Fashion Law, Italian Style - Symposium

The Reproduction of Cultural Heritage and Artworks in Fashion

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Abstract

The fashion industry has traditionally drawn from the world of art and culture by incorporating elements of cultural heritage and works of art into its design. Indeed, it is quite common for fashion brands to display renowned works of art and cultural heritage on catwalks, magazines and billboards. However, using such elements, whether cultural heritage or works of art, raises significant legal issues. For instance, intellectual property laws which protect the creators of works of art from unauthorized use of their creations require permission from the author and the paying of licensing fees. Also, Italy has a restrictive legislation protecting cultural heritage, which severely limits the possibility of the reproduction of cultural heritage, especially for commercial purposes, and even if the good is located on a public road.

I. Introduction

The fashion industry has traditionally drawn from the world of art and culture by incorporating elements of cultural heritage and works of art into its design. Indeed, it is quite common for fashion brands to display renowned works of art and cultural heritage on catwalks, magazines and billboards. Sometimes, they even choose some historic monuments as the backdrop for their advertising campaigns or fashion shows, such as Fendi with the Trevi Fountain in Rome or Yves Saint Laurent with the Tour Eiffel in Paris. However, using such elements, whether cultural heritage or works of art, raises significant legal issues.

First, intellectual property laws protect the creators of works of art from unauthorized use of their creations. Therefore, if a fashion designer wants to use a particular copyrighted piece of art in his/her collection or campaigns, he/she will need to obtain the proper permission from the author of the artistic work and probably pay licensing fees. Nonetheless, several designers have been criticized for reproducing renowned works of art without proper authorization or without giving proper credit to the original authors. For example, last year the unauthorized use of some works of the famous street artist Bansky in the windows of Guess' clothing

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stores made headlines and very recently Louis Vuitton has been sued by the Joan Mitchell Foundation for using images of its paintings in the last campaign after being denied permission.

In addition, most countries have adopted specific regulations on the reproduction of cultural heritage on a product or in an advertisement. This is especially true in Italy, where the legislation protecting cultural heritage is quite restrictive, severely limiting the possibility of its reproduction, especially for commercial purposes, and even if the good is located on a public road.

In addition to the two legal frameworks mentioned above, many others come to light when discussing the reproduction of things for commercial purposes, as might be in the case of a t-shirt reproducing a famous art photograph depicting a celebrity or someone's home. In such instance, for example, the right to the image of the person portrayed, as well as the photographer's copyright, would also come into play, and, in the second case, the property right of the owner of the building. Moreover, additional issues might be other personality rights, including the right to privacy, or the rights of a company against its competitors when it is harmed by a conduct constituting an act of unfair competition.

II. The Protection of a Work of Art in Italy

In Italy, the national historical and artistic heritage protection is a fundamental right enshrined in Art 9 of the Constitution.[1] Such a principle is then implemented by two different sets of rules that protect works of art that are also cultural heritage from different perspectives: the decreto legislativo 22 gennaio 2004 no 42 (ICHC) – which poses a discipline to protect the artistic heritage from an objective perspective – and legge 22 April 1941 no 633 (ICL) – which, from a subjective perspective, protects the author of the work of art.

As to the latter, ICL protects

> 'intellectual works of a creative nature belonging to literature, music, figurative arts, architecture, theater and cinematography, whatever the mode or form of expression (...)'.[2]

In order to be protected, the intellectual work must possess the character of creativity, which is traced in general terms to the concept of originality – intended as the result of a non-trivial activity of human ingenuity: the work is original insofar as it represents the result of an intellectual elaboration that reveals the author's personality.

Where works do not meet the necessary protection requirements to fall under

[1] 'The Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation.'

[2] ICL, Art 1.

copyright protection, obtaining prior consent from the rights holder to reproduce them will not be necessary.

ICL identifies the content and duration of the author's rights, divided into moral rights and economic rights on the work created. The formers pertain to the sphere of personality rights. Therefore, they are inalienable, nonwaivable, imprescriptible, and independent of patrimonial rights. An important difference with other legal systems in fact is that in Italy moral rights cannot be assigned to third parties or waived by the author and a contractual clause providing that will be deemed invalid. The moral rights of the author include the right to claim authorship of the work and to object to any deformation, modification or act to the detriment of the work itself, such as to prejudice the honor and reputation of the author, as well as the right of first publication, and the right to withdraw the work from commerce where serious moral reasons concur.

In contrast, the rights of economic use of the work, or patrimonial rights, are renounceable and assignable to third parties and they expire when seventy years have elapsed from the author's death. These include the right to publish the work, the right to reproduce the work in multiple copies, the right to transcribe the work orally, the right to perform, play or recite the work in public, the right to communicate the work to the public, the right of distribution, the right to elaborate, translate and publish works in collections, and the right to rent and lend.

When it comes to photographs, the above applies to artistic photographs whereas specific rules on related rights regulate the right of reproduction of simple photographs (Arts 87-92 ICL).[3] A simple photograph is a mere reproduction of reality, devoid of any expressive content, including reproductions of works of the figurative arts. In particular, Art 88 ICL recognizes some exclusive rights of economic use to the author of a simple photograph: the exclusive right of reproduction and the exclusive right to distribute and sell the photograph, except as provided for portraits and without prejudice to copyrights on the reproduced work when it concerns photographs reproducing works of figurative art. According to Art 92 ICL, the duration of the exclusive rights accruing to the photographer is twenty years from the creation of the photograph. Therefore, regardless of the nature of the asset photographed – whether it is a work of figurative art still protected by copyright or a cultural property in the public domain – Art 88 ICL introduces a limitation on the possibility of using images of properties qualified as cultural heritage and assigned to the care of museums, archives, and libraries, as well as properties located on the public road. Reusing such photographs is subject

[3] Mere photographs are distinguished from photographs endowed with creative character, which are protectable as the subject of copyright. Indeed, the photographic work finds protection in Art 2, para 7, ICL 'the photographic works and those expressed by a process similar to photography as long as they are not mere photographs (...).' In order to qualify as an artistic photograph, a photograph must meet the requirement of creativity and thus represents the result of the author's intellectual creation. This means that the photographer must have conveyed in the shot his/her own imagination, personal taste, sensitivity, and interpretation of reality.

to the constraints deriving from the exclusive rights still granted by the related right on images under Arts 87-88 of ICL. It will be discussed below that similar restrictions are present in the ICHC.

Some provisions of the ICL provide exceptions and limitations to the author's exclusive rights over his/her own artwork. Specifically, relevant exceptions include those pertaining to the reproduction, communication, and making the work available to the public.

The most relevant exception for our purposes is that provided by Art 70 ICL, which introduces some restrictions to the general rule that the reproduction of a copyrighted work always requires the permission of its author or his/her descendants. Para 1 states that

> 'The summary, quotation or reproduction of songs or parts of works and their communication to the public are free if carried out for the use of criticism or discussion, within limits justified by these purposes and provided that they do not constitute competition with the economical use of the work; if carried out for teaching or scientific research purposes, the use must also be for illustrative purposes and non-commercial purposes'.

Para 1 *bis* then goes on to provide that

> 'The free publication through the Internet, free of charge, of low-resolution or degraded images and music for educational or scientific use, is permitted, and only if such use is not for profit'.

In light of this provision, in principle, anyone is free to reproduce images of works of art and public buildings unless they are used for commercial purposes or outside the limits of Art 70 of ICL. Apart from these situations, the user will necessarily have to obtain the prior consent of the rights holder to reproduce protected works and exploit their reproductions for commercial purposes, regardless of whether or not they are placed in public places. Some scholars have adopted a narrower interpretation of the notion of profit than that of commercial use – which is understood as the use of a work that competes with that of the original work.[4] Therefore, according to such interpretation the applicability of para 1 *bis* of Art 70 should not necessarily be considered excluded in a commercial context per se. However, the opposite interpretation opting for a broader meaning of commercial purpose still prevails.

