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ARTICLE

Postcards from Italy – The Art of Controlling Images of Cultural Goods Better Than Copyright Could

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Abstract Italian provisions on images of cultural goods may be reminiscent of copyright, in particular because they allow production and uses of such reproductions upon an authorisation, they impose fees for creating or exploiting them, and point out to the notion of integrity. However, the two sets of rules remain independent and autonomous, with a different purpose, subject matter and constitutional ground. National provisions are designed and interpreted in such a way that their outreach is broader than copyright. Therefore, they introduce a para- or quasi-copyright system, i.e. rules that are not necessarily accountable to third parties, affecting in this way the producers, users and reusers of potential images, as well as the material that is supposed to stay in the public domain. This is the main reason why it is crucial to study their legitimacy. This work studies Arts. 106–108 of the Italian Code on Cultural Goods and Landscape (ICCGL) limiting the ability to reproduce cultural goods, including when they embed a work of art, and this even when the latter is in the public domain. It explains why these written rules, based on a public property paradigm, may be criticized in a political and economic perspective, but are still compliant with higher norms, including EU rules on copyright and open data. In addition to that, the paper analyses the case law related to these provisions, it focuses in particular on the personality right on cultural good emerged in recent cases, and it explains why this prerogative raises concerns as to its

Cristiana Sappa authored sections 1, 2, 3.1, 4.1 and 6; Ludovico Bossi authored sections 3.2, 4.2 and 5. The overall outcome is the result of long and fruitful discussion and reflects a shared position on the topic.

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consistency and compliance with higher norms. Finally, the article explains why a potential extraterritorial outreach of the provisions on images of cultural goods, as stated by an Italian Court, has to be challenged in different perspectives. It also clarifies costs and benefits of this solution, concluding on the operational implications on market operators and on the principle of non-discrimination.

Keywords Cultural goods · Copyright · Images · Economic rights · Moral rights · Publicity right · Personality right · Para-copyright · Public domain · Private international law · Reuse of images · Fees · Valorisation · Preservation · National provisions · Extraterritoriality

1 Setting the Scene: The Role of Images of Cultural Goods in Preserving and Valorising Cultural Heritage

According to international legal instruments that are currently in force, the notion of cultural heritage encompasses a set of intangible and tangible goods and landscape.[1] National law reflects this dichotomy. So does the Italian Code on Cultural Goods and Landscape (ICCGL).[2] Tangible goods targeted by the notion are those located in various places, such as archaeological sites, cultural heritage institutions (CHIs), natural parks, specific geographical areas, and even underwater. The qualification of "cultural" for goods is left to national rules, while both international and national norms together govern cultural goods. Under national provisions, several classes of cultural goods exist. Within this framework, the common denominator is the set of selection criteria that lets movable and immovable goods qualify as cultural goods, and therefore fall into the notion of cultural heritage. Cultural goods embed a

[1] *See* the definition of UNESCO Institute for Statistics (UIS) (2009): "Cultural heritage includes artefacts, monuments, a group of buildings and sites, museums that have a diversity of values including symbolic, historic, artistic, aesthetic, ethnological or anthropological, scientific and social significance. It includes tangible heritage (movable, immovable and underwater), intangible cultural heritage (ICH) embedded into cultural, and natural heritage artefacts, sites or monuments. The definition excludes ICH related to other cultural domains such as festivals, celebration etc. It covers industrial heritage and cave paintings". On the debate related to the different facets of the notion *see* Blake (2000), explaining the narrow aims of the first texts on cultural heritage, *i.e.* the protection of cultural property against destruction and deterioration in times of war and the complexity created by new legal instruments expanding the meaning of the term without first having set a clear understanding of its meaning as used by the texts already established; Lixinski (2019), arguing that the disconnection of local communities from cultural heritage derives from the disconnection between cultural property of the same local community, as addressed by domestic law, and cultural heritage as a notion mentioned by international UNESCO treaties; Ferrazzi (2021), who explored how the evolution within the socio-legal context enriched the term cultural heritage of new meanings at the international level; Stamatoudi (2022), who explains the differences between cultural property and the broader term of cultural heritage (since the latter also encompasses a duty to safeguard), even though they are often used in an interchangeable fashion; and also MacMillan (2021), criticizing the fossilised notion of cultural heritage composed of fixed and movable, tangible and intangible things.

