The Regulation of Cultural Meanings Through Sponsorship Contracts

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Kennst du das Land, wo die Zitronen blühn...?

J.W. von Goethe, *Wilhelm Meisters Lehrjahre*
(Berlin, 1795)

Abstract

This paper analyses the potential negative repercussions of sponsorship contracts. It assumes that cultural heritage has both a tangible value, a *corpus mechanicum*, and an intangible value, pertaining to identity and historical aspects, representing a *corpus mysticum*. With this combination of identity, historical aspects may make a tangible part of cultural heritage a testimony of civilization. Sponsorship contracts influence the intangible value of the cultural asset. The paper starts by analysing some appropriative dynamics in the field of distinctive signs which have a precise cultural or political meaning, and which, through registration, remain mainly available to private individuals. Similarly, in the event that the sponsor performing the restoration of the property brands the cultural asset, albeit for a limited time, appropriation can use the identity and inner value of the property itself. It then seems crucial to find alternative means by which to reconcile the economic support, which is necessary to protect cultural property, with the material value and intangible meaning of the cultural property.

I. Introduction

Cooperation between public entities and private individuals[1] in the care and enhancement of cultural heritage is certainly not an innovation within legal theory. For years, the legal theory of cultural heritage law has dismissed its original top-down nature,[2] which was originally based on the primary purpose of legislation,

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[1] The role of private individuals has been evolving over the years, moving from an initial phase of 'opposition' between the public interest in the preservation of the property and the interest of the individuals, to the social function of cultural heritage, which is enshrined in Art 9 Italian Constitution. Indeed, the formerly dual (public-private) relationship has now become trilateral: public instances, private instances and the interests of the community. The third phase involves other interests as well, such as those of private financiers or patrons. On this point, see L. Casini, *Ereditare il futuro* (Bologna: il Mulino, 2016), 110.

[2] The legislation on cultural heritage has had an evolution for two centuries from pre-unification states' legislation, with legal instruments that, over time, stratified and have been reused to ensure

that is, restricting the circulation[3] of 'things of art'.[4] The public-private theory of cooperation that now more fully characterizes cultural heritage law serves as a starting point for examining the spillover effects of this relationship between the public and private in sponsorships.

The concept of valorisation should mainly concern the intangible value expressed by cultural assets. This aspect could be in conflict with the protection that is focused on the material support of the asset.[5] The function of valorisation aims at allowing the use and the enjoyment of cultural assets and the largest dissemination of its intangible value. Nowadays, the original sense of valorisation

the protection of cultural heritage. For example, the declaration on cultural interest originated in the eighteenth century but, after three centuries, is still a crucial legal instrument. See A. Emiliani, *Leggi, bandi e provvedimenti per la tutela dei Beni Artistici e Culturali negli antichi stati italiani 1571-1860* (Bologna: Edizioni ALFA, 1978), 100-101; L. Casini, '«Giochi senza frontiere?»: giurisprudenza amministrativa e patrimonio culturale' 3 *Rivista Trimestrale di Diritto Pubblico*, 914 (2019). The democratisation process of the cultural heritage, started after World War II, has shifted the focus on its use, allowing the creation of 'theories inspired by medieval conception of "divided" ownership, aimed at exercise several rights, by different subjects, on the same property'. See, L. Casini, 'Patrimonio culturale e diritti di fruizione' 3 *Rivista Trimestrale di Diritto Pubblico*, 657 (2022).

[3] Two theories revolve around the circulation of cultural property. The former ('cultural nationalism') considers cultural property as part of a global heritage of humanity. The latter ('cultural internationalism') emphasizes the link between cultural property and the culture of the nation in which the property was created and allows a State to demand the return of illegally exported property. See J.H. Merryman, 'Cultural Property Internationalism' 12 *International Journal of Cultural Property*, 11 (2005); Id, 'Two Ways of Thinking About Cultural Property' 80 *American Journal of International Law*, 831 (1986); L. Casini, 'La globalizzazione giuridica dei beni culturali' 2 *Aedon, Rivista di arti e diritto online*, (2012). Even more relevant than legislation, about circulation, seems to be the work of administrative courts. Not only have they interpreted the legislation, but they have also outlined criteria to identify the cases in which works of art may or may not leave Italy, upholding protectionist measures to protect cultural heritage, laying the groundwork for the development of regulations and guidelines, as happened with the Ministerial Decree of 6 December 2017, on the criteria underlying the issuance of the certificate of free exportation. On the key function of administrative courts in the field of cultural heritage protection, see Id, '«Giochi senza frontiere?»' n 2 above, 914.

[4] An expression used by M. Grisolia, *La tutela delle cose d'arte* (Roma: Società editrice del Foro Italiano, 1952), 252, a work in which the foundations were laid for the autonomy of the law of cultural property, developed in the following years by the contributions of M.S. Giannini, 'I beni culturali (1975-1976)', in Id, *Scritti* (Milano: Giuffrè, 2005), VI, 1003, an essay described by Sabino Cassese using words borrowed from Cervantes '*todo es peregrino y raro, y lleno de accidentes que maravillan y suspenden a quien los oye*': S. Cassese, 'I beni culturali da Bottai a Spadolini', in Id, *L'Amministrazione dello Stato. Saggi* (Milano: Giuffrè, 1976), 175. On Massimo Severo Giannini's contribution to the development of cultural heritage law, see L. Casini, '«Todo es peregrino y raro...» Massimo Severo Giannini e i beni culturali' 3 *Rivista Trimestrale di Diritto Pubblico*, 987 (2015). According to Sabino Cassese, Giannini, after a long period of study on cultural heritage, reached the conclusion that in a cultural asset there are, at the same time, property rights and public functions on which the public power exercises its prerogatives. See, S. Cassese, 'Marco Cammelli e i beni culturali', Speech held during the workshop 'L'opera e il contributo scientifico di Marco Cammelli', Bologna 28 November 2011, available at https://tinyurl.com/z46khps3 (last visited 30 September 2024).

[5] L. Casini, *Cultural Heritage Law* (Cheltenham, UK – Northampton, MA, US: Edward Elgar, 2024), 59. About the dual function of protection and valorisation, see also Corte costituzionale, 9 June 2020, no 138, ECLI:IT:COST:2020:138.

is moving in a market-oriented meaning,[6] with not necessarily negative effects to reject in any case. But it must be considered that behind this change of views hides risks about the devaluation of the sense held by the cultural asset.[7] During these years, the purposes of conservation and protection were placed side by side and overlapped with the purposes of use and enjoyment of cultural property, pursuing the goal of its enhancement.[8] In Italy, the first pivot point originating the concept of valorisation was not, as one might believe, the moment at which the Ministry of Cultural Heritage and Environment was established. Indeed, this Ministry merely brought together different departments, having powers that already existed,[9] which had been exercised, mostly, by the Ministry of Education. Rather, this concept evolved thirty years later with the adoption of the Urbani Code, that was also meant to convey a new way of understanding cultural heritage, seeing it as an economic resource.

Valorisation does not only treat cultural property as an economic resource. In addition to being simplistic, it represents a nonsense, considering cultural assets to be regarded only as an economic resource. The scope of valorisation does not pertain only to an economic exploitation of the cultural assets; it should be only an aspect of this function, but not the core component of valorisation; that is about increasing the knowledge of cultural heritage.[10]

The double function of protection and valorisation introduces to the overlapped meaning of cultural assets: on the one hand, stands the physical materiality of the asset and, on the other, ranks the intangible value of its inner meaning, which is imbued with its own specific identity and symbolic value. Cultural identity is deeply evocative and recognizable, but also commercially exploitable,[11] which is caught up

[6] According to Sabino Cassese, the meaning of valorisation changed, acquiring a commercial significance. The exploitation of cultural heritage is possible but 'not in the way that the cultural intent is transformed into economic management for income-generating but allowing greater income that ensures better protection and better fruition of cultural heritage'. See S. Cassese, 'I beni culturali: dalla tutela alla valorizzazione' 7 *Giornale di Diritto Amministrativo*, 674 (1998).

[7] J.-M. Pontier, *La protection du patrimoine culturel* (Paris: L'Harmattan, 2019), 24.

[8] Valorisation is not limited to the material nature of cultural property but extends to its intangible features. See M. Dugato, 'Strumenti giuridici per la valorizzazione dei beni culturali immateriali' 1 *Aedon, Rivista di arti e diritto online*, (2014). Moreover, the idea that a latent value lies in the cultural asset comes from the words of Feliciano Benvenuti about historic centres, accordingto whom, 'the historic centre is much more than a landscape or an environment: it is the landscape of man or, to use terms that might seem poetic, the environment of the soul' (author's translation): F. Benvenuti, 'Introduzione', in G. Caia and G. Ghetti eds, *La tutela dei centri storici. Discipline giuridiche* (Torino: Giappichelli, 1997), 2.

[9] In this regard, it should be remembered that Sabino Cassese described the newly established Ministry as 'an empty box' (author's translation). See S. Cassese, 'I beni culturali' n 4 above, 173.