At first glance, Art 70 ICL seems to allow the publication of images of copyrighted works placed in public places when such communication takes place on the web. Indeed, Art 70 allows the publication via the internet only of low-resolution images for educational or scientific purposes and only in cases where such use is

[4] C. Sappa, 'Art. 70 l.d.a.', in L.C. Ubertazzi ed, *Commentario breve alle leggi sulla proprietà intellettuale e concorrenza* (Padova: CEDAM, 2016), 1730-1732.

not for profit. However, the limitation of low-resolution reproduction turns out to be problematic since modern technologies easily allow for the reproduction and publication of high-resolution images; one need only think of cell phone cameras, which are constantly being developed to allow for high-quality photography.

Para 1 *bis* further provides that reproduction may be made for educational or scientific uses only where such uses are not for profit. However, taking photos of works and posting them on the internet, such as on social media, correspond to educational or scientific uses only in some cases. Indeed, it is not easy to discern between commercial and non-commercial use when this is done on the internet.

The general rule remains that if a brand intends to use the image of a work of art in the outfits or advertisements of its collection, it will first have to check whether the author of the artwork is still alive and take care to track down him/her or his/her descendants in order to request authorization for the reproduction and to negotiate the fee for a such license of use.

III. The Protection of Cultural Heritage in Italy

Italy is an open-air museum synonymous with art, history, and culture. Given the high concentration of cultural and landscape heritage in its territory, Italy has the most considerable historical and artistic heritage in the world. This makes it, to date, the country that holds the most significant number of sites included in the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage List.[5]

It should thus be considered that such cultural heritage has a social function and an economic value to be fostered. Therefore, in legal and economic terms, an effort is necessary to ensure an efficient management, enhancement, and promotion of cultural heritage and its widest dissemination and knowledge. To this end, the ICHC imposes a series of obligations and restrictions on the protected properties to satisfy the public interest in enhancing and protecting cultural heritage.[6]

The current legal definition of cultural property is contained in Art 2 of the ICHC, which provides that:

> 'immovable or movable things which, according to Articles 10 and 11, are of artistic, historical, archaeological, ethno-anthropological, archival and bibliographical interest, and other things identified by or under the law as evidence having value for civilization, are defined as cultural property.'

In turn, Arts 10 and 11 of the ICHC qualify as cultural heritage the categories of

[5] Unesco, 'Patrimonio mondiale', available at https://tinyurl.com/ymxraevr (last visited 20 September 2023).

[6] B. Veronese, 'La protezione del patrimonio culturale, for the project Marchi e Disegni Comunitari 2019', available at https://tinyurl.com/4xhxa6kw (last visited 20 September 2023).

things, movable and immovable, public or private, listed therein. Art 10 of the ICHC provides which goods are excluded from its rules. Namely works of a living author or created no more than fifty years before, but limited to things, to whomever they belong, which are of exceptional artistic, historical, archaeological or ethno-anthropological interest for the integrity and wholeness of the Italian cultural heritage. While the limit has been raised to works created no more than seventy years before for i) immovable and movable things belonging to the State, the regions, other public territorial bodies, as well as to any other public body and institute and private non-profit legal persons, including civilly recognized ecclesiastical bodies, which are of artistic, historical, archaeological or ethno-anthropological interest, or, if the things are particularly important, even when they belong to different entities, and ii) collections or series of objects, to whomever they belong, which are not included among those indicated in para 2 of Art 10 ICHC and which, because of tradition, reputation, and special environmental characteristics, or because of artistic, historical, archaeological, numismatic, or ethno-anthropological significance, are of exceptional interest as a whole. In order to identify the cases in which a public work of art carries the interest mentioned above, according to Art 12 of the ICHC, it is necessary to carry out a verification of cultural interest, which concerns goods 'that are the work of an author who is no longer living and whose execution dates back more than seventy years.' Whereas, for private goods, Art 13 of the ICHC requires for a declaration to ascertain the existence of a cultural interest in the good.

In light of the different duration of the protection provided for artworks by the ICL and cultural goods under the ICHC, it appears that not all works protected by copyright fall within the scope of the ICHC, and vice versa.[7] In fact, there may be works of art that are not subject to the rules of the ICHC because they were created by a living author not more than fifty or seventy years before. Also, there may be works whose creation dates back more than fifty or seventy years, which however are still protected by copyright.[8] In this last case, such works would constitute the exclusive property of the author or his/her descendants, but at the same time will be subject to the restrictions on circulation provided for in the ICHC. Therefore, in addition to taking into account any copyright issues, a user who intends to reproduce a public artistic works falling within the scope of the ICHC will also need to pay attention to the provisions of Arts 107 and 108 of the ICHC, on the reproduction of public cultural property.

In general, in order to make a reproduction of a cultural heritage good in compliance with and within the scope of the ICHC, it will be necessary to contact the

[7] A. Pojaghi, 'Beni culturali e diritto d'autore' *Il Diritto di autore*, 149-157 (2014).

[8] Indeed, in Italy copyright protection expires when seventy years have elapsed from the author's death. Therefore, if a work has been created, for instance, 80 years ago, such good would be eligible for protection under the ICHC, if it presents the cultural interest. However, if the author of the work died 30 years ago, then such work would still be protected also by ICL and would continue to be protected under ICL for another 40 years.

Ministry of Culture (MiC) or the individual superintendencies entities scattered throughout the country in order to understand if and how to use the images of the cultural property in question for commercial purposes, namely beyond mere personal exploitation.

In more detail, according to Art 107 of the ICHC,

> 'The Ministry, the regions and other territorial public bodies may allow the reproduction as well as the instrumental and precarious use of the cultural goods they have in their care, subject to the provisions of paragraph 2 and those on copyright. Reproduction of cultural property that consists in making casts, by contact, from the originals of sculptures and relief works in general, of whatever material such property is made, is generally prohibited. Such reproduction is permitted only exceptionally and following the procedures established by special ministerial decree. On the other hand, casts from copies of existing originals and those obtained by techniques that exclude direct contact with the original are permitted, subject to the superintendent's authorization.'

The rule stipulates that reproductions of cultural heritage property must be made with the authorization of the administration to whose care the cultural property has been committed, and if the reproductions are made by contact through casts they have to be made in such a way as not to damage the originals.

Art 108 of the ICHC, on the other hand, establishes the criteria to determine the concession fees to be paid for the reproduction of cultural property. In fact, there are no pre-established fees publicly available, but the amount of such concession fees is decided by the authority in charge of the property being reproduced on a case-by-case basis, also taking into account the criteria set forth in para 1 of Art 108 of the ICHC, ie

> '(a) the character of the activities to which the concessions of use refer; (b) the means and manner of performing the reproductions; (c) the type and time of use of the spaces and property; (d) the use and purpose of the reproductions, as well as the economic benefits derived by the applicant.'

In this respect, some guidelines for the concession fees for each type of use are set in the Tariff for the Determination of Fees, Charges, and Modalities for Concessions Relating to the Instrumental and Precarious Use of Assets in the Ministry's Care, but the individual authorities or other administrative bodies remain free to determine their own ones.[9] Therefore, there is not a fixed fee to be

[9] Some local administrations have adopted regulations that provide forms of compensation for reproductions within the municipality's land carried out for profit. See, for instance, the tariffs provided by the Municipality of Rome for cine-television and photographic filming, available at https://tinyurl.com/47u2rcub (last visited 20 September 2023).

paid but, rather, is determined by each entity depending on the kind of use to be made, usually after a negotiation with the lawyers of the brand seeking permission.

In this scenario, with respect to fashion shows, the use of cultural heritage by the fashion house hosting the catwalk is undoubtedly made for commercial purposes. It thus requires it to identify the competent authority for such property and to seek its authorization upon payment of the relevant fees. The same applies to tv spots, press campaigns, social media content, and any other commercial use made by the maison of historical monuments, artistic and architectural works, buildings, and, generally, all works bearing a cultural value.