[2] *See* Art. 2 Italian code on cultural goods and landscape (*Codice dei beni culturali e del paesaggio*), introduced with Legislative Decree of the 22 January 2004, No. 42, ex Art. 10 Act 137/2002 (hereinafter ICCGL).

historical, artistic, archaeological, anthropological, ethnographic, archival interest, and therefore they have a civilization-related value.[3]

Some cultural goods embed works of art, and therefore may fall or may have fallen under copyright protection. This is, for instance, the case of many objects in art museums, such as paintings and sculptures, but also manuscripts and photographs, as well as CHI collections as a whole[4] with any of the above-mentioned civilization-related value. The potential presence of copyright affects their exhibition,[5] circulation and reproduction. This is why it is important to identify its presence and the right-owners, if any.[6] Not all works of art embedded by cultural goods are, however, still under the protection of copyright and this mainly depends on a time-related element. On the one hand, some works embedded in tangibles (or intangibles) are too ancient to have ever enjoyed any copyright protection; on the other hand, economic rights in copyright last for 70 years after the death of the

[3] In Italy the definition has been elaborated by a devoted Commission in the 1960s (*Commissione d'indagine per la tutela e la valorizzazione del patrimonio storico, archeologico, artistico e del paesaggio)*, created thanks to Act 310/1964. Such Commission was active until 1967. The definition is still reflected in the current Art. 2(2), referring to goods with artistic, historical, archaeological, ethnoanthropological, archivistic and bibliographic interest. *See also* Arts. 10 and 11 ICCGL, referring to the characteristics that a good needs. Some of the goods eligible as cultural ones were already mentioned in Art. 822 Italian Civil Code of 1942, which referred to immovable with historical, archaeological and artistic interest, and to museums', archives and libraries collections as part of the public property when owned by the State. In a comparative perspective, it is possible to note that national rules refer systematically to historical, artistic, archaeological, scientific interest. *See* Art. L-1 French code on cultural heritage (*Code du patrimoine*), also referring to goods with aesthetical or technical interest; Title I, Chapter I, Art. 185 Belgian (*Wallon*) Code of cultural heritage (*Code du patrimoine*), also referring to goods of architectural, social, memorial, aesthetic, technical, urbanistic interest, taking into account how rate, authentic, integrous and representative goods are; Sect. 2.10 German Act on the Protection of Cultural Property (*Kulturgutschutzgesetz*), referring also to goods from different areas of cultural heritage, especially those with paleontological, ethnographic or numismatic value. *See also* the notion of cultural heritage provided by the Convention of the Council of Europe on the value of cultural heritage for society, concluded in Faro on 27 October 2005 (hereinafter the Faro Convention): "cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time". The text entered into force on 1 June 2011, and Italy ratified it with Act 133/2022.

[4] On the qualification of museum collections as original databases and therefore the subsequent application of copyright *see* Galli (2006), pp. 452 ff. The author also discusses the protection of museum collections by the *sui generis* right.

[5] The right of exhibition falls under the right of communication to the public in civil law countries. *See* Court of Paris, 8 November 2018, on the reproduction of a Naf Naf advertising by Jeff Koons, in which the Court established the liability of the Centre Pompidou in Paris for exhibiting the work. In a different way, exhibition may not be covered by the right to display or other economic prerogatives in common law countries according to Stoke (2022).