[10] The relationship between protection and valorisation should be considered not only osmotic, but protection represents the core concern of the legislator. The protection must be applied impartially and by different administrative offices from those involved in urban-territorial development or economic-production activities of an area, distancing itself from profit-driven needs. See S. Settis, *Italia S.p.A.: l'assalto al patrimonio culturale* (Torino: Einaudi, 2002), 103; M. Cammelli, 'Italia Spa: sul saggio di Salvatore Settis (e dintorni)' 3 *Aedon, Rivista di arti e diritto online*, (2002).

[11] The institutions have increasingly become aware of the economic potential behind a careful

in its 'intangible value'.[12] This is all the more true when considering that legislation allows public administrations to register, as trademarks, distinctive elements drawn from cultural, environmental, historical or ethno-anthropological heritage.[13]

Against this background, private investors have targeted the intangible value of cultural assets, seeing in this dynamic an opportunity to emphasize their brands and raise their profits[14] using sponsorship contracts. In this way, the administration owning the cultural asset, usually lacking the financial means to protect and

and respectful management of cultural heritage. For some years, they have been adapting to the business world. For an examination of the role played by the Ministry, whether of simple protection or collaboration with private partners, and with a view to making cultural heritage usable by as many people as possible, see M. Cammelli, 'Il diritto del patrimonio culturale: una introduzione', in C. Barbati et al, *Diritto del patrimonio culturale* (Bologna: il Mulino, 2017), 17; R. Cavallo-Perin and G.M. Racca, 'Caratteri ed elementi essenziali nelle sponsorizzazioni con le pubbliche amministrazioni' 4 *Diritto amministrativo*, 583 (2013).

[12] S. Fantini, 'Beni culturali e valorizzazione della componente immateriale' 1 *Aedon, Rivista di arti e diritto online*, (2014).

[13] As provided, in fact, by Art 19, para 3, of decreto legislativo no 30 of 10 February 2005, as amended by decreto legislativo no 131 of 13 August 2010 that says 'The administrative bodies of the State, the Regions, the Provinces and the Town and City Councils can also register their trademark, whether or not having as its object distinctive elements having as their object distinctive graphic elements drawn from cultural heritage, historic, architectural or environmental heritage of their respective territory; in this case, profits from the economic exploitation of the mark, including the profits from grants of licences and merchandising, are to be used for financing institutional activities or covering deficits of the administration'. This article transposed what, years ago, some administrations put into practice. The Municipality of Assisi, for the year 2000 Jubilee, licensed a mark with its own name to a private party; in this way, its financial situation turned round. See G. Caforio, 'La tutela delle tipicità appartenenti alla pubblica amministrazione' 1 *Aedon, Rivista di arti e diritto online* (2014).

This involves the same risk of appropriation of intangible value of a cultural asset but, this time, by an administration that has few powers to inhibit a misuse of the mark when it is licensed to a private party. An administration can crystallise a cultural asset in a mark, with all the problems that this entails about the distinctiveness of the mark but, on the other hand, the risk of a misuse of the mark still stands. The Michelangelo's David case should be noted, reinterpreted by an Italian publisher as if a real model. Within the judgment no 1207 of 2023, the Tribunal of Florence stated that the publisher 'insidiously and maliciously juxtaposed David's image to that of a human model, debasing, blurring, mortifying, humiliating the high symbolic and identitarian value of the cultural asset and subjugating it by promotional and commercial purpose'.

[14] With regard to traditional dishes, artisanal knowledge, and traditional celebrations, according to some scholars, certain appropriative risks might arise also for this particular kind of intangible cultural heritage, because the 'ICH inscriptions such as the Mediterranean diet provide opportunities not for the democratization of elite heritage but, instead, for synergistic appropriation thereof by political, economic, and academic elites'. See H. Deacon, 'Safeguarding the Art of Pizza Making: Parallel Use of the Traditional Specialities Guaranteed Scheme and the UNESCO Intangible Heritage Convention' 25 *International Journal of Cultural Property*, 515-542 (2018). According to Richard Pfeilstetter there is a 'complementary relationship between ethnic identity discourse (exploited politically), the nutritional – environmental discourse (exploited economically) and the heritage discourse (exploited academically)'. R. Pfeilstetter, 'Heritage Entrepreneurship: Agency-Driven Promotion of the Mediterranean Diet in Spain' 21(3) *International Journal of Heritage Studies*, 215-231 (2014). That might endanger practices of transmission of the original practices. In this regard, see M. Forsyth, 'Lifting the Lid on 'the Community': Who Has the Right to Control Access to Traditional Knowledge and Expressions of Culture?' 19 *International Journal of Cultural Property*, 1-31 (2012).

enhance it, allows the private party, in exchange for money or for the restoration at its own expense, to associate the name of the sponsor with the cultural asset for a longer or shorter time.

Over the years, sponsorship has encountered minimally detailed regulation, especially considering the 2016 Public Contracts Code, replaced by the new 2023 Code. The sponsorship's rules focus on the provision of an economic threshold above which the administration is bound to one duty only, that is, publishing on its website, for at least thirty days, a notice announcing its search for sponsors or that it has received a sponsorship proposal, briefly indicating the nature of the content of the proposed contract. Once the thirty-day publication period has expired, the contract can be freely negotiated, in accordance with the principles of impartiality and equal treatment.[15]

A more detailed definition emerged from the Ministry of Cultural Heritage's Circular no 28 of 9 June 2016, which outlined guidelines for making an overall assessment of the proposal and laying down first procedures.

It is not clear, in case law, what rules should apply to sponsorship, namely, whether or not to include it among the public contracts awards[16] and thus make it subject to the Public Contracts Code, or if it amounts to a 'concession contract',[17] or if it should be considered to be a 'passive contract'[18] (and, consequently, the

[15] The risk of such sparse regulation lies in the possibility that the administration may choose sponsorship criteria that are entirely arbitrary. There are numerous cases examined by administrative judges in which the administration has confused procedural simplicity with arbitrariness in selection; see Consiglio di Stato, 14 June 2024, no 5367, available at www.giustiziamministrativa.it. The main issue is the uncertainty surrounding the legal institutions that should guarantee certainty; see G. della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (Bologna: il Mulino, 2009), 69.

[16] Most recently, in this regard, a ruling was delivered by the TAR (Regional Administrative Tribunal) Lazio, Rome, no 519/2014, available at www.giustizaamministrativa.it, which held that disputes about sponsorship of cultural property are subject to procurement judicial procedure. As its starting point, it was found that, in any technical sponsorship, an economic operator is entrusted to perform works or provide services at his care and expense, 'in consideration of an economic advantage resulting from the publicity given by the association of its name/brand/image with an event or asset, namely a cultural asset, while still aiming to satisfy an overriding public interest' (author's translation). Based on this, the TAR applied the criteria laid down by the Plenary Council no 22/2016 to define the scope of application of the Public Contracts Code. In fact, where it is necessary, on the one hand, to define what 'entrustment procedures' are and, on the other, to abide by a literal interpretative criterion, an all-encompassing notion should be adopted, to bring all types of contracts in which an 'entrustment' is feasible under the scope of the special 'procurement' judicial procedure.

[17] The principal characteristic of the concession contract lies in the transfer of operational risk to the concessionaire. In this manner, the concessionaire does not receive compensation from the administration, which remains 'indifferent' to the private party's ability to recoup their investment. However, the concessionaire will be able autonomously to manage the service entrusted to them. It is precisely the management in favour of the users that will compensate the private party. As to this kind of contract, see A. Botto and S. Castrovinci Zenna, *Diritto e regolazione dei contratti pubblici* (Torino: Giappichelli, 2020), 222-223.

[18] Passive contracts are those that entail a cost for the administration, while active contracts are defined as those contracts that solely result in financial income for the administration.

Public Contracts Code would not apply).[19]

While sponsorship can pursue goals that fit well with preserving and protecting cultural heritage, it is necessary to consider that this instrument always depends on the scarcity of economic resources by the public administration, which are insufficient to cope, in most cases, with conservation work. In a nutshell, sponsorship depends on a situation of imbalance, between a 'need' of the administration and a 'willingness' of the sponsor, who, attracted by a benefit to their image, stemming from the 'social' nature of his activity, makes a real marketing investment.[20]

This arrangement is likely to weaken the original scope of the identity of cultural property, through a mechanism of 'resignification'[21] of its own historical-artistic meaning.

A similar dynamic appears, in an entirely different context, ie in the evolving forms of 'complexification'[22] of the meaning attributable to given trademarks, which, as will be seen, relates to the value (social, political or artistic) underlying some of them. It is a fact that the essential and original purpose of a brand has gradually evolved. A brand's trademark is no longer about an exchange of products, that is, a useful tool for preserving competition and correcting information on the market. A brand's trademark may now have totally different meanings, which point to, thanks to the processes of branding, the world of communicative (expressive) meanings. Brands convey messages pertaining both to the objects to which they refer – the product – and to multiple other meanings underlying the feelings, values and ways of appearing, which, in a cyclical motion, act on culture and society and, conversely, are fed by them.[23]

[19] Consiglio di Stato 31 July 2013 no 4034, available at www.giustiziamministrativa.it. This thesis has also been embraced by M. Cammelli, 'Pluralismo e cooperazione', in C. Barbati et al eds, *Diritto e gestione dei beni culturali* (Bologna: il Mulino, 2011), 190.