Similarly to the provisions of the ICL, para 3 of Art 108 ICHC provides for some cases of fair use:

> 'No fee is due for reproductions requested or carried out by private individuals for personal use or study purposes, or by public or private entities for the purpose of enhancement, provided that they are implemented on a non-profit basis. [...].'

Para 3 thus makes reproductions for personal use, study, or enhancement purposes free of charge and subject only to the administration's authorization, given the absence of any profit-making purpose.

Para 3 *bis* of Art 108 ICHC also stipulates that

> 'The following activities, carried out on a non-profit basis, for purposes of study, research, free expression of thought or creative expression, promotion of knowledge of cultural heritage, are in any case free: 1) the reproduction of cultural property other than archival property subject to restrictions on accessibility under Chapter III of this title, carried out in compliance with the provisions protecting copyright and in a manner that does not involve any physical contact with the property, nor the exposure of the same to light sources, nor, within cultural institutions, the use of stands or tripods; 2) the dissemination by any means of images of cultural property, legitimately acquired, so that they cannot be further reproduced for profit.'

According to the provisions of para 3-*bis*, therefore, for example, a social network user could upload an image of a cultural property to it. However, another user could not appropriate the image of the property and disseminate it in turn for commercial purposes without having first obtained the permission of the administration having the property in its possession.

The relationship between cultural goods and copyright is thus established by Arts 107 and 108 of the ICHC, which are without prejudice to the rules governing copyright protection. In fact, when it comes to cultural heritage a double track of protection is established between the private law, individualistic protection provided for intellectual works by the ICL, and the public protection of cultural property

under the ICHC, which responds to a collective interest.[10] The fundamental matrix of such protection is grounded in Art 9 of the Constitution, which establishes the duty of the Italian Republic to promote the development of culture and to protect the Nation's historical and artistic heritage. The functions of promotion and protection find expression, respectively, in the legislation on copyright and the legislation placed to protect cultural property.[11]

However, it should be noted that some concepts found in Art 108 ICHC generate particular difficulties of interpretation, especially in cases where reproduction of the protected good occurs online. In particular, it is difficult to exclude the 'for-profit purpose' when publishing, and thus reproducing, an image online.

The obligation to limit further reproductions for profit of already disclosed images of cultural property is also difficult to apply in the digital context. Indeed, whether a digital image can be further reproduced and for what purposes depends solely on the technologies available at the time, a factor that the user cannot control at the time he or she takes or publishes the photo of the cultural property. This raises the issue of the so-called 'nth user' of a reproduction and the impact this has on the first user, namely the one who takes the photo of the asset. For example, on Facebook or Google Photos, which offer terms of use that provide exclusive copyrights, individual users may not pursue commercial purposes. However, the platform as a whole will only have for-profit purposes.

Finally, difficulties also arise in identifying which modalities are appropriate to pursue the enhancement and the promotion of cultural heritage. Photographing cultural heritage and publishing the photos under a free license, as well as expanding and illustrating Wikipedia entries, might prove to be effective ways of enhancing and promoting cultural heritage. However, the Italian legislation does not seem to agree with this position.

IV. Additional Rights Involved in the Promotion of Fashion Products

On the subject of reproduction of things for commercial purposes, in addition to copyright and the discipline provided by the ICHC, additional and different rights may also be relevant, namely the property over the good (or more precisely, its image), unfair competition, and personality rights.

1. Right of Ownership

In addition to the regulations designed to protect cultural heritage and works of art, there is another legal basis abstractly capable of founding a general power of

[10] A. Pojaghi, n 7 above.

[11] G. Calabi and A. Buticchi, 'Inserzioni tra diritto d'autore e beni culturali nelle istituzioni: una possibile convivenza?' *Diritto Industriale*, 194-199 (2021).

prohibition with respect to the reproduction of cultural heritage for commercial purposes, namely, the property right of the owner. This assumption concerns only the reproduction of the image of goods on which no intellectual property right insists.

Scholars and case-law are divided on whether there is an exclusive right to reproduce the image of a good based on the property right over the thing itself. If the rights to dispose of and enjoy the thing extend to all the utilities that can be derived from it, should the control of the circulation of the image of the good be included among the owner's prerogatives?

Indeed, the image of things, defined as an 'intangible good', is contested between its qualification as the object of exclusive rights, in the wake of the privatization of intangible goods, and its qualification as a common good, in that it is characterized by non-excludability and non-rivalry in consumption.[12] In particular, critical issues arise from the interpretation of Art 832 of the Italian Civil Code (ICC), which provides that

> 'The owner has the right to enjoy and dispose of things fully and exclusively, within the limits of and subject to the obligations established by the legal system.'

Some scholars believe that no normative basis can be found for the owner's power of opposing to the use made by third parties of the image of the things owned, as they interpret Art 832 of the ICC as providing for limitations to the faculties of enjoyment and disposition included in the property right over the things that are the subject matter of the right, without including the related incorporeal projections. Unlike the thing effigy, the image represents a non-rivalrous good: multiple people can enjoy the image without the good itself being spoiled. Therefore, creating upstream a perpetual right, even in the absence of a creative activity to be incentivized comparable to that underlying copyright protection, has the sole effect of restricting competition downstream, giving to the owner of the thing unjustified monopolistic revenues. For such goods, therefore, upon a comparative assessment of the social costs and benefits of recognizing a new atypical exclusive right over the image of things, a similar interpretation of Art 832 of the ICC should be rejected.[13] As a result, for intangible goods – such as the

[12] C.E. Mayr, 'I diritti del proprietario sull'immagine della cosa' *Annali italiani del diritto d'autore*, 603 (2010) according to whom the image of the thing is itself a good, independent of the 'tangible medium' and, therefore, excludes that the right claimed by the owner over the tangible good automatically extends to it. According to the author, the commercial value of the image should not be understood as a utility derived from the good, but rather as a utility derived from the image itself, which is independent of the good. Therefore, he believes it is possible to identify limits to the right of ownership, especially in the case where it concerns the image of a good. Indeed, the content of this right should be determined by considering both the legally protected interest of the owner and the interests of the community and the owners of other assets.

[13] G. Resta, 'Chi è proprietario delle piramidi? L'immagine dei beni tra property e commons'

image of cultural property – the logic of privatization loses its meaning, since being non-rivalrous goods in consumption, several parties can simultaneously enjoy the same good without the enjoyment itself being impeded or limited in any way.

Another part of scholars and case-law takes a contrary view, holding that the *dominus*' rights extend to the image of the property, which represents a utility due to the rights holder. Thus, particular emphasis is given to the economic value of the image, deeming it appropriate that this should benefit the right holder, especially when the image of the thing is reproduced in the context of commercial communication and for promotional purposes.[14] Hence they claim that the right to the image of the thing can be regarded as an attribute of property, or more precisely, that ownership of a thing, in addition to the thing itself in its bodily integrity, also extends to its image. Therefore, they hold that if the *dominus*' complete and absolute rights extend not only to the thing but also to its image, the *dominus* will then have the exclusive power to reproduce and disseminate it and, accordingly, the power to inhibit third parties from doing so. The rights holder's powers include the power to choose whether to offer the thing to the public view or to keep it concealed, reserving its view against the payment of a fee. In the second hypothesis, the owner can take action against the unauthorized use of the relevant images for advertising purposes. In contrast, this will not be allowed to him when, by their nature or by the destination given to them by the *dominus* himself, the things are already permanently or temporarily exposed to public view. However, even when the thing is visible to the public, its reproduction in the context of promotional messages could be deemed unlawful since it should be considered permissible only if it is done consistently with the destination for public view given to it by the owner.[15]

As to the reproduction of the image of cultural heritage goods, scholars supporting the proprietary model justify the exclusivity granted to the owner by emphasizing the benefits that could accrue to the community. By allowing reproduction against payment of a fee, the public administration could derive economic income to invest in the restoration and preservation of the asset, benefiting the community at large. Moreover, according to scholars supporting the proprietary model, allowing free reproduction of the image of the cultural asset for commercial purposes would result in an appropriation of the public asset, benefiting only one private party. Therefore, paying the fee for the reproduction of the asset would represent compensation for the community and allow for a balancing of interests.