[6] When it is excessively difficult to identify or find copyright owners, the orphan work regime, as transposed at the national level after the introduction of Directive 2012/48/EU applies. This may limit the exploitation of some works to the uses authorized by Art. 6 of the same Directive or it may condition it to the licensing regime that has been recognized at the national level. In any case, when rights are trackable and it is possible to identify the subjects managing them, an authorization for their exploitation is needed: this happens in particular in contemporary art museums – where the long-lasting economic rights are still affecting the use of cultural goods embedding the work of art and a request to the Collective Management Organization (CMO) – if any involved – needs to be made for using the protected work.

author and therefore their presence may be affected by national provisions establishing temporal requirements to qualify as cultural good.[7]

These distinctions confirm that cultural goods reflect the arts, and the arts have to be understood as an expression of fundamental freedom, thus pertaining to individual sovereignty. However, they also reflect cultural values, and because of that they cannot belong to any one individual, they have to be enjoyed, and used by all.[8] As such they fall under the public mission because they affect societal development, fairness and equality.[9] This justifies State intervention: according to constitutional principles,[10] any of the bodies with power provided by the State must ensure the protection, preservation and valorisation of cultural goods, because of the major role they play in the education of the ever-evolving community with which they are connected.[11]

Cultural goods are traditionally protected thanks to preservation-aimed activities. For valorisation purposes, they are also commonly exhibited. In addition to exhibitions, images of goods – i.e. representations of external forms of objects that can be made via reproductions[12] – can be made available, typically on the institutional site of the body hosting them. Related information may be also made available together with the images: more precisely, such an information may be composed of data describing the object – e.g. on the technique used to create it, the date of its elaboration, its author, restoration, if any, as well as when it was first

[7] *See* for instance Art. 10.5 ICCGL, introducing the need of a declaration of interest for qualifying some movable or immovable as cultural goods and thus excluding from the notion some of those whose author is still alive or created them less than seventy years ago.

[8] On the notion of cultural goods as *res* that have to be enjoyed by anyone, now and in the future, *see* Giannini (1976).

[9] Camardi (1999), explains the two viable readings of cultural goods under Art. 9 Italian Constitution, *i.e.* on the one hand the one based on cultural value, and on the other hand the economic-oriented one.

[10] *See* Art. 24 Greek Constitution and Art. 9 Italian Constitution. Tarasco (2019), also refers to Art. 97 Italian Constitution to state that the reference to this second article of the fundamental Chart justifies the very commercially-oriented view on the notion of valorisation that this author shares in his writings.

[11] On the role that cultural goods play in shaping identities *see* Blake (2000), mentioning that cultural heritage, when appropriately used, can provide an identity to multi-ethnic societies, including in periods marked by rapid changes; MacMillan (2021), arguing that the value of cultural heritage can be controlled by norms and identity of a community against its propertization and commodification driven by private property rights. *See also* the result of the empirical research funded by ICOM, described by INTERCOM and CIMAM (2022), p. 34, according to which museums in central and south-eastern Europe in particular help for enhancing national identity. Then, *see* Art. 3.a Faro Convention. According to the Italian doctrine, cultural goods are considered as a crucial element for the individual's identity and their belonging to national sovereignty according to Leone and Tarasco (2006) and Videtta (2012).

[12] A reproduction is the duplication of a work via a mechanical device, photographic techniques, videoclips, slides, microfilm, photocopies, scanned copies, etc. Thanks to an image it is possible to get in contact with an idea or to know reality. Thus, an image may also be a tool of knowledge. In a copyright-related discourse, reproduction of cultural goods is often referred to as an image. The latter remains a non-technical copyright term, even though it appears in some national Copyright frameworks. The first use of the term "image" in Italy occurred with the Act 2/2008, that introduced Art. 70.1 bis Italian Copyright Act; this provision was aimed at broadening the scope of the exception on quotation.

exhibited. In addition, the information may describe the image – e.g. its resolution, presence of watermarks, etc.[13] Also, derivative works elaborated upon cultural goods and their images are increasingly used for valorisation purposes in particular, and are often developed in an interactive fashion. The very first – but not unique – aim of all these initiatives is certainly an educational one. The purpose is to communicate something about all or a large part of the cultural goods collected in a specific site[14] to the largest public, and to share information on civilization-related elements of communities.