[20] For a disenchanted reading of sponsorships, see S. Valaguzza, 'Le sponsorizzazioni pubbliche: le insidie della rottura del binomio tra soggetto e oggetto pubblico e la rilevanza del diritto europeo' *Rivista Italiana di Diritto Pubblico Comunitario*, V, 1381 (2015).

[21] C. Crea, *Segni sociali e proprietà escludente. Per una critica del mercato delle appropriazioni comunicative* (Napoli: Edizioni Scientifiche Italiane, 2022), 33. The processes of signification and resignification are part of a legal proceeding that unfolds from trademarks, through which language control is exercised. This control, with the exclusivity protections that characterize it, can impact the usage, creation, and alteration of meanings of expressive signs.

[22] ibid 34. Crea's work is essentially concerned with the risk of appropriation by private individuals of distinctive symbols or signs holding other meanings, relevant from a social or cultural point of view. Due to the strengthened protection of registration, these symbols would remain stably drawn into a market-based and appropriative dynamic, triggering a crystallization of the meaning of the sign/mark, such as to prevent its social re-appropriation or, at any rate, to hinder its use of a common matrix.

[23] Against the cultural appropriation problem, Native Americans have brought claims under a variety of laws, from trademark and copyright to the First Amendment and Fifth Amendment, see A.R. Riley and K.A. Carpenter, 'Owning *Red*: A Theory of Indian (Cultural) Appropriation' 94 *Texas Law Review*, 859-931, 860 (2016). This cyclical dynamic, affecting culture and society, in its turn is a result of society itself and of a given culture. This reasoning can be further explored, from the point of view of industrial property, by seeing G.B. Dinwoodie and M.D. Janis, *Trademark Law and Theory. A Handbook of Contemporary Research* (Cheltenham-Northampton: Edward Elgar, 2008), 42.

In this way, a coincidence of meanings responding to marketing strategies appears and cannot do without the creation of a '*communicative surplus value*'[24] which, in turn, overlaps with pre-existing meanings, appropriating them.

Against this backdrop, just as it happens in the world of brands, the sponsorship of cultural assets may result in some forms of appropriation of the asset's value meanings. The transfer of meaning from one ambit (a purely cultural one) to another (the association of the value with a brand)[25] is a corollary and effect of the appropriative mechanism, which results in a commoditization of value impinging on cultural assets.[26]

II. The Appropriation of Cultural Meaning in the Universe of Social Signs: The Idea

The problem of attributing a commercial meaning to a cultural sign pertains to the phenomenon of secondary meaning,[27] wherein a different semantic content indicating a particular product or service is overlaid onto a pre-existing cultural meaning. In this way, the new meaning appropriates the previous one. Simultaneously, it borrows from the cultural value that affects that particular sign to generate an economic surplus.

These dynamics primarily concern an area lying midway between public domain and trademark law. However, what is interesting to analyse is the mechanism of appropriating meanings. In sponsorship, similar forms of appropriation of valuable meaning can be observed. When a cultural asset is covered under the sponsor's mark, the original value of the asset is accounted for by the commercial aspect, that takes over against the intangible meaning, exploited for a commercial

[24] C. Crea, n 21 above, 38; P. Gulasekaram, 'Policing the Border Between Trade Marks and Free Speech: Protecting Unauthorized Trade Mark Use in Expressive Works' 80 *Washington Law Review*, 887-942, 931 (2005).

[25] The reverse process, associating cultural meaning with a brand, is much more difficult. Some scholars attribute a primacy to the creation of meaning at the level of categories or objects produced rather than at the level of the brand. Additionally, the rapid pace at which brands gain or lose relevance today does not help in consolidating any potential cultural significance which they might have. For an analysis of the cultural resonance of brands, see S. Fournier and C. Alvarez 'How Brands Acquire Cultural Meaning' 29(3) *Journal of Consumer Psychology*, 519-534 (2019).

[26] In fact, 'the enhancement of the semiotic-expressive function of signs cannot result in a counter-appropriation, that is still individual and mercantile, of economic benefits, although ennobled by the narrative from non-economic interests' (author's translation): C. Crea, n 21 above, 176. This expression, borrowed from the field of private law, well summarizes the appropriative mechanism behind the value meaning of cultural assets. This method, articulated by Crea, can be used from time to time, changing its factors, to analyse issues arising from different branches of law.

[27] J. Jacoby, 'The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution' 91 *Trademark Rep*, 1013 (2001); R.H. Stern and J.E. Hoffman, 'Public Injury and the Public Interest: Secondary Meaning in the Law of Unfair Competition' 110 *University of Pennsylvania Law Review*, 935 (1962).

purpose. In this sense, a sponsorship contract can facilitate the appropriation of cultural meanings by private actors. Originally, secondary meaning allows a weak brand to acquire, over time and with intense use, another meaning in the market, through a symbol. In this way, the mark becomes recognizable to the public and takes on a specific connotation.

Secondary meaning plays a particularly significant role in the area of what are at first weak trademarks, ie, those trademarks that are purely descriptive, presenting a low distinctive capacity when they are registered. In the cases of a descriptive mark, secondary meaning can be used to consolidate mark protection and increase a brand's commercial value.

At the end of the commercial re-signification process,[28] the new sense attributed to the brand is now foreign to the meaning of that sign; the former replaces the latter and confers distinctive capacity to the mark.

The process of commercial redefinition of a sign entails the risk of appropriation of expressions which, instead, should remain within the scope of freedom of political or cultural expression or, in any case, social discussion.[29] This, for example, happened in the United States under the motto 'Black Lives Matter'. Many have attempted to appropriate this expression for commercial use. This was done through applications for registration of the motto as a trademark.[30]

If this is true of social meanings, the same reasoning applies to those of figurative nature belonging to cultural heritage. In this case, the purpose is to 'cage' the cultural meaning, perhaps previously protected by copyright, to continue to exploit economic advantages after the expiry of the protection period. This confusion between cultural and commercial meaning consists precisely in the transformation of the original message and in the appropriation of the cultural value immanent in the property. Who would link today, at first glance, the 'NIKE' brand to the winged goddess of victory?[31] And who would link the image of the

[28] C. Crea, n 21 above, 33, 146, 157, 184.

[29] The issue of risks associated with the registration of cultural signs is also addressed in Italian cultural heritage legislation. Arts 107 and 108 of the Cultural Heritage Code provide specific regulations for the commercial use of cultural assets. For non-profit uses or purposes of study, research, free expression of thought or creative expression, and the promotion of cultural heritage knowledge, no applications or payments of concession fees to the custodial structures are required. Conversely, the reproduction of artworks for commercial purposes, in addition to being authorised, must be compensated. Consider the cases of *Uffizi* v *Gaultier*, discussed in https://tinyurl.com/25mutv5k (last visited 30 September 2024), and Tribunale di Venezia, *Accademia di Venezia* v *Ravensburger*, ordinanza 24 October 2022, available at dejure.it.

[30] See R. Stronach, 'Trademarking Social Change: An Ironic Commodification' 96 *Journal of the Patent and Trademark Office Society,* 567, 569-595 (2014); A. Hernandez, 'Tribal Trademark Law' 76 *Stanford Law Review*, 689, 661-702 (2014) pointing out that during these years, since 2013, the year of the movement's inception, there have been at least fifty attempts to register the trademark 'Black Lives Matter', the first in 2015, rejected by the US Patent and Trademark Office (USPTO) because: 'the public would not perceive the slogan Black Lives Matter as source-identifying matter that identifies applicant as the source of the goods but rather as an expression of support for anti-violence advocates and civil rights groups'. See, for a full discussion of the outlined dynamics, C. Crea, n 21 above, 147.

[31] K. Assaf, 'Der Markenschutz und seine kulturelle Bedeutung: Ein Vergleich des deutschen

Starbucks mermaid to Greek mythology[32] first, and then to the Norse mythology from which the trademark is drawn? These are examples of elements that populate the cultural imagination of entire social groups, which have been frozen within a mark that initially exploited and then stripped them of their primary meaning. Sponsorship does the same, associating a commercial meaning with an asset that has a completely different significance. This is precisely what happens in processes of secondary meaning, where symbols, signs, or even colours become distinctive and identify a brand through prolonged use.

The mechanism of meaning overlap is the same, with all the risks of altering the intangible value, ie, the *corpus mysticum*, that this entails for cultural heritage.

This dynamic is also observed when a design or the shape of an accessory, such as a handbag, becomes recognisable through the demonstration of its iconicity,[33] thereby associating it with a secondary meaning. Thus, there is a connection between creative works and the acquisition of distinctiveness, with the consequence that a handbag can be registered, as has happened with the 'Birkin' by Hermès or the 'Baguette' by Fendi.[34]

If a design object can be registered through the instrument of secondary meaning, because its particular form is immediately associated with the brand, this confirms worries about the appropriative risks of the meanings of cultural assets through the superimposition of commercial marks. In this way, an association does exist between different meanings of artistic or cultural value and an economic activity, appropriating that message to overturn and weaken it. The result is that cultural meaning is completely unusable in the processes of cultural creation and communication.[35]

III. Two Case Studies on the Relevance of Intangible Value

In the first instance, it is beneficial to explore what happens when symbols or signs with cultural value undergo a type of commercial appropriation through

mit dem US-amerikanischen Recht' 1 *GRUR International*, (2009).