On the other side, scholars who argue against the proprietary model present numerous arguments supporting their thesis.[16] First and foremost, it is argued

Politica del diritto, 595 (2009).

[14] M. Fusi, 'Sulla riproduzione non autorizzata di cose altrui nella pubblicità' *Rivista di diritto industriale*, 97 (2006).

[15] ibid 102-103.

[16] G. Resta, 'L'immagine dei beni culturali e la libertà di panorama', available at

that the expenses of preserving cultural property are already financed through general taxation and that, in any case, the profits that can be earned are insignificant compared to the burdens of managing public ownership. In the case of public property exposed to public view, the freedom of expression and access to culture and the general freedom to 'enrich oneself' through knowledge of the common cultural heritage would be significantly impaired. Second, the monopoly profits can only find justification as an incentive to produce new works. However, it is not necessary for already existing assets that have enjoyed private protection in the past and are now in the public domain, such as the Colosseum. Against the reputational argument raised by scholars in favor of the proprietary model, the opposers hold that the reputational value of the cultural property can always be protected even through measures other than those of intellectual property laws and the right granted by the protection of cultural property. According to this position, with regard to public assets, the applicability of an exclusive regime on the image of such assets based on Art 832 of the ICC shall be excluded. This is especially true given the peculiar functional connotation of such goods, which are aimed at the free enjoyment by the community.

2. Unfair Competition

Promoting fashion products that include the reproduction of things, given the underlying commercial purpose, may also result in violating the rules repressing unfair competition.

A first hypothesis is that the good reproduced is an element that distinguishes or characterizes the activity or products of an undertaking. In this case, the application of Art 2598, no 1 of ICC forbidding slavish imitation seems to be conceivable if the two undertakings are competitors and, from the use of the image of the thing, a risk of confusion for the public may arise. This is especially true if the thing depicted is already present in the competitor's trademark (in such an eventuality, it may even constitute trademark infringement) but also in the case in which the latter had previously made use of it in its advertising, thus giving rise to unfair competition conduct. In practice, this happens when things belonging to competitors or things that are identical or resemble those constituting distinctive elements of the competing products or business activity are used in advertising. Another conduct integrating unfair competition occurs when a company includes in an advertisement a competitor's product in such a way as to making it refer to the latter thus misappropriating its values. In this case, there is a conduct of unfair competition by misappropriation of values under Art 2598, no 2 of the ICC.[17]

In addition to those already mentioned, where the depiction of goods occurs in

https://tinyurl.com/ym6chtdy (last visited 20 September 2023).

[17] M. Fusi, n 14 above, 107-108.

the context of comparative advertising, the provisions of the decreto legislativo 6 September 2005 no 206 which prohibit both confusing comparisons and those that exploit the reputation of others, are also relevant. Moreover, in such cases, it is also possible to incur a violation of Art 13 of the Italian Advertising Self-Regulation Code, which prohibits the imitation of other's advertising even outside of a competitive relationship and regardless of the danger of confusion, and, in any case, prohibits any undue attachment to the prestige or the reputation of third parties.

3. Personality Rights

Personality rights are also relevant in the context of advertising using the reproduction of people and things. It should be premised that the concept of personality rights now includes various rights referring to the human person in its various forms, such as those to image and name, honor, decorum and reputation, confidentiality and personal identity, that is, the right not to be made the subject of representations that differ from one's way of being.

There is a tendency to extend the protection of personality characteristics to elements of recognition secondary to the main ones, such as portrait, name, or pseudonym. Hence, their unauthorized use outside of a cause of justification is to be considered unlawful. Indeed, these causes of justification can hardly be envisaged when it comes to advertising: in fact the exemptions of the notoriety of the person portrayed, the public nature of the event, the purposes of justice, security, and culture – which under Art 97 of ICL make the consent of the person portrayed unnecessary – are difficult to reconcile with the use of the image for advertising purposes, which is made for commercial purposes.[18]

In this scenario, it has been argued that the various elements of identification of a person sometimes include simple objects that are so distinctive that they immediately recall to the public the person using them. In this respect, there is some relevant case-law affirming such principle. For example, in a decision held on 18 April 1984, the Court of Rome held that the unauthorized use in an advertising campaign of objects considered distinctive elements of the famous songwriter Lucio Dalla (*ie*, a knitted woolen hat and a pair of binoculars), led consumers to immediately think of his person and thus constitutes an infringement of the singer's image rights. The Court held that a prejudice to the singer-songwriter's image could result from such use, raising the risk of negatively affecting his character since he was presented as a product marketer.[19] In 2015 the Court of Milan confirmed the same principles, ordering a company to pay the damages suffered by the heirs of famous actress Audrey Hepburn, for the unlawful use of her image in an advertising campaign. Indeed, the advertisement depicted a model with the same hairstyle, black dress, long black gloves, jewelry, and glasses of the famous actress, namely

[18] ibid 111.
[19] Pretura di Roma 18 April 1984, *Giurisprudenza italiana*, I, II, 544 (1984).

elements inextricably linked to the iconic image of Audrey Hepburn.[20] However, in order for the mere sight of the thing to immediately recall in the recipients of the advertisement the person concerned, it is necessary that the use of the object by the person in question has been protracted and established by customs, and that the object represents a characteristic of that person, since it is inconceivable that an object of generalized use, which everyone wears or uses, could identify only one person.

V. Freedom of Panorama

Being able to look at the world around us is a faculty taken for granted, so much so that it has never been questioned. In experiencing public spaces, individuals encounter various copyrighted works, for example, public sculptures, murals, images and text on billboards, and street art. It is expected that what is freely visible is also freely reproducible. This situation is known in the legal world by the concept of 'panorama freedom' (from the German word '*Panoramafreiheit*'), according to which everyone would be free to reproduce public spaces and use reproductions of them for personal and commercial purposes.

Freedom of panorama is an exception to copyright law found in the copyright laws of various jurisdictions and consists of the possibility to reproduce and communicate to the public artistic works (eg, sculptures, paintings, buildings, monuments, etc) protected by copyright and placed in public spaces, without infringing the rights of their respective owners. The impact of technological and digital developments on the regulation of reproductions in public space has not been limited to the field of intellectual property, also extending to the area of privacy and cultural heritage law.

At the European level, the freedom of panorama was introduced by the European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167 (InfoSoc Directive), whose Art 5(3)(h) leaves it to the discretion of the EU Member States to introduce the exception – to the rights of reproduction, communication and making available to the public – in their national legislation when using works, 'such as works of architecture or sculpture, *made to be located permanently in public places*.' The core of the exception to the author's exclusivity is thus the permanent placement of the work in public places.

However, Italy has not implemented Art 5(3)(h) of the Infosoc Directive into its national law. Unfortunately, Italian legislation does not appear to be aligned with the regulatory requirements imposed by technological and cultural development, pushing toward the free enjoyment of copyrighted works in public places. Therefore, the onus falls on the interpreter to track the applicable provisions and determine

[20] Tribunale di Milano 21 January 2015, available at www.onelegale.wolterskluwer.it/.

their scope and extent.

In addition to the provisions contained in the ICL, in addressing the issue of freedom of panorama in Italy, one must also take into consideration what is established by the ICHC, which provides that the reproduction of cultural property requires the prior authorization of the public authority having the reproduced property in its possession and, in some cases, also the payment of a fee.

The regulatory framework previously examined – which sees the ICL and the ICHC as the main protagonists in the field of freedom of panorama in Italy – can be more clearly analyzed by taking into account the dichotomy of the regime, on the one hand, between goods exposed to public view and goods not visible from the outside and, on the other hand, between goods in the public domain and goods protected by copyright.

As previously mentioned, sometimes the two protections may overlap (so-called dual track) and in such cases it will be necessary to obtain two different authorizations for those who intend to reproduce an artistic work that is also a cultural asset. The first authorization is to be obtained from the public administration to whose care the property is committed, while the second is to be obtained from the owner of the copyright on the work until the work has fallen into the public domain, and unless such reproduction falls under the exceptions provided for in the copyright law – which is to be excluded if the reproduction of the work is done at high resolution and for commercial purposes.