All the above-mentioned activities imply costs. First, costs related to protection and valorisation are high because of the value of cultural goods themselves, and the subsequent necessary highly skilled level of care in implementing such initiatives.[15] Second, preservation includes basic costs that are generally high, which may also become prohibitive, for instance when cultural goods are quantitatively rich and predominantly ancient, like in the case of archaeological objects. Third, such costs are also increasing because the set of cultural goods is constantly expanding. The expansion happens via the acquisition of goods in collections, or via findings of data and material that occur thanks to research in the history of art, architecture, archaeology, or through archivist and bibliographical documentation. In addition, cultural goods are expanding because of the continuous creation of works that may fall under this broad definition at different times. Fourth, costs related to protection, preservation and valorisation are also increasing because of the higher expectations on the bodies hosting the goods that are connected to the technological facilities now available. In the past, bodies managing cultural goods were supposed to index collected goods and – when their conservation was not in danger – to exhibit them. Today they are strongly encouraged to keep up the indexing practice, but also to

[13] These are the so-called metadata that together with paradata and the image, i.e. the reproduction of the cultural good, fall under the notion of public sector information (PSI), in case the body managing the cultural good is a public sector body.

[14] The constitutional value of cultural goods imposes their comprehensive dissemination as a crucial step in the education experience. A selection-based dissemination would reflect an economic approach and market dynamics, not cultural ones. On this Camardi (1999), explaining how art becomes cultural goods upon the assessment based on social use and subsequently how the State has to ensure their preservation and valorisation to satisfy the collective interest to use it. This approach implies that the State produces and organizes an offer of cultural goods independently from the demand of individual consumers (thus, affecting their sovereignty).

[15] The value of a cultural good is determined, not only by the civilization-related interests it reflects, but also by its scarcity, since, the most often, it is unique or realized in limited series. Different methods – using different variables – are used for assessing such a value. Most of the studies related to these methods come from the early 2000s. *See* Frey (1997), criticizing the willingness-to-pay method because it is not connected to political decisions (while popular referenda are able to relate alternative options and democratic decisions; Mourato and Mazzanti (2002) arguing that economic valuation is a necessary but not sufficient stage to achieve a sustainable use of cultural resources and to help conservation and access (while assessing the respective opportunity costs); Throsby (2003), stating that Contingent Valuation Measures do not capture part of the non-economic values of cultural goods, and that cultural value potentially drives people's decision making on cultural goods'. On choice experiment analysis (*i.e.* valuation based on the perception of part of the population grounded on the good's features: *see* Moreschini (2003), explaining that they can be complementary to marketing and socio-economics surveys; Tirendi (2006), illustrating the advantages of such a method, in particular because of the accurate results obtained.

digitise them, if possible, in a 3D format, or, more broadly, in a format that does not create any interoperability issues on the short or average term. Ideally this digitization is aimed at making the images of the goods available to the public for different purposes.

It should be noted that the current technological infrastructure helps multiplying copies of decent quality very fast and at a very limited cost. As a consequence, once the image of a cultural good is available online, it is very hard to control its further reproduction, sharing or reuse. Thus, the digital image of a cultural good that was made available to the public is not as scarce as the reproduced cultural good is. The resulting impact is that whatever the format or the quality of such reproduction, the latter does not have the same high value that non-replaceable cultural goods have.[16] Still, their value is created by the strong interest in visual signs and for images in particular existing in current society. The latter populate digital communication channels which are also used for elaborating different kinds of audiovisual and multimedia works. More broadly, images of unique or rare cultural goods are able to serve educational purposes, via the enablement of access to knowledge on cultural heritage, or to suit market dynamics.

Because of this cross-cutting interest in images, bodies managing related cultural goods may opt for different solutions. From the perspective of knowledge dissemination, there is a strong public interest in producing copies of cultural goods and letting them circulate widely. Thus, bodies hosting cultural goods that adhere to this approach will make the related images available on their institutional websites or will contribute to international platforms aimed at making such images available to the broadest public.[17] This is in line with the expectations of the mission of CHIs, as described above.

