# *Essays*

## Art and Law: Authentication and Assessment Within the Italian Legal System

Giampaolo Frezza*

**Abstract**

The aim of this paper is to investigate specific matters linked to the so-called authentication and judicial verification of the authenticity of artwork in the Italian system. After an analysis of the so-called right of authentication and archiving of the work of art (Art 21, para 1, of the Constitution), the essay analyses the issue of court assessment of the artwork's authenticity, for the purposes of which a case-by-case assessment of the adequacy and reasonableness of the related claims is required.

### I. Introduction

The purpose of the present essay is to analyse the relationship, within the Italian system, between art, and in particular contemporary art, and law.

After an overview of the principles and values underlying the relationship between art and law (section 2), the paper investigates specific matters linked to the so-called authentication and the judicial verification of the authenticity of artwork (section 3). Indeed, authentication is a private activity, mostly carried out by certifying bodies and qualified as a free expression of thought (Art 21 Constitution). Nevertheless, in some cases it can resemble an opinion to identify the applicable provisions. In addition, the authentication involves the intervention of a judge in order to protect the substantial legal situations that actually arise from the request for verification of the authenticity of the artworks. The clear closure of Italian case law in matters of admissibility of such claims needs to be reviewed with a view to assessing its adequacy and reasonableness (section 4).

### II. Art and Law: Values, Principles and Rules

Art and beauty are the most tangible expressions of a cultural phenomenon, which plays a significant role in the Republican Constitution of 1948: it is highlighted in Arts 9 and 33. The application, coordination and interpretation of these legal provisions outlines an idea of artistic expression that operates within the social function of the legal system and individual freedoms. With

* Full Professor of Private Law, Lumsa University.

regard to the first aspect, the State is required to ensure the conditions necessary for the implementation of artistic freedom (the aesthetic-cultural value is of primary importance in the Italian legal system). State and local authorities must contribute to the promotion of art as stated by the Constitutional Court.[1] With reference to the second profile, art is fully integrated into the framework of the fundamental rights of human beings, first and foremost those guaranteed in Arts 1, 2, 3, para 2 and 4, para 2 of the Italian Constitution.[2]

It appears therefore plausible to affirm, given the interpretation of the afore mentioned set of rules, that art is inherent to the legal system as a whole and it is linked to the primary value of the individual and his full and integral development (Art 2 of the Constitution).[3]

The enshrinement of these freedoms, *inter alia*, is useful to guarantee the effectiveness of judicial protection of all rights deriving from them, in the event that these interests are harmed by a wrongful conduct perpetrated by public and private subjects.[4] This is, in fact, particularly true in relation to copyright protection and, above all, to legal protection provided by the judicial system in favor of the person who can claim a (material or immaterial) property right on *res* 'work of art'. In relation to this last aspect, there is, in Italy, as well as in other legal systems,[5] a lack of protection, to which the jurist must give an answer,

[1] Corte costituzionale 9 March 1990 no 118, available at https://tinyurl.com/md5ary7h (last visited 30 June 2022); Corte costituzionale 18 December 1985 no 359, available at https://tinyurl.com/yhh2fy9b (last visited 30 June 2022); Corte costituzionale 24 June 1986 no 151, available at https://tinyurl.com/h4mhv2az (last visited 30 June 2022); Corte costituzionale 29 March 1985 no 94, available at https://tinyurl.com/3h9xtzy4 (last visited 30 June 2022).

[2] P. Perlingieri and R. Messinetti, 'Art. 9', in P. Perlingieri ed, *Commentario alla Costituzione italiana* (Napoli: Edizioni Scientifiche Italiane, 2001), 44; G. Bianco, 'Ricerca scientifica (teoria generale e diritto pubblico)' *Digesto*, *Discipline pubblistiche* (Torino: UTET giuridica, 1997), XIII, 360, with specific regard to Art 3 Constitution.

[3] P. Perlingieri and R. Messinetti, 'Art. 9' n 2 above. About the human person as a central value in the legal system, cf the several essays available in P. Perlingieri, *La persona e i suoi diritti. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), passim.

[4] F. Polacchini, 'La libertà di espressione artistica in una prospettiva multilivello', in Id, *La libertà di espressione artistica. Limiti giuridici e politically correct* (Bologna: Persiani, 2018), 18. The effectiveness of the protection of rights is a latent need in the legal system, which finds diversified points of emergence, the subject of an increasing attention by the literature: recently, cf F. Alcaro, 'Una riflessione su "fatto" e "diritto" (ed effettività)' *Rassegna di diritto civile*, 773-790 (2018); L. Corazza et al , *Fenomeni migratori ed effettività dei diritti* (Napoli: Edizioni Scientifiche Italiane, 2018), passim; G.R. Filograno, 'Regole limitative della responsabilità civile in tema di vigilanza bancaria ed esigenze di effettività nella tutela del risparmio popolare' *Foro napoletano*, 389-405 (2017); M. De Angelis, *L'effettività della tutela della salute ai tempi della crisi* (Napoli: Edizioni Scientifiche Italiane, 2016), passim; D. Siclari, *Effettività della tutela dei diritti e sistema integrato dei servizi sociali* (Napoli: Edizioni Scientifiche Italiane, 2016), passim; I. Prisco, 'Il rilievo d'ufficio della nullità tra certezza del diritto ed effettività della tutela' *Rassegna di diritto civile*, 1227-1257 (2010). See also, fn 7 below for furthermore indications.

[5] A. Donati, *Law and Art: diritto civile e arte contemporanea* (Milano: Giuffrè, 2010); A. Donati, 'La definizione giuridica delle opere d'arte e le nuove forme di espressione artistica contemporanea' *La rivista del consiglio*, 118-128 (2017-2018), where is available a comparatistic perspective on French and USA legal systems; L. Palandri, *Giudicare l'arte*, *Le Corti degli Stati Uniti e*

according the canons of interpretation, that we will try to identify in this paper.

The work of art, as a product of this activity, falls within the broader notion of 'cultural heritage', as defined by Arts 2 and 20 of the Code of Cultural Heritage: a concept that includes, in addition to the *res corporale*, a further dimension that goes beyond the material consistence of the 'Res' and that involves the aptitude to realize heterogeneous interests and constitutive values of a community, of a place, of an era.[6] We can, therefore, talk about the relevance of the *corpus mysticum* beyond the *corpus mechanicum,*[7] where the involved interests become, as effectively summarized, a 'meta-individual' value.[8] This has led to the enhancement of a dynamic profile of these assets, different from the static and structural profile on which the literature has been based, for years.[9] The focus has shifted, from conservation to enhancement,[10] representing a fulfillment of the plan outlined by the Constitution, as a result of, not only the economic and social progress, but by the increasing synergy between public and private sectors, as well.