1. Goods in the Public Domain Placed in Enclosed Spaces

The debate surrounding the applicable regime for the reproductions of public domain goods located in enclosed spaces is centered on the role of museums as guardians of culture. Museums engage in various activities that rely on the image of the artworks exhibited, such as virtual exhibitions, enabled by technological advancements or collection books. Virtual museums are a valuable tool that expand access to artworks and broaden public knowledge, but they also give rise to a system based on exclusive rights to photographic reproductions that restricts access and use.

Although the images, as well as the artworks they depict, may not be protected by copyright law, many museums still require permission and impose fees for their use through licensing policies. This practice of licensing creates complexities in obtaining permission to use images and may conflict with the primary mission of cultural institutions to disseminate their collections to a wide audience.

The legal situation surrounding goods in the public domain depicted in images is uncertain. Although the reproduction of the work is free from a copyright perspective, museums may still require permission for both the creation and use of images. The trend of museums asserting exclusive rights over images of public domain artworks is based on the property right over the reproduced object. The imposition of terms and conditions for the use of images continues to raise

questions about the balance between protecting the interests of museums and promoting access to cultural heritage for the public.[21]

2. Goods Not in the Public Domain Placed in Enclosed Spaces

What was mentioned in the previous paragraph can also be adapted to the case of reproduction of goods not in the public domain located in enclosed spaces, such as paintings by living or deceased authors whose death occurred less than seventy years ago that are kept in a museum. These works are still protected by copyright law and the author or other owner can claim rights to their commercial exploitation. Unauthorized commercial exploitation of such works can result in compensatory remedies, injunctive relief, and, where possible, the restitution of profits made.

In addition to works protected by copyright law, cultural heritage goods protected by the ICHC may also not be in the public domain and be located in enclosed spaces. In this case, in order to take photos or videos for commercial purposes that capture cultural goods that have not fallen into the public domain, it will be necessary to contact the entity to whose care the cultural properties are committed in order to assess the existence of any licensing agreements between the author of the work and the entity to whose care the property is committed. If the rights of economic exploitation of the work have been assigned to the entity to whose care the property is committed, royalties should be paid to this entity and not the author of the work.[22]

If the cultural property being reproduced is still protected by copyright and no licensing agreement has been established, entity holding the copyright needs to be identified and permission to reproduce it according to Arts 107 and 108 of the ICHC needs to be obtained. The rules on exceptions and limitations to ICL will apply if the conditions exist. For example, according to Art 70, para 1-*bis* ICL, it is possible to freely publish a low-resolution image of a copyrighted work on a website for educational or scientific use if there is no profit motive.

However, complications arise when the photograph has a creative character and is protected by copyright. In this case, permission for the commercial exploitation of the original photograph must be obtained not only from the author of the work photographed but also from the author of the photograph.

Case-law has consistently interpreted the notions of personal use and non-profit use in a restrictive way. For example, in the case of a photograph intended for a free calendar, although there was no direct economic return for the author of the publication, the purpose of profit could not be excluded since the author of

[21] P. Magnani, 'Musei e valorizzazione delle collezioni: questioni aperte in tema di sfruttamento dei diritti di proprietà intellettuale sulle immagini delle opere' *Rivista di Diritto Industriale*, 211 (2016).

[22] A.A. Cardarelli, A. Pisani, A. Signorelli, 'La libertà di panorama: stato dell'arte e prospettive di riforma' available at https://tinyurl.com/mmzsku44 (last visited 20 September 2023).

the calendar could still advertise its own activity or host advertisements within the calendar. The same applies to educational purposes: publishing a photo of a work protected by the ICHC or ICL within a scholarly text does not exempt the payment of statutory fees and royalties.[23]

3. Goods in the Public Domain Placed on the Public Street

The issue of reproducing goods that are in the public domain and exposed to public view, such as the Trevi Fountain and the Colosseum, presents a significant legislative gap under Italian law.

Despite being publicly accessible, if these goods are protected by the ICHC, their reproduction will still require authorization from the entity to whose care the cultural property is committed, as well as the payment of a fee. Indeed, the provisions outlined in Arts 107 and 108 of the ICHC do not make a distinction between goods kept in restricted access areas and those that are freely visible, instead relying on the cultural significance of the goods.

4. Goods Not in the Public Domain Placed on the Public Street

The last scenario concerns works protected by copyright and freely visible from public areas, such as public installations created by living artists, or deceased less than seventy years ago, such as the 'L.O.V.E.' sculpture by Maurizio Cattelan or the new Ara Pacis building designed by Richard Meier.

These works are still protected by copyright, making their reproduction for commercial purposes subject to the prior authorization of the author or the owner of the exclusive rights. Italian copyright law does not provide any exception for photographs of works in public places. However, it does provide certain exceptions, such as photographic reproductions made for the purpose of criticism or discussion, within limits justified by those purposes and provided they do not compete with the commercial use of the work. Additionally, low-resolution images of works can be freely published on the internet for educational or scientific purposes, as long as they are not for profit.

Given this complex regulatory landscape, legislative intervention is required to introduce a new exception to copyright law. The goal is to strike a balance between the public's right to enjoy works that are openly visible and the author's right to earn remuneration. Protecting the economic rights of the owners should not limit the public's access to these works, and copyright laws should promote creativity rather than hinder the dissemination of culture.[24]

[23] G.M. Riccio 'Libertà di panorama. Cos'è e perché serve una legge' available at https://tinyurl.com/yc3hucs7 (last visited 20 September 2023).

[24] A.A. Cardarelli, A. Pisani and A. Signorelli, n 22 above.

VI. Relevant Case-Law on the Commercial Exploitation of Cultural Goods

In recent years, several decisions prohibited the commercial exploitation of the image of cultural heritage, without first obtaining the authorization from the administration and, therefore, without paying the concession fee. In these precedents, the courts have identified the rules to be followed when using photographs that reproduce the cultural heritage protected under the ICHC, without distinguishing between the case where the artwork is located within a museum – and is therefore accessible only after purchasing an admission ticket – and the case where the artwork is part of the urban landscape – and it is therefore freely visible to anyone without restrictions.

1. The Reproduction of the Altamura Man

In its decision of 23 April 2013 no 9757, the Italian Supreme Court addressed for the first time the question of what can be understood as a reproduction under Art 107 of the ICHC.[25] In particular, although the provision in question expressly and ordinarily prohibits the reproduction of cultural goods by means of casts, it does not provide a clear definition of what constitutes a reproduction, opening interesting interpretative issues.

In the case at hand, the MiC sued a company that had offered for sale reproductions of state archaeological property consisting of the paleoanthropological deposit of the Grotta di Lamalunga in Altamura. Since no concession had been issued for the reproduction of the concerned cultural property, the Ministry requested that the defendant be ordered to cease the marketing of the reproductions and pay damages.

In particular, the Supreme Court observed that 'it is indeed possible to refer to the provision of copyright law that defines the concept of reproduction', namely Art 13 of the ICL according to which

> 'the exclusive right of reproduction concerns the multiplication of copies of the work in all or in part, either direct or indirect, temporary or permanent, by any means or in any form, such as copying by hand, printing, lithography, engraving, photography, phonography, cinematography, and any other process of reproduction.'

However, the Supreme Court ruled that there was no reproduction in that specific case since the replica was created not by copying the actual shape of the skull (which was mostly embedded in a cave and thus not visible), but instead by creating a 'hypothetical reconstruction' based on scientific findings and reconstructive hypothesis of how the entire cranial structure could have looked like. Therefore,

[25] Corte di Cassazione 23 April 2013 no 9757, available at www.onelegale.wolterskluwer.it.

the Supreme Court held that this resulted in a 'new work', that is instead protected under copyright law.

