018).

[55] See F. Shaheed, Report of the Special Rapporteur in the Field of Cultural Rights Farida Shaheed, Copyright policy and the Right to Science and Culture, United Nations General Assembly 24 December 2014.

of a new fictional character with original personality, identity, psyche, and role in the entertainment industry.

Considering these numerous and significant factors, as well as the new dimension of copyright in the contemporary age, it is reasonable to assume that the Court of Appeal of Milan, in light of the decision of the Court of Cassation, will eventually exclude – as it happened with the 'traditional' plagiarism hypothesis – the occurrence of an incremental plagiarism: this endless saga of *Big Red* v *Gabibbo* might finally be on the verge of its conclusion.