Art, and in particular contemporary art, is nowadays an additional safe haven, implying significant investments. It therefore circulates as a form of wealth, but its guarantee of declaration of 'authenticity', does not appear to be informed by any principle that would attest to its certainty and security.[11]

*la libertà di espressione artistica* (Firenze: Firenze University Press, 2016), 71.

[6] S. Rodotà, 'Lo statuto giuridico del bene culturale' *Beni culturali, tutela, investimenti, occupazione, Annali dell'associazione Bianchi-Bandinelli*, 15 (1994). On the same topic, see T. Alibrandi and P.G. Ferri, *I beni culturali e ambientali* (Milano: Giuffrè, 2001), 25; M.P. Chiti, 'I beni culturali', in M.P. Chiti and G. Greco eds, *Trattato di diritto amministrativo europeo* (Milano: Giuffrè, 1997), I, 351; V. Cerulli Irelli, 'I beni culturali nell'ordinamento italiano vigente', in M.P. Chiti ed, *Beni culturali e comunità europea* (Milano: Giuffrè, 1994), 28; M. Comporti, 'Per una diversa lettura dell'art. 1153 c.c. a tutela dei beni culturali' *Le ragioni del diritto. Scritti in onore di L. Mengoni* (Milano: Giuffrè, 1995), I, 420; M. Ainis and M. Fiorillo, 'I beni culturali', in S. Cassese ed, *Trattato di diritto amministrativo (*Milano: Giuffrè, 2003), II, 1452.

[7] In Public Law literature, see among others M.S. Giannini, 'I beni culturali' *Rivista trimestrale di diritto pubblico*, 24 (1976). About trade of artistic work, M. Costanza, 'La circolazione delle opere d'arte: regole civilistiche di scambio', in M. Costanza ed, *Commercio e circolazione delle opere d'arte* (Padova: CEDAM, 1990), 6.

[8] A. Gambaro, 'Il diritto di proprietà', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1995), VIII, 2, 425, which highlights the emphatic nature of any legislative definition.

[9] A. Nervi, 'Il comodato di opera d'arte La sponsorizzazione culturale. I diritti di sfruttamento economico dell'opera d'arte e il merchandising museale', in P. Rescigno and E. Gabrielli eds, *Trattato dei contratti* (Torino: UTET, 2010), 13; F. Delfini and F. Morandi, *I contratti del turismo, dello sport e della cultura* (Torino: UTET, 2010), 539, 543, according to F. Santoro Passarelli, 'I beni della cultura secondo la Costituzione', in *Studi in memoria di Carlo Esposito* (Padova: CEDAM, 1973), III, 1324.

[10] L. Casini, 'La valorizzazione dei beni culturali' *Rivista trimestrale di diritto pubblico*, 651-707 (2001).

[11] In broad terms, see G. Vettori, 'Circolazione dei beni e ordinamento comunitario' *personaemercato.it*, 19 May 2008. With specific regard to the aim of this essay, see M. Costanza, *Commercio e circolazione di opere d'arte* (Padova: CEDAM, 1990), passim. On the rising of a legal principle related to its circulation and marketing, G. Frezza, *Arte e diritto fra autenticazione e accertamento* (Napoli: Edizioni Scientifiche Italiane, 2019), 28, where we argued that nowadays we are witnessing a growing and significant diffusion, at different levels of Italian-European sources, of

Moreover, the provisions set forth in Law no 106 of 2004 on the so-called legal deposit, mainly applicable to the *performance* of all contemporary art events, appear not being adequate to this purpose: such deposit, in fact, must be made at the Central Institute only for sound and audiovisual assets and concerns sound and video documents, totally or partially produced in Italy.

Nevertheless, if the aim is to guarantee the safe circulation of traditional artistic manifestations (ie, those that take the form of paintings or sculptures), some careful scholars – who calls into question, in this context, the principles of adequacy and reasonableness[12] – recalls the validity of the system introduced by legge no 1062 of 1971. The latter provides that the judge must avail himself of the help offered by technical experts designated by the Ministry for Cultural Heritage in criminal proceedings for counterfeiting, alteration, illegitimate reproduction for profit, trade and false declaration of authenticity of the copy in case of doubts on the authenticity of the artwork. However, an enhanced organization system would be beneficial in this regard, possibly ensured by special registers of listed experts subdivided by specific competences, and capable of assessing the artistic value of creative works, together with a strong involvement of the Public Administration which would exercise a coordination and oversight

legal rules enacted in order to guarantee the circulation of 'wealth', in its broadest sense, according to parameters of certainty and safety. According to Corte di Cassazione-Sezione penale III 31 March 2000 no 4084, *Cassazione penale*, 615 (2001), we can speak of a legally relevant interest in the regularity and honesty of exchanges in the art and antiques market. According to Tribunale di Lecce 30 April 2009, *Giurisprudenza di merito*, 2262 (2010), which has analyzed , from a criminal point of view, the original repressive legislation of the counterfeiting or alteration of artworks, contained in the legge of 20 November 1971, no 1062 (Arts 3 and 4), then transposed, substantially, into Art 127, decreto legislativo 29 October 1999 no 490, and, again, in Art 178 of the Italian Civil Code), the legal object of the crimes contemplated therein was represented not only by the protection of public faith (Corte di Cassazione-Sezione penale III 5 October 1984 no 8075), but also by the market of works of art, understood as an interest in the regularity and honesty of exchanges in the art and antiques market (Corte di Cassazione-Sezione penale III 31 March 2000 no 4084, talks about multi-offensive crime): for instance, we may consider EU rules on accreditation and market surveillance in the marketing of products or those on accreditation in accessing the activities of credit institutions, as well as the internal rules concerning the control of the issuance of metallic coins. We may also mention the 'safety' rules on product quality certifications, in particular industrial ones, and those related to financial markets, as well as the creation of 'certainties' through the emergence of the so-called independent bodies (*amplius*, A. Benedetti, *Certezza pubblica e "certezze" private* (Milano: Giuffrè, 2010), 89. Another example is represented by the set of Community derived rules on consumer protection merged into the Consumer code, which aims to protect the weak subject of the contractual relationship while, at the same time, implementing forms of control of the market and, within it, those relating to the circulation of consumer goods. Cf G. Perlingieri, *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici* (Napoli: Edizioni Scientifiche Italiane, 2011), 35; I. Prisco, *Le nullità di protezione. Indisponibilità dell'interesse e adeguatezza del rimedio* (Napoli: Edizioni Scientifiche Italiane, 2012), 12; S. Polidori, *Nullità di protezione e sistematica delle invalidità negoziali* (Napoli: Edizioni Scientifiche Italiane, 2016), 9. Finally, rules on the circulation of real estate wealth must be taken into consideration (G. Frezza, 'Circolazione immobiliare e certezza del diritto' *Rivista di diritto privato*, 167-179 (2018)).