This decision from the Supreme Court can be interpreted as meaning that when a cultural heritage asset is recreated or re-elaborated in a new creative work without being exactly copied, it does not qualify as a reproduction under the ICHC. Indeed, some scholars noted that the difference between a reproduction and a new work lies in the method of creation. Namely, the copies made through molding of the original piece are considered reproductions, while those created through sculpting or shaping are closer to independent artistic actions rather than a copying act. Similarly, digital 3D models can either be the result of reproducing an existing object through laser scanning or photogrammetry, or the result of creating the model from scratch.[26]

2. The Countless Unauthorized Reproductions of Michelangelo's David

Michelangelo's David is one of the most famous sculptures from the Italian Renaissance period, created in the early 1500s. It is widely considered as one of the most emblematic works of Italian art and is displayed at the Accademia Gallery in Florence since 1873. Like most icons, the David has often been used for advertising by various companies.

For instance, in March 2014, the American weapons company ArmaLite Inc used the image of Michelangelo's David in an 'armed' version for advertising purposes. MiC, deeming the juxtaposition of the David with firearms offensive and unfair, reacted to that use with firm opposition, resulting in the American company's spontaneous withdrawal of the advertising campaign.

Again, on 25 October 2017 the Court of Florence issued and order in favor of the Accademia Gallery, which sued a travel agency that promoted its higher-priced guided tours made by unlicensed guides in Italian museums, including the Accademia Gallery, using a photo of Michelangelo's David on their promotional materials such as brochures, pamphlets, and website.[27] The Court accepted the Accademia's arguments on the unauthorized use of the cultural property and banned the travel agency from using Michelangelo's David image for commercial purposes without permission and payment of reproduction rights, in breach of Arts 107 and 108 of the ICHC. As a result, the agency had to immediately remove all advertising materials and black out the image of David on its website. The Court also mandated the agency to publish the text of the order in various newspapers and periodicals selected by the Accademia, as well as on their website. The agency was also fined two thousand euro for each day of non-compliance. The injunction granted to the Accademia Gallery was not limited to Italy but applied throughout Europe.

[26] F. Remondino and S. Campana, *3D Recording and Modelling in Archaeology and Cultural Heritage. Theory and best practices* (Oxford: Archaeopress, 2014).

[27] Tribunale di Firenze 26 October 2017, *Foro Italiano*, II, 682 (2018).

More recently, the Michelangelo's David has been involved in another unauthorized reproduction, this time by Brioni, a prestigious Italian menswear couture brand. In 2018 Brioni launched an advertising campaign featuring a full-scale marble replica of Michelangelo's David statue, dressed in a Brioni suit. The replica was created by an Italian sculpture workshop in 2002 and had been used for various projects before being loaned to Brioni for the advertising campaign. MiC initiated legal proceedings against both Brioni and the workshop, seeking an injunction to prevent the use of David's image for commercial purposes. The advertising campaign was promptly withdrawn, and the sculpture workshop agreed not to use the replica without the Ministry's authorization. The Court of Florence then rejected the request for an interim injunction on the grounds of lack of urgency, but noted that the case raised questions about the definition of 'reproduction' and whether the use of the David statue constituted a 'creative re-elaboration' under the ICL.[28] In its defense, Brioni argued that the advertising campaign did not reproduce the original David statue, but rather a different creation made by the sculpture workshop and a tailor. The Court did not provide a definitive answer to these questions, but the very fact that the Court felt the need to mention them indicates that the answer was far from clear.

Finally, in April 2022, the reproduction of the Michelangelo's David has been used – again, without the authorization of the Accademia Gallery – in an advertising campaign by a Tuscan sculptor training center.[29] The Court considered

> 'the use of the image of David on the website of a commercial company (...) capable of degrading the image of the cultural good by making it a distinctive element of the quality of the company that, through its use, promotes its image, with an indisputably commercial use, which could lead third parties to believe that such free use is lawful or tolerate'.

Therefore, the Court found the existence of a good prima facie case and of the danger in delay requirements due to

> 'the vulgarization of the work of art and culture and the reproduction without prior examination by the competent authorities of the compatibility between the use and the cultural value of the work, which creates the risk of an irreversible damage for all those uses that the competent authority should judge incompatible'. The Court further considered that 'the protection of a non-patrimonial aspect related to the reproduction of the cultural asset (...) can only be configured as the right to the image of the cultural asset'.

[28] Tribunale di Firenze 2 January 2019, available at https://tinyurl.com/4rf8crk8 (last visited 20 September 2023).

[29] Tribunale di Firenze 11 April 2022, available at www.dejure.it.

3. The Reproduction of Teatro Massimo's Image for Advertising Purposes

Another relevant decision involves the Teatro Massimo in Palermo, which is Italy's largest opera house known for its unique architecture and acoustics, designed by Giovan Battista Filippo Basile in the late 19th century.

The court of Palermo supported the Teatro Massimo Foundation, which holds the rights to use the theater, in the lawsuit against the Banca Popolare del Mezzogiorno.[30] The bank used an image of the theater's facade in its advertising campaign, in breach of Arts 107 and 108 of the ICHC. The bank challenged any violation of the ICHC, claiming that no rights can be claimed on reproductions of the exterior architecture of a cultural asset, which is part of the city's landscape and visible to the public and must be considered in the public domain. However, this argument was not accepted by the court, given the lack of freedom to panorama in Italy.

The decision seems also to address the issue concerning the right of publicity of the cultural heritage, which shall be assessed on a case-by case basis by the authorities in charge of the relevant monuments. The court confirmed the protectability of the right of publicity also for legal entities by providing for the possibility to obtain compensation when the reproduction of the good leads to a decrease in the consideration of the entity, both in terms of the negative impact that such a decrease entails in the entity's actions, and in terms of the decrease in consideration by the general public. However, in the present case, the court found that the manner of reproduction used by the bank was neither disparaging nor detrimental to the historical and artistic value of the theater, thus rejecting this argument.

4. *Uffizi* v *Jean Paul Gaultier*: The Reproduction of the Botticelli's Venus

At the end of 2022, the Uffizi Museum in Florence took legal action against the fashion designer Jean Paul Gaultier for using the well-known painting, Birth of Venus by Sandro Botticelli, in his spring/summer 2022 *Le Musée* capsule collection without being authorized to do so. The collection was meant to celebrate art and features reproductions of masterpieces, including Botticelli's. Despite the noble intention, the Uffizi Museum was not pleased with this homage. Indeed, after sending a warning letter, the Uffizi Museum decided to take legal action grounding its arguments on the violation of the ICHC.

The Uffizi Museum has relied several times on the ICHC to act against unauthorized reproductions of the cultural artworks it collects, including against Pornhub for its 'Classic Nudes' series featuring paintings from the museum's

[30] Tribunale di Palermo 21 September 2017, available at https://tinyurl.com/bddas54j (last visited 20 September 2023).

collection. Again, the dispute is not about copyright, as the ICHC governs the use of cultural heritage regardless of its copyright status.

5. The Puzzle with the Image of Leonardo da Vinci's *Uomo Vitruviano*

The Uomo Vitruviano is a pen and ink drawing on paper made by Leonardo da Vinci, a symbol of Renaissance art, and is kept in the Gallerie dell'Accademia in Venice.

Since 2009, Ravensburger, the Europe's leading puzzle company, has been making a puzzle reproducing the image of the *Uomo Vitruviano*, for which the Gallerie dell'Accademia was demanding royalty payments equal to 10% of earnings since 2019. Initially, the Venetian museum tried to reach an agreement with the German company to define the fees due for the use of such image. However, when faced with refusal, it decided to take legal action.

With the order dated 17 November 2022, the Court of Venice ruled that the Italian and German branches of the toy company Ravensburger needed to be authorized by the *Gallerie dell'Accademia* and pay royalties to it, in order to produce and distribute puzzles with the image of Leonardo da Vinci's *Uomo Vitruviano* on them.

This is the first decision to expressly address the issue of the applicability of the reproduction of cultural heritage regulation dictated by the ICHC to activities that took place outside of Italy.