[32] M. Phillips and A. Rippin, 'Howard and the Mermaid: Abjection and the Starbucks' Foundation Memoir' 17(4) *Organization*, 481 (2010); C. Crea, n 21 above, 36.

[33] For a significant work about the interweaving between secondary meaning and cultural meaning and for a distinction between cultural heritage and brand heritage. In particular 'while brand heritage is usually marketed to consumers and places primacy on facts about the brand, and creates myths, cultural heritage is defined by its interest in communities beyond consumers. The two can, of course, overlap. Items of brand heritage become relevant to a wider audience for their cultural value. In these circumstances, the divide between culture (primarily expressive uses) and commerce (primarily information about production that is relevant on the market) is particularly hard to identify'. See F. Caponigri, 'Iconic Copies™' 23(2) *Chicago-Kent Journal of Intellectual Property*, 24-25 (2024).

[34] ibid 49-50.

[35] M. Senftelen, 'A Clash of Culture and Commerce: Non Traditional Marks and the Impediment of Cyclic Cultural Innovation', in I. Calboli and M. Senftelen, *The Protection of Non Traditional Trademarks. Critical Perspectives* (Oxford: Oxford University Press, 2018), 309.

trademark registration, for example, when artworks like Rembrandt's 'The Night Watch' or sculptures by Gustav Vigeland, one of Norway's foremost sculptors between the 18th and 19th centuries, are registered and used exclusively as trademarks. In the latter case, the City of Oslo intended to register some of Vigeland's works as trademarks, mistakenly conflating copyright with trademark usage rights.

The case involves a legal dispute between the City of Oslo and the Norwegian Industrial Property Office (NIPO), regarding the registration of Gustav Vigeland's statues as trademarks. The dispute concerned the interpretation of trademark laws as to whether or not public artworks could be registered as trademarks.

Following NIPO's rejection of the application, the City of Oslo appealed to the EFTA Court, claiming a right to the sculptures based on the economic efforts made by the administration, even after the expiration of copyright, to publicise and make Vigeland's statues known to a wide audience.

The EFTA Court's decision, in its reasoning, unfavourable to the City of Oslo, revolves around two moral premises. Firstly, it considers that a certain audience might find the trademark registration offensive, as these works hold a distinct status within Norwegian cultural heritage. Secondly, registering artworks as commercial trademarks would amount to an appropriation of the artwork itself and a trivialization of the inherent cultural value.[36]

The decision significantly impacts the concept of appropriating artistic meaning, using morality as a tool whenever trademark registration corresponds to a redefinition of its meaning in the commercial context.[37] The risk perceived is substantial; by registering the image of a cultural asset as just another trademark, its significance may be obscured, and its ability to convey an artistic message weakened or entirely lost.[38]

According to the EFTA Court decision, a true monopoly of use and exploitation might arise, akin to that provided for by copyright law, which would definitively solidify the possibility of reuse or reinterpretation of the artistic message.[39] The appropriative dynamic underlying the EFTA Court's decision to apply criteria of

[36] EFTA Court, 6 April 2017, Case E-5/16 *Municipality of Oslo*, § 92, available at www.eur-lex.europa.eu.

[37] While some authors have enthusiastically embraced the EFTA Court's decision, like M.R.F. Senftleben, *The Copyright/Trademark Interface – How the Expansion of Trademark Protection Is Stifling Cultural Creativity* (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2021), 25, other authors have criticised the morality-linked approach, finding instead applicable reasoning in the criterion of lack of distinctiveness. On this topic, Y. Basire, 'Public Domain Versus Trade Mark Protection: The Vigeland Case' 13 *Journal of Intellectual Property Law and Practice*, 434 (2018).

[38] M. Senftleben, 'Der kulturelle Imperativ des Uhreberrechts', in M. von Weller et al eds, *Kunst im Markt – Kunst im Recht. Tagungsband des Dritten Heidelberger Kunstrechtstags am 9. und 10. Oktober 2009* (Baden-Baden: Nomos, 2010), 75.

[39] The public interest criterion could be used precisely to refuse registration as a trademark of an artistic expression, so as to exclude any possibility of use, creative evolution and re-signification of the work. S. Dusollier, 'A Positive Status for the Public Domain', in D. Baldiman ed, *Innovation, Competition and Collaboration* (Cheltenham, UK – Northampton, MA, USA: Edward Elgar, 2015), 135.

public policy and morality in the Vigeland case stems from a sociological perspective. For cultural evolution to occur, the positions taken in cultural and artistic fields must represent potential lines of development towards a new culture and art.[40] Otherwise, by constraining the meaning of these social or cultural expressions, processes of reinterpretation could not take place.

Another important case is the US Supreme Court decision in *Dastar* v *Twentieth Century Fox*.[41] Dastar Corp. released a video collection, with public domain images, on World War II campaigns. Previously, Twentieth Century Fox had produced the film 'Crusade', for which it held the copyright that expired in 1977. Dastar recompiled some of the original footage, modified a scene and made further cinematic additions, all without referencing Twentieth Century Fox's series or the book by General Eisenhower, which inspired the original series.

Twentieth Century Fox sued Dastar, alleging copyright infringement and a violation of para 43 of the Lanham Act, which emphasises the 'origin' of the 'goods'. The US Supreme Court interpreted this expression as referring to the producer of the tangible goods, ie, the videotapes, but did not extend it to the originator of the idea behind the creation of the tangible goods, as this domain is covered by copyright.

Thus, when something falls into the public domain, there are no further protections available, and a statement, idea or creation in the public domain can be freely reused. Similarly, the message conveyed by cultural assets, an artist's worldview, their religious, philosophical, or aesthetic beliefs, fall into the public domain and cannot be constrained by a trademark (nor by copyright).

It is evident that in both cases, the EFTA Court and the US Supreme Court placed significant importance on the risk of monopolistic use of artistic expressions that must remain in the public domain to be reused and reinterpreted in new artistic messages.

IV. Applying the Results of Secondary Meaning to Sponsorship Contracts

At this stage, it is imperative to ascertain whether or not the dynamics of

[40] P. Bourdieu, *Die Regeln Der Kunst: Genese und Struktur des Literarischen Feldes* (Frankfurt am Main: Suhrkamp, 1999), 370, who bases his theory on the value production of the work of art and not so much on its materiality. The decision under review has a certain relevance to the so-called Rogers test. See *Rogers* v *Grimaldi*, 875 F. 2d 994, 999 (2d Cir. 1989). This mechanism, devised to protect free speech in the realm of trademarks, applies based on two coinciding possibilities: 1) whether or not the use of another's trademark in an expressive work has some 'artistic relevance' to the underlying work and 2) whether or not the use 'explicitly misleads as to the source or the content of the work.' In the Vigeland case, the artwork itself risked being registered as a trademark, and the EFTA Court identified this as a risk to the artistic significance of the works, which would be excluded from the normal processes of cultural evolution.

[41] *Dastar Corp.* v *Twentieth Century Fox Film Corp. et al*, 539 U.S. 23, 26 (2003).

appropriation and recontextualization of signs, as described thus far, can extend to the realm of cultural sponsorships and if they yield similar effects in this domain. Examining two landmark cases that have stirred discussion in this field will provide the best means to verify the validity of this assertion.

The first seminal case concerns a sponsorship agreement signed by the Tod's brand to fund restoration work on the Colosseum. On one side, the private party providing funding; on the other, the Superintendency,[42] which, in exchange for a donation of twenty-five million Euros, granted a profitable communication plan, consisting in the opportunity to promote and gain national and international visibility for the restoration work.

The agreement stipulated that the sponsor could manage communication dynamics directly or through the 'Friends of the Colosseum' Association to promote and provide widespread visibility, nationally and internationally, to the restoration work, aiming to make the Colosseum 'increasingly accessible to young people, differently-abled individuals, retirees, and workers'.[43] The sponsor was a member of the Association tasked with publicising the initiative.

The communication plan involved establishing a temporary or permanent structure near the Colosseum, where the sponsor could display its distinctive trademarks throughout the restoration and for the following two years. Within that structure, the Association could run communication campaigns jointly with foundations, research institutions, universities or other public or private entities with similar aims. The sponsor had exclusive rights over the use of the photographic images and filming of the restoration work to be done.

Additionally, the Association was granted the exclusive right to use a logo depicting the Colosseum, with the option to register it as a trademark for use in printed material '*and in any promotional or advertising initiative*'.

Furthermore, Tod's was permitted to use the phrase 'Sole sponsor for the restoration of the Colosseum based on the intervention plan'; to use the Association's logo representing the Colosseum on its letterhead; to place its brand on the back of the Colosseum admission tickets; to advertise its contribution on the construction site fencing, in forms compatible with the historical and artistic character and decorum of the Colosseum; to advertise its contribution to the restoration works; to use material and documentation produced by the Association, including projecting images within its spaces or on its website.