[12] Among all, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), passim.

role. Equally, the obsolete register of protected works could actually be very useful, at least in terms of presumption of the artistic nature of the creation registered therein. The protection of the artwork is, in fact, notoriously justified by private interests (such as the moral right of the artist), as well as public or collective interests (such as those relating to the protection of artistic heritage, of the cultural heritage and of market control). Contemporary artistic production, with the example of street art and the proposal to consider its 'works' as common goods,[13] above all, has the credit of having forcefully started the debate.

Though, the general public register of protected works has never been created; hence, mentioning a real registration obligation appears quite problematic nowadays.[14] A reasonable explanation may be found in the complexity of the procedure, which also foresees an onerous authentication, governed by specific regulations. Therefore, it is hoped that,

> 'in the face of the problems related to the conservation and documentation of contemporary works of art, it might be possible to consider adapting this register to the purpose of safeguarding and protecting contemporary artistic production, which is ephemeral and often made from materials that deteriorate quickly'.[15]

In addition, the enforcement, on 29 August 2017 of the *(legge annuale per il mercato e la concorrenza)* Annual law for market and competition (Art 1, paras 175 and 176), with the changes it made to the heritage code, cannot be ignored. Its aim is to simplify the control procedures concerning the circulation of items related to the antiques market. Together with the novelties regarding time (from fifty to seventy years) and threshold limit values beyond which there is an obligation to obtain prior authorization before the exportation of works, an electronic register has been introduced to guarantee certainty and security, which is characterized by technical features that allow eg real-time consultation by the Superintendent.[16]

Thus, a fact appears unquestionable: the principle of certainty and safety for legal transactions (including those involving works of art) is now objectively

[13] P. Virgadamo, 'La protezione giuridica dell'opera d'arte ai confini del diritto d'autore (e oltre): dalla logica mercantile all'assiologia ordinamentale' *Diritto di famiglia e delle persone*, 1493, 1478-1508 (2018).

[14] M.V. Sessa, 'La tutela degli interessi pubblici e privati nella riproduzione delle opere d'arte' *Foro amministrativo*, 1019-1060 (2001), which, not surprisingly, configures the interest as a collective interest.

[15] A. Donati, 'Autenticità, *Authenticité*, *Authenticity* dell'opera d'arte. Diritto, mercato, prassi virtuose' *Rivista di diritto civile*, 987-1025 (2015).

[16] This register is divided into two lists: the first one relates to the things for which exhibition to the export office is required; the second one relates to the things for which the certificate is issued electronically without the need to exhibit the thing to the export office, without prejudice to the right of the superintendent to request at any time that any of the things indicated in the list be shown to him for direct examination.

included in a series of rules based on the realization of a collective and super-individual interest, rather than a merely private interest.

Based on this rationale, careful scholars rightly refer to the need to protect 'public trust arising from the relationship characterized by professional *status*':[17] this need must necessarily inspire those who aim at a safe circulation of documents certifying the authenticity of artworks. The issue here is not just that of being able to freely express one's own thoughts and to exercise the activities related to the enjoyment of copyright, but it also concerns the matter of carrying out an activity shaped by super-individual values and principles.

This will not be a minor issue in the solution of the problems that arise in the world of art, especially as far as the circulation of artworks is concerned, an issue that we will deal with in the following paragraph.

## III. The Right of Authentication and Free Expression of Thought

Our legal system lacks of legislation with regard to the so-called right of authentication and archiving of the work of art.[18] Ordinary legislation governs certain aspects related to the protection of the artwork. Art 2575 et seq of the Italian Civil Code, in fact, regulate the object, the purchase, the content, the subjects, the transfer of the right of use and the withdrawal of the artwork from the market, but provide nothing about cataloguing.

Indeed, legge no 633 of 1941 concerning copyright, does not contain, in this sense, a specific provision; it defines protected artworks, the subjects of copyright, the content and duration of this right and introduces specific rules regarding certain categories of works. Arts 144-155 et seq, in particular, regulate copyright on post-first sales of artworks and manuscripts, the contents of which is beyond the aim of the present study.[19]

Furthermore, the Law on protection of things of artistic or historical interest (legge no 1080 of 1939)[20] does not come to the rescue nor does the Presidential

[17] R. Calvo, 'Expertise degli strumenti ad arco e affidamento nel prisma della responsabilità senza contratto' *Contratto e impresa*, 1-8 (2010), in the context of the authenticity of stringed instruments. This essay tends to apply the safeguard obligations regime aimed at protecting third parties in the relationship between the latter and the 'certifier': this is the theory of the so-called contract with protective effects towards third parties.

[18] From a comparative perspective, see A. Donati, n 15 above, 1000. The author refers to the French experience: *loi* 11 May 1957 no 57-298, transposed into the intellectual property code, introduced an exception to the characteristic of the non-disposability of the moral right of the author, granting the artist the right to dispose of this subjective legal situation, thus being able to appoint, by will, a body that manages, after his death, the various forms in which this moral right is concretely expressed, including that of issuing certificates of authenticity.

[19] See also Art 144, para 1, legge 22 April 1941 no 633, replaced by Art 2, para 2, decreto legislativo 13 February 2006 no 118 (which implemented Directive 2001/84/CE), which provides, in favor of the author, a right to compensation on the price of each sale subsequent to the first transfer of the work. On copyright, recently, see P. Virgadamo, n 13 above, 1500.

[20] *Amplius*, V.M. Sessa, n 14 above, 2941, who, after having outlined the technical and legal

Decree no 19 of 1979, ratifying and executing the Paris Text of the Berne Universal Convention of 24 July 1971.[21]

A first regulatory clue can be found in Art 64 of the Code of cultural heritage (decreto legislativo 22 January 2004 no 42 Codice dei beni culturali e del paesaggio), according to which

> 'whoever carries out the activity of sale to the public, exhibition for the purpose of intermediation aimed at the sale of paintings, sculptures, graphics or objects of antiquity, or of historical or archaeological interest, or in any case usually sells the work of arts or objects themselves, has the obligation to deliver to the buyer the documentation certifying the authenticity or, at least, the probable attribution and origin of the artworks. Alternatively, a declaration may be issued in the manner provided by the laws and regulations on administrative documentation, containing all the available information on authenticity or probable attribution and origin. This declaration, where possible in relation to the nature of the art work and the object, shall be attached to a photographic copy of the same'.[22]

This is a typical legal effect,[23] specifying the obligation upon individuals who carry out public selling activities to deliver certificates of authenticity of the artist's artworks (also known in commercial language as the 'authentic photo').