From a different perspective that also takes into account commercial interests and implications, it is possible to identify various approaches. According to one, a wide dissemination of images of cultural goods would have positive implications on the attractiveness of places where they are hosted and therefore cultural tourism would be encouraged.[18] This would mean that there would be an impact not only on the implementation of education and access to knowledge, but also on the freedom to

[16] On the notion of "aura" of cultural goods *see* the famous Benjamin (1936), using it to illustrate the difference between the value of a unique work and its mechanical reproduction, lacking the *hic et nunc* that only the material version can have. As such, cultural goods are out of market dynamics, and this implies that Art. 8 Directive 790/2019 on the Digital Single Market applies to them. However, the access to the exhibition premises may be interpreted as a commercially oriented activity. In any case their unique or scarce character affects complementary business initiatives, such as tourism or hospitality in the area where the cultural goods are located. On some market dynamics in the field *see* Sappa (2023), explaining how private operators neutralize the ability of CHIs to enhance efficient self-funding mechanisms. On cultural tourism *see* already Bellini et al. (2007), arguing how this affects the quality of living, but also prices related to non-tradeable sectors such as restoration, hotels, etc., immovables and the contraction of the tradeable sector.

[17] As an illustration, *see* for instance the initiative of the Rijksmuseum on its institutional website and on the Europeana portal. Making image available is the best compromise when it is not possible to access the source work. For a discussion on this *see* Wallace (2023).

[18] In this perspective the Italian Ministry of culture created the advertisement campaign called Open to Meraviglia (wonder) to boost tourism visits to Italy in 2023. In this campaign, many cultural goods and sites have been reproduced around the edited image of the Venus of Botticelli acting as an influencer in different framework representing many clichés (*e.g.* eating a pizza; taking a selfie in the San Marco square in Venice). The campaign has been strongly criticised by the public in different perspectives. *See* the website of the campaign at the link https://www.italia.it/it/open-to-meraviglia.

conduct a business in the nearby area. According to a more traditional approach, bodies managing cultural heritage would tend to have partial or full control over the creation and sharing of images of cultural goods. For instance, they could decide to ask for authorization and compensation for any commercial use of the image, and leave other uses free, or they could choose to control any request to reproduce a cultural good and impose a fee for any of its uses, commercial or non-commercial.

This last approach finds its main justification in the costs related to the public mission of CHIs. More precisely, they argue that any revenue generated by the control over the production and use of images can be reinvested in preservation and valorisation initiatives, thus favouring an appropriate implementation of their educational mission[19] and enabling a concrete and better enjoyment of cultural goods, or at least, related information. Such a self-funding system may be implemented by using different legal instruments, for instance copyright or other tools broadly referred as para-copyright forms of protection (Section 2). This paper focuses on one specific para-copyright regime introduced via the Italian written rules on images of cultural goods and their interpretation (Section 3) and, after having pointed out at the parallelism with copyright, and in particular once identifying the differences, it aims at assessing its merely partial compliance with constitutional principles and EU law (Section 4), as well as its outreach (Section 5). Finally, the paper concludes by referring to the discrepancy between the focus of the national legislator and that of EU policymakers, the latter being on the creation of dataspaces and clouds and therefore oriented towards extensive reuse (Section 6).

2 Copyright and Para-Copyright: Using Different Legal Tools for the Same Aim of Controlling Images of Cultural Goods

Legal tools have often been used by CHIs to control the production and use of images with the main (but not only) aim of generating funds to be reinvested in preservation and valorisation initiatives, thus favouring an appropriate implementation of their educational mission.