From this controversial case, it seems that companies can purchase usage rights

[42] The Superintendencies are peripheral bodies of the Ministry of Culture scattered throughout the national territory. Their purpose is to safeguard the cultural heritage falling within their jurisdictional area, which includes both cultural assets and the landscape.

[43] Of key importance is point 4.1 of the sponsorship agreement, for which see P. Rossi, 'Partenariato pubblico-privato e valorizzazione economica dei beni culturali nella riforma del codice degli appalti' 2 *federalismi.it*, 17 January 2018, 10-11. Extensive excerpts from the communication plan are also given in the judgment of Consiglio di Stato, 31 July 2013, no 4034, available at www.giustiziamministrativa.it.

of cultural heritage to advertise their commercial activities. Even if the advertisement is in line with the decorum of the cultural asset, there remains an overlap of meanings; on one side, the original historical-artistic significance and on the other, a mark that uses a cultural asset for commercial purposes, even if representative of globally recognized know-how and part itself of the Italian cultural heritage.

The rights granted to the sponsor would be exercised for the duration of the restoration work and for the following two years. However, the Association would enjoy the rights specified in the communication plan for fifteen years, '*potentially extendable through a separate agreement signed by the parties*.'[44]

It is important to remember that private investment makes possible all these conservation interventions on the property, considered in its materiality, that otherwise could not take place.

Nevertheless, this type of contract, advantageous for both parties and without which the cultural asset would not be restored at all or would not receive the necessary interventions, in light of the considerations made and the case cited, raises a significant question.

Is there a form of appropriation of the meaning of the cultural asset on which sponsorship is carried out in these circumstances? If so, can we contemplate the risk of a diminution of the cultural asset's intrinsic value, once it is temporarily associated with a brand? Sponsorship contracts risk forfeiting the intrinsic value of the artwork and the intangible value that accompanies and characterises a cultural asset. Often, there is much more concern about how to finance the preservation of the asset rather than genuinely enhancing it, allowing the cultural asset to be fully enjoyed and appreciated. It must not be forgotten that a cultural asset is intended for public enjoyment and is offered for the benefit of all its users. Sponsorship contracts, through purely economic utilisation, jeopardise the very essence of cultural assets, undermining their intangible value, which is universal and thus the heritage of all humanity.[45]

Another more recent case study further emphasises the risk that given assets, particularly the most representative ones in cultural heritage, may be used to promote a positive commercial image of the sponsor without a corresponding enhancement of the intrinsic value of the asset.

The case concerns the restoration intervention sponsored by a fashion house, Diesel, on the Rialto Bridge.

The amount invested by the company was five million Euros, in exchange for a communication plan[46] through which the company could, initially, use the scaffolding erected during the restoration for its promotional campaign, personalize some water-buses with its brand linked to the restoration work and display banners,

[44] See Consiglio di Stato, 31 July 2013, no 4034, n 43 above.

[45] A. Bartolini, 'L'immaterialità dei beni culturali' 1 *Aedon, Rivista di arti e diritto on line* (2014).

[46] Reference is made to the Communication Plan of the Department of Public Works of the City of Venice, available at https://tinyurl.com/3yz4nyrk (last visited 30 September 2024). See also, P. Somma, *Privati di Venezia, La città di tutti per il profitto di pochi* (Roma: Castelvecchi, 2021).

at two docks, with its logo.

Additionally, it could use Ca' Vendramin Calergi, Ca' Rezzonico (home to the Museum of 18th Century Venetian Art), the Doge's Palace and St. Mark's Square for private company events.

The logical-legal mechanism observed in this case perfectly aligns with the overlap of meanings, where the expressive function represented by the brand overshadows that represented by the immaterial and intrinsic value of the cultural asset. The recontextualization mechanism of the cultural asset, through association with the promotional message, cannot translate into

> 'a counter-appropriation, albeit still individual and commercial, of economic advantages, although ennobled by the narrative of self-appropriation and by non-economic interests.'[47]

Therefore, the regulation of sponsorships must ensure that the overlay or association of the sponsor's name with the cultural asset occurs in a manner respectful of the asset itself. However, the preservation of the cultural asset is not only a 'material' necessity, connected to avoiding the asset's deterioration or demise, and so its unavailability to future generations.[48] It is also an urgent priority to prevent the private party from appropriating the cultural identity and deriving far greater profit therefrom than the economic sum offered, thereby diminishing the historical and artistic significance of the cultural property.

Another issue arising in sponsorship concerns the image of the granting administration. This aspect cannot be overlooked, as the decision to enter into a sponsorship agreement, for a public administration, has direct implications for its image, depending on whether the sponsor shares a leading role with the administration. However, this does not put the administration and the private entity on the same contractual level. The sponsor meets the administration's requirements,[49] thereby conditioning the relationship and placing the public

[47] C. Crea, n 21 above, 176. The expression, fitting perfectly in the present case, is contextualised and gains significance within the broader framework of the public domain, a phenomenon concerning both material and immaterial things, characterised by a space of free use for anyone. This space is endangered by appropriative processes described by J. Boyle, *The Public Domain – Enclosing the Commons of the Mind* (New Haven, USA: Yale University Press, 2008), 43, where he highlights and criticises the *enclosure* dynamics related to immaterial assets. The interpretation of the public domain in French scholarship more overtly pertains to the concept of *chose commune*, as referred to in Art 714 of the Code civil, as noted by S. Dusollier, 'Domaine public (Propriété intellectuelle)', in M. Cornu, J. Rochfeld and F. Orsi eds, *Dictionnaire des biens communs* (Paris: Presses universitaires de France, 2021), 413.

[48] The expression is borrowed from that literature that has endeavoured to examine the legal aspects of the phenomenon – not new – of the alteration and erosion of resources to the detriment of future generations. The cultural origin of the need to protect resources arises in the field of the environment and natural resources. Consider the concept of Earth's inhabitants as usufructuaries: 'the Earth belongs in usufruct to the living', T. Jefferson, *The Writings of Thomas Jefferson* (Washington, DC: A.E. Bergh, 1907), VII, 456.

[49] S. Valaguzza, n 20 above, 1381.

party in a disadvantaged position.

Control over the association of the promotional message with the monument is entrusted to the Superintendencies, which can make assessments to prevent certain advertising messages from being conveyed through the cultural asset under restoration. The most common cases occur in sponsorship contracts between the administration and companies operating in the business of advertising billboards. Not only do these contracts concern the sponsor's advertising exploitation but advertising exploitation overall. Specifically, the exhibition spaces granted by the administration on the cultural asset are occupied by advertising unrelated to the sponsor.

Based on the practice of using scaffolding to advertise not only the sponsor but other brands that purchase advertising space from time to time, another consideration arises. By its nature, the advertising message must reach the highest number of potential consumers, which means that the location of the cultural asset on which intervention is carried out must be strategic for advertising purposes. This assumption arises from observing which cultural assets have been able to benefit from sponsored restoration; either they are culturally representative (the Colosseum or Rialto Bridge have always been associated with Italy's image abroad) or they are strategically located cultural assets allowing for the widest dissemination of the promotional message.[50]

This reasoning can naturally lead to one conclusion, that the market determines which assets are 'worthy' of accessing recovery through sponsorship and which instead may continue to deteriorate, given their 'marginality' from the perspective of advertising exploitation. It is normal for a church façade opening onto a busy road in cities like Rome or Milan to be much more attractive than an historically interesting cultural asset in a provincial city, far from the circuits of tourists, especially foreign ones. Quite different from sponsorships, are the activities of patronage which in Italy can be carried out through the 'Art Bonus' initiative. This is a tax tool that generates a tax credit for those who make charitable donations to support Italy's public cultural heritage, amounting to 65% of the donated sum. Through this mechanism, entirely different from sponsorships, it has been possible to raise nearly three million Euros for the safety and restoration of the Torre Garisenda[51] and the maintenance of the Torre degli Asinelli, in Bologna. It has also enabled Ferragamo to restore the Fountain of Neptune by Ammannati in

[50] It's important to consider the case before the TAR Lazio Rome arising from two technical sponsorship procedures on five Roman churches belonging to the FEC – 'Fondo Edifici di Culto' and on the headquarters of the National Roman Museum. See TAR Rome, 15 May 2023, no 8586 and TAR Rome 10 January 2024, no 519, available at www.giustiziamministrativa.it.

[51] The connection between tangible and intangible value, in this specific case, is further heightened by the fact that even Dante Alighieri mentions the Garisenda Tower in his Inferno, likening it to the Giant Antaeus who is about to grasp him. Through the Art Bonus scheme, donations from many active and aware citizens will fund the restoration and consolidation of this 'fragile giant' that belongs to all humanity, just as the literary work in which it was used as a metaphor.

Florence.

On these considerations, the basis of sponsorship contracts lies in reciprocity,[52] which quite explicitly points to the concept of cost-effectiveness, ie, the necessary proportion which must be balanced between the contract performances. It often happens, however, that in sponsorship contracts, the revenue from publicity activities is far greater than the amount offered.