Nevertheless, Art 64 of the cultural heritage code allows a first summary and descriptive classification of the 'archiving' concept: the declaration of 'accreditation',[24] made by a person engaged in the activity of sale to the public,

concept of a work of art, deals with the scope of applicability of legge 22 April 1941 no 633 and legge 1 June 1939 no 1089, including the time limits for the protection of the copyright.

[21] The Berne Convention for the Protection of Literary and Artistic Works was signed on 9 September 1886, completed in Paris on 4 May 1896, revised in Berlin on 13 November 1908, completed in Bern on 20 March 1914, revised in Rome on 2 June 1928, in Brussels on June 26, 1948, in Stockholm on 14 July 1967 and finally in Paris on 24 July 1971.

[22] As modified by decreto legislativo 26 March 2008 no 62. On the basis of consolidated case law, the provision in question applies to the case referred to in the text: indeed, according to the new code of cultural heritage, the works of living authors and those whose execution does not date back to more than fifty years are excluded from the general regulation on cultural heritage of the national heritage, but not from the specific regulation relating to the authentication and counterfeiting of works of art Tribunale di Lecce 20 April 2009, *Giurisprudenza di merito*, 2262 (2010).

Concerning the rule referred to in the main text, see B. Mastropietro, 'Mercato dell'arte e autenticità dell'opera: un "quadro" a tinte fosche?' *Rassegna di diritto civile*, 556 (2017), which analyses the problems related to the issue of authentication (of tangible and intangible works) by the author himself and by certified bodies and the artist's heirs. On cultural inheritance protection, see A. Mansi, *La tutela dei beni culturali e del paesaggio* (Padova: CEDAM, 2004), 173, with regard to the aspects of the marketability of such goods and those relating to the counterfeiting of artistic works.

[23] Corte di Cassazione 3 July 1993 no 7299, *Giurisprudenza italiana*, 1, 410 (1994); also available in *Giustizia civ*ile, I, 1925 (1994); and in *Diritto d'autore*, 424, (1994), with regard of the same duty pursuant to Art 2 legge no 1062 of 1971.

[24] P. Cipolla, 'La prova del falso d'arte, tra il principio del libero convincimento e l'obbligo di motivazione razionale' *Giurisprudenza di merito*, 2201-2214 (2010), which distinguishes the

containing all the available information on the authenticity or probable attribution and origin of the artwork in the absence of other documentation, or, in alternative, a documentation, different from the previous one, certifying the authenticity or at least the probable attribution and origin of the works.

This set of rules, however, does not allow to solve in our system the issue of the possible configuration of the right to authenticate, exclusively or not, on behalf of certain subjects. Different approaches to this problem may be identified.

According to one opinion,[25] this right may be considered as part of the author's moral right and can be exercised by the author himself during his lifetime: pursuant to Art 20 legge no 633 of 1941, in fact, the author can 'claim the authorship of the work and oppose any distortion, mutilation or other modification'; he can also oppose any 'act to the detriment of the work itself' that may cause 'prejudice to his honor and his reputation', so that he would be the only person entitled to the declaration of authenticity. Therefore, in order to be qualified as an expression of the author's moral right, the right of authentication should be transferred to the legitimate holder, and/or other categories of heirs referred to in Art 20 legge no 633 of 1941, as purchase *iure proprio* (and not *mortis causa*) on the occasion of death,[26] subject to the condition that the person called to inherit accepts the inheritance.[27] In commercial law, this approach suggests that the right of authentication would belong exclusively, in case of death of the author, to the categories identified by Art 23 legge no 633 of 1941, and in particular just to the legitimate holders (for instance, the surviving spouse and children).

A different perspective is offered by relevant case law, according to which

> '*expertise* is a document containing an authoritative opinion of an expert on the authenticity and attribution of an artwork. The document can be issued by anyone, on the market, considered competent, since it is not a right exclusively reserved to the artist's heirs, who cannot, therefore, attribute or deny to third parties, such as art critics or scholars, the right to release

authentication ('autenticazione'), proper to the author or expert, from the accreditation ('accreditamento'), which is of anyone; P. Cipolla, 'La falsificazione di opere d'arte' *Giurisprudenza di merito*, 2032 (2013); P. Cipolla, 'L'arte contemporanea, la repressione penale del falso e l'art. 2, comma 6, d.lgs. 29 ottobre 1999 n. 490' *Cassazione penale*, 2463 et seq (2002). Instead, he speaks of a sort of 'self-declaration' ('autodichiarazione'), A. Ardito, 'Commento all'art. 64', in A. Angiuli et al eds, *Commentario al codice dei beni culturali e del paesaggio* (Torino: Giappichelli, 2005), 190. According to another part of the scholars, this certificate would be aimed at guaranteeing the 'lawfulness' of the origin: A. Papa, 'Commento all'art. 64', in V. Italia et al ed, *Testo unico sui beni culturali* (Milano: Giuffrè, 2000), 177. For an analysis of the cited rule and more references, see A. Milione, 'Commento all'art. 64', in M.A. Sandulli ed, *Codice dei beni culturali e del paesaggio* (Milano: Giuffrè, 2006), 479.

[25] More references in G. Frezza, n 11 above, 39.

[26] Tribunale di Milano 1 July 2004, unpublished.

[27] Among others, A. Palazzo, 'Le successioni', in G. Iudica and P. Zatti eds, *Trattato di diritto privato*, (Milano: Giuffrè, 2000), I, 3; P. Perlingieri, 'I diritti del singolo quale appartenente al gruppo familiare' *Rassegna di diritto civile*, 90, 71-108 (1982); T. Ascarelli, *Teoria della concorrenza e dei beni immateriali* (Milano: Giuffrè, 1960), 761; A. Cicu, 'Successioni per causa di morte', *Parte generale*, in A. Cicu and F. Messineo eds, *Trattato di diritto civile* (Milano: Giuffrè, 1961), XII, 70.

> expertise on authenticity of the work of their relative. The formulation of judgments on the authenticity of a work of art made by a deceased artist constitutes an expression of the right to free expression of thought and, therefore, may be carried out by any expert accredited by the marketplace'.[28]

The above mentioned case law reiterates the concept according to which

> 'since the attribution of an artwork to an artist is mere expertise on a commercial level, it can be carried out by any accredited expert that operates in the marketplace'.[29]

It is therefore inherent to the right of free expression of thought, in compliance with Art 21, para 1, of the Constitution.[30]

The question then arises as to the legal qualification of this activity.