VII. The Regulatory Gap in the Code of Cultural Heritage: Reproduction Versus Reworking

The ICHC provides limitations to reproduction of cultural properties for profit, subordinating it to the previous authorization of the administration to whose care the cultural property is committed, and the payment of the concession fee determined on the basis of the criteria set forth in Art 108. Also, except in cases expressly provided for by the law, Art 107 prohibits to reproduce cultural property by making casts, by contact, from the originals of sculptures. Therefore, from a combined reading of Arts 107 and 108, it is not clear whether the re-elaboration of a good part of the cultural heritage made for commercial purposes, without prior authorization and payment of the fee to the relevant entity, may constitute a breach of the ICHC. In fact, ICHC does not expressly prohibit the re-elaboration of a cultural property, as a form of reproduction.

There is a division in both doctrine and case-law regarding the interpretation of Arts 107 and 108 of the ICHC. Some scholars and the majority of case-law (see, for instance, the numerous decisions concerning the Michelangelo's David) gave a broad definition of the term 'reproduction'. As a result, the supporters of this interpretation, deem necessary to obtain authorization from the entity in charge

of the heritage property before reproducing its appearance for commercial purposes, including any possible reworking thereof. The main reasons for this approach lie not only in the need to protect the integrity of the cultural heritage, but also to prevent any free-riding from its reputation or any use in any unappropriated contexts.[31] Scholars that adhere to this broad definition, found the legal basis for this theory in the proprietary model, thus considering that the administrative entities to whose care the cultural property is committed may exercise the standard prerogatives of the owner, including the right to prohibit any unauthorized display of its property.[32] And this regardless of the technique used for the reproduction, of whether the final – possibly – re-elaborated result is objectively different from the original work, not representing its 'spitting image', or of where the cultural property is located – whether inside a museum or outside, on the public street, freely visible for all to see.

On the other side, a minority of scholars and case-law (see, for example, the decision of the Italian Supreme Court concerning the Altamura Man) gave a more restrictive interpretation of the term 'reproduction', thereby allowing for the re-elaboration of the protected cultural heritage, also for commercial purposes, without the need to obtain prior authorization or to pay the concession fees to the entity in charge. This approach objects to a broader interpretation of the concept of 'reproduction' under the ICHC, as this might have the practical effect to revive an expired copyright over the cultural heritage and ultimately jeopardize the freedom of expression granted by Art 21 of the Italian Constitution. Following this interpretation, reworkings of cultural properties for commercial purposes are allowed, as the re-elaboration of cultural heritage represents a form of creative expression, allowing for the reinterpretation and revival of the cultural heritage.[33]

This approach is based on the fact that the rights relating to the use of the image of the Italian cultural heritage are exhausted in the special regulations contained in ICHC, which expressly exempt the provisions governing copyright, but do not mention those on unfair competition or image rights. As a consequence, while copyright might theoretically coexist with the protection afforded by ICHC (if its term has not expired), unfair competition and image rights do not apply to cultural heritage. This is because, except in exceptional cases, there is no competitive relationship between the authority in charge of the cultural heritage and those exploiting its reworking for commercial purposes. Secondly, right of publicity and image rights provided by Arts 10 ICC and 96 ff ICL, as personality rights, concern only physical persons and not also things.

[31] On the concept of value as applied to cultural heritage see P. Petraroia, 'La valorizzazione come dimensione relazionale della tutela, in G. Negri-Clementi and S. Stabile eds, *Il diritto dell'arte: la protezione del patrimonio artistico* (Milano: Skira, 2014), 41-49. See also M. Montella, 'La Convenzione di Faro e la tradizione culturale italiana' *Il capitale culturale*, 13-36 (2016).

[32] M. Fusi, n 14 above, 98-99.

[33] M. Modolo, 'Riuso dell'immagine digitale del bene culturale pubblico: problemi e prospettive', available at https://tinyurl.com/mrxkejuw (last visited 20 September 2023).

Given the lack of clarity on the interpretation of Arts 107 and 108 of the ICHC, if the monument is creatively reworked, re-elaborated and modified, there could be room to evaluate, on a case-by-case basis, whether the authorization from the administration to whose care the cultural property is committed, can be bypassed. In order to reach a positive conclusion, and avoid the requirements provided for in the ICHC, substantial modifications must be made to the reproduction of a cultural property. However, the ultimate result of this process is uncertain and contingent on various factors, including the degree of resemblance between the original monument and the one resulted from the re-elaboration, the level of detail visible to the individual, the monument's significance within the frame, and so on.

In light of the above, it is therefore evident that there are still many questions without an answer. For instance, can the authority responsible for a cultural property exploit its reputation to the point of limiting to third parties the possibility to perform any reinterpretation of it? If this is the case, can this prerogative of the authority be based on the property right to the image of the good? Can things have a reputation? Furthermore, what are the limits on reproduction for commercial purposes? Is it possible to give a restrictive interpretation of the word 'reproduction' in order to make the re-elaboration of cultural properties for commercial purposes lawful? Would a negative answer not be in conflict with the constitutional principle of freedom of expression? Would such a limitation have a negative impact on the development and spread of culture? If the cultural property is displayed in public, would the provision of a limitation on its reproduction not be in conflict with the community's right to enjoy the works of the Nation's historical and artistic heritage?

Therefore, the relationship between reproduction and re-elaboration of cultural heritage is influenced by a complex balance of factors that include the preservation and enhancement of cultural heritage, the restrictions set by the ICHC, and the freedom of expression provided for in the Constitution. This balance requires careful consideration and a reasonable assessment of the interests of all parties involved, to ensure that cultural heritage is protected and enhanced, and that at the same time everybody is free to express themselves and create artistic works without restrictions.

VIII. Conclusive Remarks and Future Perspectives

The Italian regulatory framework concerning the reproduction for commercial purposes of things is complex and often subject to controversy, especially when the thing being reproduced belongs to the cultural heritage or is an artwork still protected by copyright. This complexity is due to the difficult balance between the different public and private interests at stake. On the one hand, the interest of the administration to whose care the cultural property is committed to be able to control the reproduction of the property as well as to be able to profit from its reproduction, or the interest of the author to make profit from the reproduction

of his/her work of art. On the other hand, the interest of the public to enjoy the cultural and artistic heritage of the Nation, as well as to freely make reproductions and re-elaborations of such goods. The balancing of these interests is often difficult to achieve also because of the interpretative and coordination limits among the several laws and provisions governing the matter.

The outdated Italian legal framework regulating the reproduction of cultural heritage and copyrighted works remained the same even after the enter into force of the European Parliament and of the Council Directive 2019/790 of 17 april 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130, whose Art 14 provides that

> 'when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.'

Indeed, notwithstanding the clear intent of the European legislator to promote open access to the use of data in general, in implementing the Directive (EU) 2019/790 the Italian legislator introduced Art 32-*quarter* into the ICL. The new Art 32-*quater* provides that

> 'upon the expiration of the protection period of a work of visual art, any material resulting from a reproduction of such work is not subject to copyright or related rights, unless it constitutes an original work. The provisions regarding the reproduction of cultural heritage assets in the Code of Cultural Heritage remain in force.'

Therefore, nothing changed: by leaving the protection of cultural heritage intact, administrative authorities still retain control over for-profit reproductions, irrespective of their copyright status. Hence the interpretative and coordination difficulties persist.

The obsolescence of the Italian legal framework on this matter is even more evident in light of the rapid and unstoppable development of technology, which offers new digital reproduction techniques every day. With the spread of increasingly sophisticated means of reproduction and the possibility of instantly sharing information, it is becoming more frequent for everyone to incur violations of the ICHC or the ICL due to unlawful reproductions of cultural properties or works of art protected by copyright. Indeed, the ability to reproduce works quickly and precisely without losing quality has made it more difficult to identify situations in which reproduction is allowed and where it constitutes a violation of the law. Although the digital context has clearly evolved, the law has not yet adapted, and continues to provide limits on the possibility of reproducing and distributing reproductions and creative reworkings of such goods, even when they are located on public roads

and therefore freely visible. This thus prevents the free enjoyment and valorization of such goods, as well as severely limits general creativity.