The Court of Auditors has focused on this aspect,[53] identifying an element of financial liability in the described imbalance.

V. Alternative Tools to Sponsorship, not only of a Public Nature

The appropriative risks and commercial re-signification inherent in sponsorship contracts could be mitigated through the increase and development of alternative contractual tools, which envisage greater involvement of economic operators, animated by a spirit of patronage[54] and active citizenship.

A primary administrative solution that could reconcile the advantage of cost savings for administrations and the demands for fair gains for private entities could be identified in public-private partnership contracts.

Firstly, through public-private partnership contracts, the issue of overlapping meanings is weakened. In fact, partnerships typically do not involve any reference to a communication plan, which is characteristic of sponsorships and is the counterpart to restoration or monetary donations. Therefore, the risks of appropriating the intangible value underlying the tangible asset are absent.

Secondly, partnership contracts can be considered more suitable for the valorisation of cultural assets. Indeed, valorisation involves various additional activities such as ticketing, restaurants, bookshops, guided tours that explain the artworks,[55] all of which can be managed by private entities without compromising

[52] Refer to A. Montanari, 'Il sostegno dei beni culturali: riflessioni per una strategia "altruistica"' 2 *Aedon, Rivista di arti e diritto on line* (2021).

[53] The Italian Corte dei conti, in its report on 'Public-Private Partnership Initiatives in Cultural Heritage Enhancement Processes', noted that 'in exchange for a certain over twenty-year exclusive, the consideration paid by the sponsor amounts to €1,250,000 per year,' a notably low amount when compared to the priceless value and international visibility of the monument in question. It is precisely in this aspect that the contractual imbalance and the element of financial liability were identified. Reference is made to the Court of Auditors' report of 4 August 2016, no 8/2016/G, Chapter III, §7, available at https://tinyurl.com/y7ecunym (last visited 30 September 2024).

[54] Regarding private involvement in the management of cultural heritage, the British experience stands out as a model of particular interest. Indeed, within the British Museum, various Boards of Trustees are established to play an operational role, while planning and control over private activities remain firmly in the hands of the administration. Moreover, one must also recall the work of Arts & Business, which has served as an institutionalized link between administrations and private entities since 1976. In 2005, Arts & Business published the fifth edition of the Sponsorship Manual, a reflection of the approach with which the United Kingdom has provided its response, distinct as always, to the issue of preservation and enhancement.

[55] For an examination of the practical aspects of the enhancement function, see L. Casini, n

the inherent message of the asset.

Other key aspects that should incline administrations towards favouring the conclusion of partnership contracts over sponsorship contracts are essentially twofold. The first relates to the duration of the contractual relationship between the administration and private entity. In this way, intervention on the cultural asset will not be a mere 'hit and run' but will entail a series of obligations that the private party must fulfil in anticipation of its economic return and, as seen, without a communication plan that weakens the intangible value of the cultural asset. Private entities can comprehensively care for cultural assets, alleviating the financial burden on public administration, but without compromising its intangible value by overlapping their marks on the cultural asset itself. The second relates to risk allocation, which will burden – at least the demand-related risk – directly on the investor, thereby holding the administration harmless, resulting in significant cost-savings without compromising the immaterial value underlying the cultural asset.

The reform of public contracts law, carried out by the new Public Contracts Code,[56] has disclosed a new perspective, ie, the centrality of the public role as an indispensable tool for economic[57] policy, innovation development and a means by which also achieving established goals –[58] and especially – at the European level.[59]

5 above, 58.

[56] With the new Public Procurement Code, decreto legislativo 36/2023, an attempt has been made to provide a regulatory system in order to increase the use of this particular contractual instrument inspired by shared administration logic and a conception of collaboration between the public and private sectors. It is precisely on the possibility of public-private collaboration and the phenomenon of the 'administrativisation' of private law that reference is made to S. Cassese, 'Verso un nuovo diritto amministrativo? Lezione per festeggiare il 60° anniversario della Scuola di specializzazione in studi sulla pubblica amministrazione - Spisa', Bologna, 26 October 2015, available at www.irpa.eu; Id, *La nuova Costituzione economica* (Bari: Laterza, 2008), 7. Due to its intrinsic characteristic, the public-private partnership, even within the national framework, has begun to assume increasing importance following the pandemic events and the ensuing economic crisis. This has had the effect of restoring to the public administration a centrality that had gradually been eroding, through the implementation of certain political-economic choices to which it seemed to have, by now, abdicated. On this point see F. Bassanini, G. Napolitano and L. Torchia, *Lo Stato promotore. Come cambia l'intervento pubblico nell'economia* (Bologna: il Mulino, 2021), passim.

[57] For a comprehensive examination of the connection between public contracts and technological innovations, their function as wealth attractors and their use as an economic policy tool, see V. Lember, R. Kattel and T. Kalvet, *Public Procurement, Innovation and Policy. International Perspectives* (Berlin-Heidelberg: Springer, 2014), 2. More recently, F. Decarolis, 'Il contributo dell'analisi economica nei contratti pubblici', in R. Chieppa et al eds, *Il nuovo codice dei contratti pubblici. Questioni attuali sul D.Lgs. n. 36/2023* (Piacenza: La Tribuna, 2023), 63.

[58] In the new Public Procurement Code, there has been a reversal in the hierarchy of the main objectives to be pursued. This is clearly stated in Art 1, para 1, of decreto legislativo 36/2023, which establishes, as a fundamental principle of the Code, the principle of outcome, which becomes the focal point around which the principles of competition, legality, transparency, environmental and social protection must nevertheless revolve. For a more in-depth examination from a scholarly perspective, see M. Cammelli, 'Amministrazione di risultato', in M. Immordino and A. Police eds, *Principio di legalità e amministrazione di risultati. Atti del Convegno, Palermo 27-28 febbraio 2003* (Torino: Giappichelli, 2004), 122.

[59] The reference is obviously to the NRRP.

Partnership presupposes a contractual mechanism that potentially could give a significant boost to the economy, taking advantage of its 'leverage effect'.[60] In this way, the administration can benefit, on the one hand, from private capital, expanding its economic resources for the protection of cultural interests, while on the other, it can integrate, as a medium-to-long-term benefit, its own know-how, through the knowledge and experiences made available by the private partner.

The regulatory enhancement of partnership represents an opportunity to allow significant economic savings for administrations, along with the possibility of ensuring efficient maintenance of cultural heritage,[61] that is, it should not be limited only to the recovery of the property but should allow the property to express its significance in modernity, to make it usable in a stable and prolonged manner.

This is possible only if partnership contracts are long-term and entail responsible use of the assets entrusted by private operators (or the third sector) and appropriate profits. These profits should not derive from the mere overlay of a commercial name on a cultural asset, but from 'equal' management of the asset between private actors and a public administration. This way, services will be left to the creativity of the private party and its entrepreneurial risk, while the administration will have to oversee the correct use of the asset.

Another reason that should drive administrations towards the more difficult – but also more suitable – partnership agreements is their capacity to involve civil society in development-oriented choices.[62]

If all those identified aspects are essential for the successful outcome of the partnership agreement, the true linchpin of the relationship is the correct allocation of risk. This is a particularly complex burden, especially for the administration, which consists of the need to identify, at the conclusion of the contract, the correct allocation of those risks falling on the administration and those falling on the private investor. Their correct redistribution is the true secret to the success of public-private collaborations and to making the service supplied truly efficient.

In public-private partnership risks must be allocated to those who can handle them. The administration will certainly be better equipped to manage the issues

[60] The significance of the public-private partnership instrument as productive of a beneficial 'leverage effect', namely understood as a 'multiplier of public resources invested', is well expressed in A. Moliterni, 'Le prospettive del partenariato pubblico-privato nella stagione del PNRR' 2 *Diritto amministrativo*, 442 (2022); in the economic literature see E. Iossa and D. Martimort, 'The Simple Microeconomics of Public-Private Partnership' 17(1) *Journal of Public Economic Theory*, 4-48, 48 (2015).

[61] This is due to the connection existing between conservation and valorisation, a connection that must be traced back to the constitutional provision contained in Art 9 of the Italian Constitution, which is outlined in its first paragraph. Also, Art 118 of the Italian Constitution stimulates activities, useful to enhancing cultural heritage, understood as research, study, and dissemination of knowledge. All those activities are assigned and distributed, according to subsidiary criteria, among the Ministry, regions and other local authorities. Protection, on the other hand, which is based on conservation, remains firmly under the State's control. According to Art 117 of the Constitution, only the State can legislate in the field of protecting cultural assets.

[62] A. Moliterni, n 60 above, 450-451.

arising from regulatory changes, compared to the private party, which will be able to solve technical and construction-related issues, thanks to its know-how.

This is a particularly difficult operation,[63] especially when it comes to demand risk. Depending on the different factual circumstances, these burdens – which should generally be borne by the private party due to its entrepreneurial nature, especially in the case of 'hot' contracts – could also be shared by the administration, in the event that the cultural heritage partnership contract concerns 'warm' operations.[64]

A tangible example of what has been discussed so far concerns the 'Azienda Agricola Pompei' project, which involves the possibility of establishing agricultural crops such as olives, vines, and flowers in the uncultivated areas of the Archaeological Park.