[28] Tribunale di Roma 16 February 2010, *Diritto di famiglia e delle persone*, 1730 (2011). See also Corte di Appello di Milano 18 April 2017 no 1654, unpublished; Tribunale di Roma 31 March 2010, unpublished; Corte di Appello di Roma 8 June 2010 no 3657, unpublished; Tribunale di Milano 17 April 2014 no 5552, unpublished.

[29] Tribunale di Milano 13 December 2004, IP special section, unpublished.

[30] The freedom of expression must be understood as a freedom with contents that cannot always be the same but must be evaluated '(...) case by case, avoiding (...) judgments pronounced *ex ante* on the basis of a perpetual edict': L. Paladin, 'Libertà di pensiero e libertà d'informazione: le problematiche attuali' *Quaderni costituzionali*, 12, 5-27 (1987); A. Di Giovine, *I confini della libertà di manifestazione del pensiero* (Milano: Giuffrè, 1988), 12; C. Visconti, *Aspetti penalistici del discorso pubblico* (Torino: Giappichelli, 2008), 243. In this vein, A. Morrone, *Il custode della ragionevolezza* (Milano: Giuffrè, 2001), 451, speaks of 'dialectic between constitutional provisions, legislative provisions and contexts'. More details available also in C. Caruso, 'Tecniche argomentative della Corte costituzionale e libertà di manifestazione del pensiero', in C. Valentini ed, *Costituzione e ragionamento giuridico* (Bologna: Archetipolibri, 2012), 169.

It is useful to remember that authoritative scholars generally place this freedom within the framework of the fundamental rights of the person (this is known to constitutionalists as the 'individualist' approach): C. Esposito, 'La libertà di manifestazione del pensiero nell'ordinamento italiano', in Id ed, *Diritto costituzionale vivente: Capo dello Stato ed altri saggi* (Milano: Giuffrè, 1992), 119, for whom when it is argued that Italian Constitution guarantees the right of expression of thought in an individualistic sense, it means that it is guaranteed to the individual as such regardless of the qualifications that the individual may have in any community and of the functions connected to such qualifications; it also means that it is guaranteed so that man can unite with the other man in thought and with thought and eventually operate together. P. Barile, *Libertà di manifestazione del pensiero* (Milano: Giuffrè, 1975), 81; A. Pace and M. Manetti, 'Articolo 21', in G. Branca and A. Pizzorusso eds, *Commentario della Costituzione. Rapporti civili* (Bologna: Zanichelli, 2006), 97.

On the relationship between freedom of thought and human dignity, see L. Scaffardi, *Oltre i confini della libertà di espressione. L'istigazione all'odio razziale* (Padova: CEDAM, 2009), 228. Regarding the relationship between Art 21 Constituion and the principle of equality, see: P. Caretti, 'Manifestazione del pensiero, reati di apologia e di istigazione: un vecchio tema che torna d'attualità in società multietnica', in Id et al eds, *Diritti nuove tecnologie trasformazioni sociali, Scritti in memoria di Paolo Barile* (Padova: CEDAM, 2003), 125 and A. Pizzorusso, 'Limiti alla libertà di manifestazione del pensiero derivanti da incompatibilità del pensiero espresso con princípi costituzionali', ibid 667. See also G. Nicastro, 'Libertà di manifestazione del pensiero e tutela della personalità nella giurisprudenza della Corte Costituzionale', available at https://tinyurl.com/54cwbj4y (last visited 30 June 2022). On the evolution of doctrinal and case law interpretation of Art 21 Constitution see F. Polacchini, n 4 above, 23-30.

According to part of the literature, the judgment expressed by a certifying body is considered as 'a personal opinion', therefore subjective, unsuitable to become objective evidence. From this point of view, in addition to being an expression of Art 21 of the Constitution, the 'opinion' also implements Art 33 Constitution, which implies that the declaration comes from freedom of teaching. In this sense, the 'opinion' is necessarily linked to the scientific dignity and authority of its author.

According to an additional point of view, 'the so-called archiving', not carried out by the author or by an expert of national importance, technically constitutes 'authentication' and falls within the category of accreditation, the value of which depends on the qualifications of the person granting it: it constitutes a simple private writing having an assertive content of an act not referable to the declarant and so attributable to the category of 'opinions'.[31]

We believe that a univocal legal classification of the activity, herein described, is not satisfactory, as it appears essential to contextualize it taking into account the peculiarity of the concrete matter which it refers to.[32] Indeed, beyond the *nomen iuris*, there is an incontrovertible fact: when an expert scholar writes a scientific essay (hence, the coordination with Art 33 of the Constitution), following a paper published by the opinion press or as an idea publicly expressed either through the so-called media or social media, this activity can be qualified as freedom of expression of thought. In these cases, the limits set out in para 6 of Art 21 Constitution will apply.

The case is, however, different– as is in the majority of concrete instances – where thought is expressed not as a purely subjective 'opinion' but as an objective assessment: expressing one's own idea, in fact, about the beauty of the artwork or its suitability to be considered as such, which is a purely subjective assessment, is quite different from verifying that the signature of the painting is an autograph, that the canvas corresponds to those usually used by the artist, that the graphic trait is ascribable to the artist, that the colors are of the same quality as those used by the artist, etc, which are all objective evaluations.[33]

This clarification may not seem quite relevant, but it will actually reveal its

[31] P. Cipolla, n 24 above, who clarifies the evidentiary value of a certificate of authenticity (and its characteristics).

[32] According to the method suggested by P. Perlingieri, 'Produzione scientifica e realtà pratica: una frattura da evitare' *Rivista di diritto commerciale*, 455-477 (1969), also available in *Studi in onore di Giuseppe Grosso* (Torino: Giappichelli, 1974), VI, 397, and in Id, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 1.

[33] In our opinion, a descriptive parallelism can be drawn between what is argued in the text and the activity of the seller-gallery owner of the work, whose behavior must always be informed of the obligations of diligence and correctness (Art 1176 of the Italian Civil Code) jointly and severally liable (Art 2055 of the Civil Code) for damages if the work sold is subsequently found plagiarized: Corte di Cassazione 26 January 2018 no 2039, *Rivista di diritto industriale*, 420 (2018). The principle that emerges from the reading of this ruling allows to affirm that the obligation to behave with the duty of qualified diligence pursuant to Art 1176 of the Italian Civil Code is always upon the experts of the art market.

significance in relation to our following reasoning: indeed, being the opinion 'incoercible', no action is given, in abstract, against those who, expressing their opinion, do not recognize the authenticity of the artwork. Coercion, in fact, against one's thought is unthinkable. The possibility, therefore, to bring proceedings before a court, in order to obtain a 'mandatory' filing, must be excluded, when different authorities express their negative opinion. Summarizing, the problem is connected with the existence or not of the right to a judicial assessment of the authenticity of the work, which will be discussed in the following paragraph.