However, it seems that now there is an intention to take a step forward. In 2021, Italy approved the National Recovery and Resilience Plan (PNRR) to boost the economy after the COVID-19 pandemic in order to enable the country's green and digital development. The revitalization of Italy outlined by the PNRR is built around three strategic axes shared at the EU level: digitization and innovation, ecological transition and social inclusion. In pursuit of these goals, investments are planned for the digitization of cultural heritage, thus fostering accessibility and development of new services by the cultural/creative sector. In this regard, interventions on 'physical' heritage will be accompanied by digitization operations of what is kept in museums, archives, libraries and cultural venues, so as to enable citizens and professionals to explore new forms of enjoyment of cultural heritage.

There is thus awareness that digital represents a great opportunity to create an ecosystem of culture capable of increasing potential demand and expanding accessibility for different audience segments, reaching generational and geographic targets that are difficult to engage, and weaving new relationships between cultural heritage and people. The path of digital transformation of heritage and cultural institutions pursues specific goals, including expanding the forms of access to digital heritage to improve cultural inclusion as well as cultural heritage digitization practices. Indeed, a wider use of digital content is encouraged in order to improve and strengthen the user experience in presence and on site but also for non-presence users, by experimenting with immersive, interactive and multi-user experience contexts such as the Metaverse.

If the digitization of public cultural heritage will be accompanied by increased opportunities for reusing digital reproductions of cultural heritage, then it will be able to support creativity, cultural entrepreneurship, publishing, and tourism. Moreover, allowing free reuse of images, also for commercial purposes, can revive these industries.

Recently, cultural heritage institutions have started using non-fungible tokens (NFTs) to digitally preserve cultural assets – although many continue express strong disapproval towards NFTs that purport to convert historical artworks into tokens secured by blockchain technology. For instance, the Uffizi Museum in Florence has been one of the first to test the potential of NFTs in 2021, certifying the authenticity of the digital work corresponding to the reproduction of the Tondo Doni. A digital copy of the work was created, protected with a technology that prevents its reproduction, thus guaranteeing its uniqueness; in addition, a kind of digital hardware frame was produced as a support for the work. The Uffizi Museum certifies the authenticity of the reproduction, certifies the transfer of ownership with the NFT, and delivers all the material to the new owner. The NFT of the Tondo Doni – namely, the reproduction of the work on digital media – was then sold at a value of 240.000 Euro. After the sale took place, the reaction of the

Ministry of Culture was not long in coming: it prohibited entering into contracts with Cinello, the technical partner who made the NFT, for the digitization of museum works, which constitute heritage belonging to the public. In particular, the Ministry objected that, in addition to the failure to go through a public procedure, such a transaction raises a risk related to the transfer of intellectual property rights over the property. However, according to the ICHC, the entity to whose care the cultural property is committed can allow the reproduction for commercial purposes of the cultural property in return for a fee. In this regard, the Ministry has announced that it is in the process of drafting guidelines regarding NFTs and digital reproductions.

The great advantage of NFTs is that they contribute to preserve memory. Indeed, NFTs are permanently stored on the blockchain, and are therefore impossible to lose, and can be accessed from anywhere and at any time. In addition, NFTs can also represent 3D monuments or artworks, thus allowing them to be seen from any angle. The NFT of the Tondo Doni does not represent an isolated case of connection between culture and technology. The crypto art project Monuverse merges blockchain technologies with 3D digital art, pushing cultural heritage to the next level, aiming at enhancing the world's most iconic monuments with the aid of art and technology, connecting communities to local institutions around the world to create a new way to experience the human legacy.

Another interesting example of interaction between art and new technologies took place in February 2022, when the Unit Gallery in London, in collaboration with four Italian cultural institutions (the Pinacoteca di Brera, the Complesso Monumentale della Pilotta in Parma, the Veneranda Biblioteca Ambrosiana, and the Uffizi Museum) and the technical partner Cinello, organized the exhibition 'Eternalising Art History'. In the exhibition, digital reproductions with NFTs of six masterpieces belonging the aforementioned institutions were displayed. In addition to making these artworks accessible to a wider audience, the exhibition also aimed at selling limited-edition digital works. However, in Italy, these masterpieces born analog and subsequently digitized by the legitimate rights holders and/or owners of the physical asset must face the complex regulatory framework which sees – among others – the provisions and the related limitations of the ICL coexisting with the ones of the ICHC.

At this point it remains to be seen what policies cultural institutions will adopt with regard to the digitization of their heritage. Namely whether, in a profit-optimizing perspective and on the basis of partnerships with private individuals who provide the necessary technological support, they will aim for more control of digitization by creating unique (or limited edition) and authentic digital reproductions of greater economic value because of their uniqueness. Or, whether in a view of accessibility to cultural heritage, they will make reproductions free, making use of creative commons licenses, for example.

Similarly, video games are also becoming an increasingly important means

for the enjoyment of art and culture, especially among younger generations. Indeed, video games can provide an interactive and engaging form of storytelling in which history and culture are conveyed in an unconventional but effective way. Game designers aim to create a sense of immersion for players by replicating physical locations of particular cities. In doing so, designers may recreate notable landmarks, including buildings and artworks relevant in terms of arts and culture. For example, a video game was developed in 2022 to promote Sicily's cultural heritage. The game is called Augustus and is an immersive journey through some of the island's most beautiful archaeological sites. The idea is to promote the beauty of the island through a new, interactive and engaging tool, capable of bringing to the enjoyment of archaeological sites and monuments a young audience, often left on the margins of traditional initiatives aimed at promoting cultural heritage.

However, when Italian cultural heritage is being in any way included in the videogame, game designer should deal with the ICHC and investigate to which administration the cultural property belongs, and which fee are required for its reproduction. If the monument belonging to the Italian cultural heritage is reproduced with no modification whatsoever, authorization is absolutely mandatory. However, as previously mentioned, given the lack of clarity on the interpretation of the provisions of the ICHC, if the cultural property is creatively reworked and modified by the game designer, there is room to evaluate, on a case-by-case basis, whether the authorization from the entity to whose care the cultural property is committed, can be bypassed. In order to reach a positive conclusion, the modifications made usually shall have a substantial impact on the final representation of the monument in the videogame. However, the outcome of this analysis is uncertain, and depends on a number of different factors, such as the level of similarity between the original monument and the one depicted in the videogame, the way in which the monument is represented, the level of detail that the user can perceive, its role in the story, and so on. Furthermore, for a positive outcome, it is important not to mislead the public in suggesting that the videogame is somehow sponsored or associated with the cultural heritage property depicted or the relevant authority to whose care the property is committed, as this could give rise to claims of false endorsement and unfair competition.

To conclude, the current Italian legal framework regarding the reproduction for commercial purposes of cultural heritage properties and artworks protected by copyright represents a significant limitation not only for the fashion industry, but for society as a whole. The need to pay for reproduction discourages the use of images of cultural goods and works of art, thus limiting their dissemination around the world. Additionally, the interpretative uncertainty regarding the possibility to re-elaborate the image of such goods severely limits the creativity and freedom of expression of the public. In this situation, no one seems to benefit: neither the public entities to whose care the cultural property is committed, nor the authors holding the intellectual property rights to the works, nor the people, businesses, and

professionals who wish to showcase the beauties of our country to the world. This is a lose-lose situation, where the creativity of artists is limited, the public's ability to freely enjoy works is limited, and the ability of administrative entities to promote themselves and their works is limited.

It is therefore necessary to promote a legal framework that fosters creativity, freedom of expression, and the dissemination of art and cultural goods, without compromising the rights of authors and intellectual property owners. It is to be hoped that the Italian legislator will quickly intervene to correct the strong regulatory inconsistencies that currently characterize the national legal framework by providing a clear and broad interpretation of the concept of reproduction and introducing the freedom of panorama exception, extending it to commercial uses as well.