Through several public notices, the Archaeological Park has sought economic operators interested in managing, under the administration's supervision, the cultivation of the green areas that are not affected by archaeological excavations and hold no cultural interest. The plants must be grown organically and with ancient methods. The aim is to enhance the archaeological site by restoring certain areas to agricultural use, in the interest of the Archaeological Park, using the resulting production for self-promotion and to earn a percentage on the sale of those pruducts. The involvement of private entities is not confined to the cultivation and processing of the products but also includes the participation of non-profit organisations dedicated to the integration of disadvantaged individuals into society, with positive implications for the whole area.[65]

The possibilities of avoiding a commercial branding of monuments do not end here. Collaboration agreements, as happened in the case of the City of Bologna, are the result of the involvement of civil society and active citizens in administrative decisions. The paradigm on which collaboration agreements are based does not refer, as seen for sponsorships, to a 'need – availability' dynamic, but is instead attributable to a subsidiary mechanism. This presupposes the involvement of citizenship, since the stage of identifying the public interest to be protected.

[63] The difficulty and high costs of designing a public-private partnership are briefly discussed by F. Decarolis, n 57 above, 65, who recalls the literature from across the Channel regarding the cost-effectiveness ratios for launching a public-private partnership. According to this economic orientation, now outdated, projects that are financed with less than twenty million Pounds Sterling would not be suitable for partnership. For a comprehensive examination, including the Italian experience, see C. Giorgiantonio, 'Infrastructure and PPP in Italy: The Role of Regulation' 3(2) *Journal of Infrastructure, Policy and Development*, 204-219, 207 (2019).

[64] Public-private partnership contracts can be divided into 'hot', 'cold' and 'warm'. In the case of a cold partnership, the administration pays a fee to the private party for the management of a service or asset. On the other hand, hot contracts involve revenues exclusively derived from users of a particular asset or service entrusted by the administration to the private party. Warm contracts represent a balance between the first two, where a portion of the revenue comes from users and a portion from the administration.

[65] About this particular and successful experience, see https://tinyurl.com/2xfhnk22 (last visited 30 September 2024).

The distinguishing and valuable element of this tool concerns co-design activity, carried out jointly by the citizens who will sign the agreement, and the administration. When the agreement is signed, the citizens exercise their freedom,[66] recognized by Art 118 of the Italian Constitution, representing the tangible application of the principle of horizontal subsidiarity.[67] It should be noted that even in the case of sponsorships, it is still an initiative originating from a private party, suggesting that the flow of power,[68] information and decisions is reversed, moving from citizens to administration. However, this is partly untrue, regarding the phenomenon of appropriating the intangible value of cultural assets.

Sponsorships, despite being a private initiative, are regulated like licensing. The flow of power does not move directly from citizens to private parties; this happens apparently. While collaboration agreements involve administrations and citizens on an equal footing, as parties to a contract, sponsorships involve procedural phases culminating in an adjudication by the administration.

Furthermore, whether or not sponsorship is an expression of horizontal subsidiarity, it would not be sufficient to eliminate the risks of dilution and appropriation of the intangible significance of the cultural asset for marketing purposes on the part of the sponsor.

In this particular form of relationship, consideration is totally absent, and the underlying collaboration agreement can be justified by a donation.[69] However, the problem with this approach lies in the potential lack of liability in case of non-compliance by the citizen party (who naturally may also be an entrepreneur). This circumstance is particularly difficult to address and raises serious doubts about the actual scope of the instrument, which would not contemplate any form of contractual sanction. On the other hand, providing for it could hinder its use, considering its purely gratuitous nature.

[66] G. Arena, *I custodi della bellezza. Prendersi cura dei beni comuni. Un patto per l'Italia fra cittadini e istituzioni* (Milano: Touring Club, 2020), 147.

[67] Horizontal subsidiarity, introduced into the Italian Constitution in 2001, pertains to the relationship between 'the whole of political power with the whole of civil society', according to S. Cassese, 'Il nuovo Titolo V della Costituzione Stato/Regioni e Diritto del Lavoro' 5 *Lavoro nelle Pubbliche Amministrazioni*, 677-679 (2002). Regarding horizontal subsidiarity, mention should be made of the interpretation provided by the Constitutional Court in judgment no 131 of 26 June 2020, in www.cortecostituzionale.it, which held that co-design is one of the aspects most closely related to horizontal subsidiarity. See also G. Arena, 'L'amministrazione condivisa e i suoi sviluppi nel rapporto con cittadini ed enti del Terzo settore' 3 *Giurisprudenza Costituzionale*, 1449 (2020).

[68] G. Arena, 'Il principio di sussidiarietà orizzontale nell'art. 118 u.c. della Costituzione' *Studi in onore di Giorgio Berti* (Napoli: Jovene, 2005), 179-221, 182.

[69] Collaboration agreements have attracted the attention of scholars, who are beginning to study them, especially following the surge in the number of agreements entered into by Italian municipalities. Their main purpose is associated with the care of common urban assets and is articulated in more detail compared to cases of urban regeneration. Among the most significant collaboration agreements, the City of Bologna one stands out, as being subject to detailed examination. In particular, see P. Michiara, 'I patti di collaborazione e il regolamento per la cura e la rigenerazione dei beni comuni urbani. L'esperienza del Comune di Bologna' 2 *Aedon, Rivista di arti e diritto on line* (2016).

Hence, if a private law interpretation were given to the collaboration agreement,[70] it could be framed as a donation with a burden.[71] However, this requires a genuine awareness that cultural assets are 'testimonies having value of civilization'[72] and that the private operator's recovery does not correspond to the need for economic growth of the sponsoring company, but to true patronage.

The significant aspect is that the creation of alternative legal mechanisms can certainly, over time, be central to the creation and development, in the field of cultural assets, of groups of citizens taking care of the common heritage in an economically disinterested manner.

However, the time required to achieve full awareness of the importance of such involvement by the population can only be quite long.

For this reason, one possibility, in order to make the overlapping of meanings operated by sponsorship more acceptable, might lie in the extension of the applicability of ministerial decree DM 161 of 2023, which defined the guidelines to determine the minimum amounts envisaged, as consideration or fees, for the use or reproduction of cultural assets.

The direction outlined by the ministerial decree is that of adequate economic valorisation,[73] which would allow, at least, to align sponsorships with the path laid out by the Court of Auditors, which had already ruled on the case of the Colosseum sponsorship. In that ruling, the Court of Auditors highlighted how the contributions made by private parties in return for the advertising exploitation of cultural assets should be commensurate with the value of the asset itself. This operation would require particular skill on the part of administrative staff and would, in any case, be extremely difficult because it involves jointly assessing the value of the cultural asset, which is often invaluable, the actual cost of restoration activities and the proceeds from the advertising campaign conveyed by the notoriety and prestige of the asset. In this way, it becomes clear that the publication period of the public announce cannot ensure the necessary balance

[70] An approach stemming from the fact that collaboration agreements would not be the result of authoritative administrative activity and therefore could not be subject to the law of administrative procedure. In this regard, see A. Giusti, 'I patti di collaborazione come esercizio consensuale di attività amministrativa non autoritativa', in R.A. Albanese, E. Michelazzo and A. Quarta, *Gestire i beni comuni urbani: modelli e prospettive: atti del convegno di Torino, 27-28 febbraio 2019* (Torino: Quaderni del Dipartimento di Giurisprudenza dell'Università di Torino, 2020), 27.

[71] 'Donation with a burden' allows for the inclusion of a clause in the contract that provides for a burden on the donee, failure to comply with which results in the termination of the contract. See A. Montanari, n 52 above.

[72] As stated in the second paragraph of Art 2 of decreto legislativo no 42 of 22 January 2004, in which the definition dating back to the Franceschini Commission of 1964 has been almost literally transposed. The Franceschini Commission transformed the conception underpinning the legislation on works of art, found in the Rosadi and Bottai laws and based on the aesthetic philosophy of Benedetto Croce, into a historicized concept. On this point see A. Bartolini, 'Il bene culturale e le sue plurime concezioni' 2 *Diritto Amministrativo*, 223 (2019).

[73] G. Piperata, 'I beni del patrimonio culturale tra canoni e corrispettivi' 3 *Aedon, Rivista di arti e diritto on line* (2023).

required by the Court of Auditors in this matter. Such balance should be achieved through contractual means.

The establishment of a 'tariff schedule', as happened for the fees for the use and reproduction of images of cultural assets, would be extremely useful to allow administrations to discern the quality and effectiveness of the offer made by the interested sponsor. With the introduction of the tariff scheme, other problems arise, adding to that of the overlap of meanings, and bringing back the age-old dichotomy public *vs* private, between the proprietary rights over the use of images derived from cultural heritage and the free use of what falls within the public domain.[74]

Certainly, this possibility is a palliative compared to the complex problem of the appropriation of the immaterial value of cultural assets. In this case, it is the public party that appropriates the intangible value of cultural assets to exploit them economically. This cannot fix the problem of sponsorships and the connected risks of appropriation of the intangible value of cultural assets.