## IV. Judicial Assessment of the Artwork's Authenticity: The Negative Stance of the Italian Courts

Thus, we have come to the essential core of the matter, namely the analysis of the question concerning the admissibility of a claim for verification of the authenticity of a work of art.[34] As case law teaches, it can be prodromal in relation to the need to protect a substantial situation, such as the case relating to compensation for damages for tortious liability.[35] At times, this assessment may constitute the grounds of a request for protection aimed at eliminating a situation of uncertainty concerning the right of ownership (of the work of art).[36] Yet, in some cases, this claim is proposed *tout court*, ie regardless of its necessary connection to a subjective right, simply because the certifying body, accredited by the market – and therefore able to influence the economic and financial evaluation of the work – rejects the inclusion in its archive,[37] or errs in its dating.[38]

Finally, it should not be forgotten that the assessment of authenticity may constitute the requirement of a claim for termination of the sale contract of the artwork, either due to lack or defect of essential qualities of the goods sold, pursuant to Art 1497 of the Italian Civil Code; or in order to ascertain the delivery of *aliud pro alio* or seek for annulment of the contract for error on the essential qualities of the artwork, pursuant to Art 1429 no 2 of the Italian Civil Code.

Herewith, we shall exclusively deal with the case where such a claim is brought *tout court*, ie regardless of the protection of a subjective situation as a precondition.

[34] M.F. Guardamagna, 'L'azione di accertamento giudiziale dell'autenticità di un'opera. I recenti sviluppi giurisprudenziali' *Diritto di famiglia e delle persone*, 1588-1606 (2018).

[35] Corte di Cassazione 4 May 1982 no 2765, *Giustizia civile*, II, 1982, 1745, with the analysis of Di Majo, *Ingiustizia del danno e diritti non nominati*; also available in *Foro italiano*, I, 1, 1982, c 2864, with reflections of F. Macario.

[36] Corte di Appello di Milano 11 December 2002, *Diritto d'autore*, 224 (2004), with note of M. Fabiani.

[37] Tribunale di Milano 19 June 2006 no 127, *Repertorio Foro italiano*, *Diritti d'autore* (2008); Tribunale di Milano 18 January 2006 no 74, *Repertorio Foro italiano*, *Diritti d'autore* (2009); Tribunale di Milano 17 October 2007 no 142, *Repertorio Foro italiano*, *Diritti d'autore* (2009).

[38] Tribunale di Milano 14 July 2012 no 8626, *Danno e responsabilità*, 291 (2014).

According to a decision of the Supreme Court of Cassation[39] in relation to 'cognitive' judgments, the action of ascertainment cannot have as its object – except in the cases provided by the law – a mere factual situation. Instead, it must aim at the protection of a right that has already arisen from an actual and not simply potential harm. Therefore, the action aimed at obtaining the independent ascertainment of the authorship of a work of art is inadmissible.

However, case law appears to be based on two opposing positions. The Court of Milan, eg, has recently held this action admissible if based on indisputable (scientific and factual) elements. Contrarily, it declared inadmissible an order for inclusion in the general catalogue of an artist, edited by an institution that carries out artworks' archive activity, since it represents a free expression of thought and is unenforceable[40]. The Court of Rome, instead, has a different opinion, since it has issued, within a very short period of time, several judgements, with the same 'facto and the same 'motivations'. In particular, following the refusal to archive by the most accredited certification body, a claim was submitted on the grounds that the opinion given was the result of both incompetence and naivety and in breach of the most elementary principles of professional diligence; the request, however, was declared inadmissible by the judge.[41]

The reasoning behind these decisions can be summarized as follows:

*a)* the opinion issued by any certifying body represents a free expression of opinion (Art 21 of the Constitution);

*b)* the claim aimed, in these cases, to the ascertainment of the authorship of the artwork either in the event of discordance of opinion or in that of uncertainty. Hence, the question that arises is whether a judge has the power to ascertain, with the charisma of truth, such authenticity or not;

*c)* it must be ruled out that this power can be exercised pursuant to Art 72 of the Notary law, concerning the verification of the authenticity of the signature, as already clarified by previous case law;

*d)* in the absence of unquestionable evidence, such as photographic documentation of the artist while he/she is creating the artwork, it is only possible to ascertain in probabilistic terms whether a pictorial work is attributable to an author on the sole basis of the trait or signature;

*e)* therefore, no judicially enforceable law exists to ascertain the authenticity of an artwork[42]. On the matter, the Court of Rome states: 'if it is true that a judicial assessment aims at affirming the existence of a right as a legitimate prescriptive will when settling a dispute, this would imply an exclusive attention to a 'mere

[39] Corte di Cassazione 30 October 2017 no 28821, *Foro italiano*, 1, I, c 167 (2018).

[40] Tribunale di Milano 15 February 2018 no 4754, *Diritto di famiglia e delle persone*, 660-665 (2019).

[41] Tribunale di Roma 15 May 2017 no 9610, *Foro italiano*, I, c 3772 (2017); Tribunale di Roma 17 April 2018 no 7792; Tribunale di Roma 21 June 2018 no 12692.

[42] Tribunale di Roma 15 May 2017, *Foro italiano*, I, 12, c 3772 (2017), with opinion of G. Casaburi.

evaluation' or yet a determination of the existence or not of a lawful right. The assessment is not, actually, finalized to confer procedural truth and to implement a rule in a specific case but to ascertain a lawful right in abstract. Therefore, the focus must be on what is 'the right' (...)

> 'considered being the object of the judicial assessment. Clearly, such right cannot concern the ownership of the artwork, since it is undisputed that the pictorial work of art *sub iudice* belongs to the claimant, nor can it concern the moral right of copyright',

which belongs to the persons indicated by Art 20 of the copyright law;

*f)* in which case, again according to the abovementioned judge, the object of the claim is not to establish a right, but to verify the existence of a series of qualities of the good, such as the artistic trait, the colors, the use of a certain canvas or of typical subjects. The latter, all together, could lead to a judgement of probability related to an artist who worked according to well-known patterns.

Nowadays such case-law approach seems to be consolidated, although we have recently tried to identify reasons in favor of the admissibility of a claim of ascertainment,[43] from a structural and functional perspective.

## V. A Possible Theoretical Reconstruction

We believe, above all, essential to propose a constitutionally oriented interpretation of the action of ascertainment and its object, emphasizing, as said by Wach and Chiovenda, how necessary it is to consider the 'prejudicial uncertainty',[44] so to evaluate the judicial protection requested, in view of the fact that the trial is useful 'not only for the protection of subjective rights, but first and foremost for the implementation of the legal system'.

In this perspective, we favor a hermeneutical approach in the context of which it is also possible to protect 'interests that are not legally relevant as subjective rights, for which the constitutional protection of Art 24 of the Constitution does not apply, if not with a functional profile'[45] so as to ensure a more suitable action adherent to the actual social reality.[46]

[43] G. Frezza, n 11 above, 76.

[44] G. Chiovenda, 'Azioni e sentenze di mero accertamento' *Rivista di diritto processuale civile,* I, 31 (1933); G. Chiovenda, 'Adolfo Wach' *Rivista di diritto processuale civile,* I, 366 (1926), also available in *Saggi di diritto processuale civile (1894-1937)* (Milano: Giuffrè, 1993), 263.

[45] G. Frezza, n 11 above, 91.

[46] According to F. Ferrari, 'Un inquadramento sistematico del diritto all'autenticità dell'opera d'arte: "Arte e diritto fra autenticazione e accertamento" di G. Frezza' *dirittodelleartiedellospettacolo.it* (2020), 'a similar phenomenon – now solved at a regulatory level, at least in the field of intellectual property – has also been placed in the past in the context of the discussion regarding the possibility of acting in a negative assessment even as a precautionary measure, as is now envisaged by Art 120 para 6 *bis* code of intellectual property. Precisely with reference to the negative assessment actions, with

Secondly, it must also be pointed out – herein appropriately and concisely – that the 1942 codification left behind the naturalistic idea of the concept of 'thing', that may also be suitable to comprise the work of art. At the same time, thanks to the contribution of the best civil law doctrine, a clear distinction between 'thing' and 'good' has been formulated. The 'thing' is conceived as a pre-juridical and neutral concept, while the concept of 'good' is the result of the legal qualification[47] and is intended as a legal synthesis between the usefulness of the thing (objective element) and the interest to protect the subjective legal situation (subjective element).[48] Thus, emphasizing just one of the two factors afore mentioned, to ensure the unity of the theoretical notion of good, is a formalistic, static and partial approach. The identification of the asset as an interest, which leads to the qualification of the situation of 'apprehension' of the same, must also be followed by the evaluation of the utility expressed by the 'thing', which, in the case of a work of art, is at the same time existential and patrimonial. Therefore, it seems that the inadmissibility of the action to ascertain the authenticity of the artwork leads to disregarding the importance of the 'utility' element of the notion of good, as seems to be argued by the case law herein criticized. Then, if works of art can be considered as *res* in the juridical sense (ie, a synthesis of interests and utility), it is necessary to affirm that the inadmissibility of ascertaining the authenticity of the work ontologically frustrates this element, linked to the notion of legal asset: indeed, a non-authentic work of art does not have the character of utility.

Finally, it seems essential to analyze how the owner *status* concerning the artwork is regulated: Art 832 of the Italian Civil Code defines the right of ownership as the faculty to enjoy and, separately, to dispose of the good.[49] This is clearly not a hendiadys, and, consequently, the two powers assume autonomous significance.

Relevant legislation, in particular, cannot be interpreted as the exclusive

respect to which the fear is evidently that of avoiding the reintroduction in the legal system of the non-compliance actions, in light of the lack of an ad-hoc rule, the object of the judgment would not concern the right itself, but mere questions (E. Merlin, 'Azione di accertamento negativo di crediti ed oggetto del giudizio' *Rivista di diritto processuale civile*, 1064-1082 (1997).

47 R. Nicolò, *L'adempimento dell'obbligo altrui* (Milano: Giuffrè, 1936; Camerino: Edizioni Scientifiche Italiane, 1978), 78; P. Perlingieri, *I negozi su beni futuri*, I, *La compravendita di cosa futura* (Napoli: Jovene, 1962), 45.

48 It is the well-known perspective of S. Pugliatti, 'Immobili e pertinenze nel progetto del secondo libero del codice civile', in Id, *Beni immobili e beni mobili* (Milano: Giuffrè, 1967), 192; Id, 'Riflessione in tema di "*universitas*" '*Rivista trimestrale di diritto e procedura civile*, 992 (1955). In this vein, G. Carapezza Figlia, *Oggettivizzazione e godimento delle risorse idriche. Contributo a una teoria dei beni comuni* (Napoli: Edizioni Scientifiche Italiane, 2008), 8-29, where is available a further analysis.

49 L. Barassi, *Proprietà e comproprietà* (Milano: Giuffrè, 1951); N. Irti, *Proprietà e impresa* (Napoli: Jovene, 1965); C. Salvi, 'Il contenuto del diritto di proprietà', in A. Gambaro, 'La proprietà', in A. Gambaro and U. Morello eds, *Trattato dei diritti reali*, I, *Proprietà e possesso* (Giuffrè: Milano, 2008), 295; F. Macario, 'Commento all'art. 832 c.c.', in E. Gabrielli ed, *Commentario del Codice Civile* (Torino: UTET, 2013), 291.

'right to alienate' the owned good (ie the artwork) but it consists, in agreement with a shared opinion, of the 'power of appropriation of the good's economic value'.[50] Since this approach is favored by the Constitution, belief towards the constitutional right to ownership has, in recent years, come about.[51]

Indeed, if the Civil Code focuses on the right of ownership through a variegated catalog of actions in its defense and different forms of protection[52], the

[50] C. Argiroffi, *Delle azioni a tutela della proprietà*, in P. Schlesinger ed, *Codice civile. Commentario* (Milano: Giuffrè, 2011), 24.