These forms of commercial appropriation contradict the proper use that should be made of cultural heritage, one that, because of its meanings and intrinsic values, should remain available to humanity, serving to the spiritual progress of the people.

On the contrary, forms of cultural appropriation of the intangible value of cultural assets should always be considered permissible. In this regard, the Italian State plays a dual role, that of protecting the dignity, integrity and authenticity of cultural assets and promoting the development of culture.[75] By another point of view, the rules governing the commercial use of the image of a cultural asset could limit a cultural appropriation, avoiding new forms of cultural heritage.[76]

This awareness only confirms that cultural assets can be subject to dynamics of change or evolution of their meaning. The risk to avoid is that this occurs in a purely commercial sense.

In conclusion, it does not provide any indication on the dilemma between favouring the economic exploitation of cultural heritage, albeit with the aim of reinvesting the proceeds in the care of the asset or expanding the categories of gratuity and free enjoyment of cultural assets. Perhaps these categories would be more suitable for the social purpose behind cultural assets (ie, the spiritual growth of the individual and the improvement of society), in the face of a chronic lack of funds constantly putting them at risk.

Ultimately, the objective to pursue should be to cast this issue, as is the case with the use of images of cultural heritage, less in a mercantilistic way and more in a prospective strategy for cultural development.[77]

[74] G. Sciullo, 'Il d.m. 161 del 2023: un'analisi giuridica' 2 *Aedon, Rivista di arti e diritto on line* (2023).

[75] See F. Caponigri, 'An Italian Style of Cultural Appropriation?' *Notre Dame Journal of International and Comparative Law*, available at https://tinyurl.com/25hna563 (last visited 30 September 2024).

[76] ibid

[77] The belief in the necessity of an 'education' about cultural assets has always been widespread

VI. Conclusions

As analysed, when a sponsorship contract is concluded, what is transferred, albeit temporarily, is a right of commercial exploitation of the artistic asset, which is inexorably linked to the image of the asset itself. As has also been observed, this type of exploitation linked to the image of a monument not only finds its way in the Public Contracts Code and is regularly admitted in the legal system but is also a very useful tool for channelling financial resources towards the preservation of assets, amid a general shortage of funds, the latter being a well-known fact. A peculiar aspect of sponsorship has been highlighted by the Court of Auditors, which, as seen, has identified the crux of the issue in the possibility of balanced remuneration even for the public administration, recognising a loss to public funds whenever the obligations undertaken by the private party in favour of the administration and the positive image return for the sponsor are unbalanced, compared to the value of cultural assets.

Furthermore, drawing inspiration from the re-signification processes identified in the world of brands, appropriative phenomena can also be traced in other branches of law. This is possible because the fundamental issue always revolves around the overlapping of meanings. Under the guise imposed by the sponsor, who conveys a commercial message – promoting themselves or even other brands – the meaning of the cultural asset is modified and commercialised, just as happens in the processes of mercantile appropriation examined in the world of social signs. In this way, the meaning of the cultural asset, which can be reinterpreted and used for artistic and cultural purposes, can be damaged, once it is associated with an advertising initiative.

Branding, the commodification of signs having cultural or social meanings, represents the manifestation of an appropriation. Similarly, this appropriation occurs when, for commercial purposes, the image and underlying value of a cultural asset are appropriated.

Linking a cultural asset to a marketing campaign can be interpreted as an 'evolved form of use'[78] of the asset, which requires the control of the administration entrusted with the care of the asset itself and, even before that, a broadly discretionary authorization power, considering the artistic or historical nature of the asset. This nature of the asset should guide the pace of conservation and

in academia, considering the pioneering approach of Massimo Severo Giannini in his teachings. For further insights, see M.S. Giannini, 'I beni culturali' 1 *Rivista trimestrale di diritto pubblico*, 3 (1976). The awareness of the instrumental role of cultural heritage as an indispensable element to accompany the civil and economic development of the country has been expressed by S. Baia Curioni, 'Rompere lo specchio di Narciso. I diritti di immagine relativi al patrimonio culturale come occasione di imprenditorialità, autonomia e decentramento' 2 *Aedon, Rivista di arti e diritto on line*, 203-207, 205 (2023).

[78] With regard to this aspect, see P.F. Ungari, 'I beni immateriali tra regole privatistiche e pubblicistiche – Atti del Convegno di Assisi (25 – 27 October 2012). La sponsorizzazione dei beni culturali' 1 *Aedon, Rivista di arti e diritto on line*, (2014).

valorisation, and opportunities for commercial overlap should be limited. Consequently, it is crucial to ensure not only the preservation of the asset in its materiality but also protection of its 'identity significance',[79] looking at its 'aesthetic-perceptive' scope.[80]

In sponsorship, the utility derived by the sponsor party comes from the connection established between the economic operation and the positive significance attributed to it, in terms of promotional impact on their own brand. It is precisely in this passage that the immaterial aspect of the cultural asset, a component inseparable from the thing, is temporarily appropriated by the sponsor.

On the other hand, the idea of incorporating an immaterial element into a thing, especially if the latter coincides with a cultural asset, leads to the belief that the asset, if economically exploited in a manner inconsistent with its nature, is endangered under its connotation as a cultural testimony.[81]

The incorporation of the values and identity significance – immaterial – into the *res* is a direct consequence of the assumption that the cultural asset amounts to a testimony of civilization, and precisely this testimony represents the immaterial value that adheres to and 'vivifies' the physical entity: the cultural asset.[82]

Upon this theoretical premise, economic use phenomena are then grafted, which, as seen, closely concern the problem of protecting and valorising cultural assets and the related dilemma existing between managerial use of cultural heritage and choices for free and consciously gratuitous use of cultural heritage.

The appropriative process of surplus value, be it social or cultural, be it a symbol or any other entity bearing identity values, even if temporary, still entails the risk that on certain categories of assets, conceived to be available to the

[79] ibid

[80] ibid. The Author outlines the issue for which possible solutions have been sought through various tools offered by the Public Procurement Code and beyond, summarizing it as a kind of warning when he cautions, 'it is necessary to avoid that the use by the sponsor spills over into a form of ideal appropriation, subtracting from a good, which by definition belongs to everyone, its identity value' (author's translation).

[81] The already cited theory of incorporation has been used to highlight the relationship between the *res* and its immaterial value in the context of changes of use. This operates on the asset but, if it concerns a cultural asset, also on its incorporated historical-artistic value. Furthermore, the instrument of incorporation has been used to legitimize the duplication of constraints on certain assets. Indeed, on a property already subject to artistic constraint, a specific destination can also be imposed. For example, in the 'Il Vero Alfredo' case in addition to the artistic constraint imposed on sculptures and the commercial space of this famous restaurant in Rome, the Consiglio di Stato decided that in this case 'a different use than the current one is not allowed, in order to protect the cultural assets and the values embedded in them'. See the Adunanza Plenaria, 13 February 2023, no 5, available at www.giustizia-amministrativa.it. For a careful examination of the theory of incorporation, see G. Morbidelli, 'I confini della tutela: il vincolo culturale di destinazione d'uso. Della progressiva estensione della componente immateriale nei beni culturali e dei suoi limiti' 1 *Aedon, Rivista di arti e diritto on line*, 53-57, 54 (2023).

[82] It is necessary to quote the words of Massimo Severo Giannini, who conceived the concept of cultural assets as immaterial goods, based on the fact that 'a testimony with civilizational value is an immaterial entity inherent in one or more material entities, but legally distinct from them, in the sense that they are physical supports but not legal assets'. M.S. Giannini, n 77 above, 24.

community, 'excluding properties' may be conferred.[83] The exploitation of cultural heritage in these terms, 'branding' the façades of monuments with the logo of those who have provided, not for philanthropic but for commercial purposes, for the payment of their conservation, pertains to an 'extractive'[84] paradigm carrying the contrast between a certain value apparatus and economic exploitation logic. This contrast of difficult harmonization can find a solution in alternative forms of private involvement, preferably through the dissemination of participatory tools that have already demonstrated their effectiveness.[85]

[83] A type of ownership that would lead certain expressive forms to crystallize when they are transformed into commercial objects, thereby affecting the processes of 'codification of social signs relevant to public discourse,' and which finds its rationale in the private individual's desire to monopolise communication on the sign for purely economic purposes. The meaning of the expression is the subject of analytical study by C. Crea, n 21 above, 146.

[84] The view of an extractive mechanism concerning cultural assets, considered the 'oil' of Italy, is found in U. Mattei, 'Beni culturali, beni comuni, estrazione', in E. Battelli et al eds, *Patrimonio culturale. Profili giuridici e tecniche di tutela* (Roma: Roma Tre Press, 2017), 147.

[85] A fine example is the architectural and functional restoration of Casa Bossi in Novara, a splendid example of nineteenth-century architecture by the architect Alessandro Antonelli. Through the 'Love Committee for Casa Bossi', efforts were made to create a cultural space within the residence for the recovery of local artisanal knowledge, as well as a co-working space, thereby becoming the focal point of the 'Piemonte Antonelliano' project.