[51] P. Perlingieri, 'Introduzione alla problematica della «proprietà»', in Id ed, *Raccolta di lezioni* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1971-1972), passim; Id, 'Note sulla crisi dello Stato sociale e sul contenuto minimo della proprietà' *Legalità e giustizia*, 439 (1983); Id, 'Proprietà, impresa e funzione sociale' *Rivista di diritto dell'impresa*, 207-227 (1989); Id, 'Principio «personalista», «funzione sociale della proprietà» e servitù coattiva di passaggio' *Rassegna di diritto civile*, 688-697 (1999); Id, 'Introduzione a H. Rittstieg, La proprietà come problema fondamentale. Studio sull'evoluzione del diritto mercantile', in E. Caterini ed, *Traduzioni della Scuola di specializzazione in diritto civile dell'Università di Camerino* (Napoli: Edizioni Scientifiche Italiane, 2000), 9; P. Perlingieri, 'Conclusioni', in G. D'Amico ed, *Proprietà e diritto europeo* (Napoli: Edizioni Scientifiche Italiane, 2013), 325; Id, '«Funzione sociale» della proprietà e sua attualità', in S. Ciccarello et al eds, *Salvatore Pugliatti, I Maestri italiani del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2016), 187; Id, 'La «funzione sociale» della proprietà nel sistema italo-europeo' *Corti salernitane*, 175-195 (2016). About property right there are several theories in literature; on the one hand, the 'storic' perspective (P. Grossi, *Le situazioni reali nell'esperienza giuridica medievale* (Padova: CEDAM, 1968); P. Perlingieri, *Un altro modo di possedere: l'emersione di forme alternative di proprietà alla coscienza postunitaria* (Milano: Giuffrè, 1977); Id, *Il dominio e le cose. Percezioni medievali e moderne nei diritti reali* (Milano: Giuffrè, 1992); F. Vassalli, 'Della legislazione di guerra e dei nuovi confini del diritto privato', in Id, *Studi giuridici* (Milano: Giuffrè, 1960), II, 359; F. Vassalli, 'Per una definizione legislativa del diritto di proprietà', in Id, *Studi giuridici* above, 239; S. Romano, 'Sulla nozione di proprietà' *Rivista trimestrale di diritto e procedura civile*, 337 (1960)); on the other hand, the reconstructive perspective (S. Pugliatti, *La proprietà nel nuovo diritto* (Milano: Giuffrè, 1954); S. Rodotà, 'Note critiche in tema di proprietà' *Rivista trimestrale di diritto e procedura civile*, 1252 (1960); S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Bologna: il Mulino, 1981); P. Rescigno, *Lezioni su proprietà e famiglia* (Bologna: il Mulino, 1971); P. Rescigno, 'Per uno studio sulla proprietà' *Rivista di diritto civile*, I, 1 (1972); other scholars, furthermore, suggest an economic view of property right (R. Sacco, *La proprietà* (Torino: Giappichelli, 1968); U. Mattei, 'La proprietà', in R. Sacco ed, *Trattato di diritto civile*, *Diritti reali* (Torino: UTET, 2001), 6; A. Gambaro, *Il diritto di proprietà*, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1995), 1; A. Gambaro, *La proprietà*, in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 1990), 98). See also, in the last perspective, G. Calabresi and A.D. Melamed, 'Modelli di analisi economica e regole giuridiche nella disciplina della proprietà', in G. Alpa et al eds, *Analisi economica del diritto privato* (Milano: Giuffrè, 1998), 69; C.M. Rose, 'Il contributo dell'economica al diritto di proprietà', in G. Alpa et al eds, ibid 78; A. Pericu, '*Property rights* e diritto di proprietà', in G. Alpa et al eds, *Analisi economica* n 51 above, 102. See also, *ex multis*, F. Parisi, 'Private Property and Social Cost' 2 *European Journal of Law and Economics*, 149-173 (1995); H. Demsetz, 'Toward a Theory of Property Rights' 57 *American Economic Review*, 2, 347-359 (1967), also in the Italian translation E. Colombatto, *Verso una teoria dei diritti di proprietà*, in E. Colombatto et al eds, *Tutti proprietari la nuova scuola dei property rights* (Firenze: Le Monnier, 1980), 61; Y. Barzel, *Economic Analysis of Property Rights* (Cambridge: Cambridge University Press, 1997); A.A. Alcian, 'Some Economics of Property Rights' 30 *Il politico*, *4*, 816-829 (1965).

[52] These actions have as their object the mere ascertainment of the right of ownership and tend to 'eliminate any uncertainty about the legitimacy of the power of fact and law over the property or rather in the declaration of compliance of the state of fact with the rule of law' (L. Colantuoni, 'Le azioni petitorie', in *Trattato dei diritti reali, Proprietà e possesso* (Milano: Giuffrè, 2008), I, 983). The Italian

Constitution is suitable for outlining a relevant content element, to be understood as a synthesis between the patrimonial value of the asset (patrimonial legal situation) and the fulfillment of the value of the person (existential legal situation).

The ownership of a work of art represents the paradigmatic example of a situation that adds up, both the existential profiles (ie with merely aesthetic profiles related to the possession and enjoyment of the artwork) and patrimonial profiles. Nevertheless, this legal state of affairs cannot be statically understood, as seems to be argued by the case law referred to above and herein criticized, but rather, should be approached in a dynamic sense, as a power of disposition.

It is within this framework that the certifying institution, called upon for the archiving at the end of an intellectual operation, comes into play. As previously mentioned, issuing a negative opinion is an expression of freedom of thought, a pure and unquestionable opinion and, as such, unenforceable. We have already argued that this 'opinion' must necessarily be objectified in an opinion rendered with diligence, reliability and good faith. The refusal to file the application and the consequent request for judicial verification of authenticity, cannot be rejected on the basis of the assumption, typical of the above-mentioned case law, according to which rights but not facts are ascertained, such as whether the artwork is authentic or not. Thus, its immediate consequence would irremediably compromise the patrimonial aspect and disposal of the artwork itself and, more so, if the certifying body is the one most accredited by the art market.

Finally, this position could be qualified as 'dominant' and contradictory to the competition rules of the Italian-European system of sources of law[53], if considered from an economic-mercantile standpoint.

These three arguments (the constitutionally oriented interpretation of the assessment action; the work of art as a 'good' in the legal sense including *utilitas*; the functional concept of ownership of the artwork) may represent, with the obvious assistance of expert witnesses, solid points for the admissibility of the judicial ascertainment of the authenticity of the artwork.

legal system provides different types of mere assessment actions: for instance, the one referred to in Art 949 of the Italian Civil Code and to the action for the settlement of boundaries; hence the issue, in legal literature, regarding the admissibility of a general, atypical assessment action (ibid 984).

53 R. Mongillo, *Opere dell'ingegno, idee ispiratrici e diritto d'autore* (Napoli: Edizioni Scientifiche Italiane, 2012), 78; A. Pappalardo, *Il diritto della concorrenza dell'Unione europea* (Torino: UTET, 2018); A. Catricalà et al eds, *Concorrenza, mercato e diritto dei consumatori* (Torino: UTET, 2018); C. Fratea, *Il* private enforcement *del diritto della concorrenza nell'Unione europea* (Napoli: Edizioni Scientifiche Italiane, 2015).