Copyright, if any, is typically used by CHIs as a tool aimed at control. Its scope of application concerns original works of art, including those collected by the same CHIs. As already mentioned, the protection of works in the real world, however, may be rare because of their old age, and in any case the CHI may not be the copyright owner of such works. These elements limit the impact of copyright on cultural goods embedding works of art as a self-funding tool. Conversely, copyright protects original reproductions of cultural goods: this explains why it can be, and actually is used to control the circulation and exploitation of images of cultural goods.[20]

[19] Marciano and Moureau (2016) explain the economics perspective of this, *i.e.* museums monopolize the "downstream market of the copies or reproductions of works" with the aim of "their upstream market of the service they provide to the public".

[20] *See* the debate over the reproduction of the Conservatorium Hotel in Amsterdam (renamed the Breenbergh Hotel) in the video-game Call of Duty, as well as the different impact that copyright may have on the reproduction of its interior and exterior parts. Because of the existence of a quite permissive freedom of panorama exception it will be easier to reproduce exterior sides of a copyrighted building than interior ones, Thomas (2022).

It should be noted that when reproducing cultural goods for preservation purposes or for facilitating the access to the information on them, or yet for enhancing their reuse, the aim of such an activity is to make faithful reproductions.[21] However, often the identical reproduction of artistic cultural goods has been protected by either copyright, because the assessment of originality has been particularly generous,[22] or because of the existence of other neighbouring rights, such as the one on non-creative photographs.[23] For a long time, this protection has been offered even when the reproduced works of visual art[24] were already in the public domain,[25] thus enabling a relocking of material which is supposed to be freely reusable. This solution had put in place a *sine die* protection for images of cultural goods. Some legal rules changed the framework and aimed at impeding this possibility: in particular in different geographical areas and in different times. The goes back to the *Bridgeman I* decision[26] first and, more recently to Art. 14 of

[21] The request of a specific quality of the reproduction will depend on its specific destination. So the resolution demanded will be different in case of a reuse for entertainment purposes or of technical purposes (such as construction). In some countries an exception of quotation has been introduced to allow the use of low-resolution images of protected works: *see* Art. 70.1 bis Italian Copyright Act, *supra* note 12.

[22] Appeal Paris, 26 September 2001, *Propriétés Intellectuelles* 2002, 3, pp. 46 ff., commented by Sirinelli. Bonnaud-Le Roux (2020), p. 7, refers to some French non-univocal cases. For instance, Appeal Paris, 4 Ch A, 4 March 2009, No. 07/12226, granted protection because of choices on lights, colours-contrast, angles, aimed at "hiding the author" and celebrate the work of Art. *See* then the practice to use a © symbol on reproductions of works of English museums, even when it is debatable to identify copyright protection: the reason may be the reference to an originality threshold that is lower than the one required by EU law. However, *see THJ v. Sheridan* [2023] EWCA Civ 1354, in which justice Arnold explains that "What is required is that the author was able to express their creative abilities in the production of the work by making free and creative choices so as to stamp the work created with their personal touch" and that "This criterion is not satisfied where the content of the work is dictated by technical considerations, rules or other constraints which leave no room for creative freedom". This approach matches with that of the EU. With reference to the practice of museums to claim copyright over images of cultural goods and to the said decision *see* Grosvenor (2023). In a comparative perspective and with particular reference to reproductions of goods collected in museums *see* Kogan (2012) who criticizes the *Bridgeman* case and seems favourable to copyright protection.

[23] Such a right is designed on copyright, but it is shorter in time. On the protection of photographs by copyright in France *see* Latreille (2022). In Italy, on the alternative between copyright and the neighboring right protection *see* Bocca (2002), discussing the challenges of understanding which reproductions remain deprived of any form of protection. For a comparative perspective *see* Margoni (2014), mapping in particular the presence of the neighbouring right on photographs in different countries, such as Italy, Germany, Spain and Austria.

[24] On the notion of works of visual art Sappa (2022). Under US law however *see* Copyright Act of 1976, 17 U.S.C. § 101 (2006), according to which works of visual arts are those created in single copies on in numbered and signed print runs up to 200 copies, while works for hire and advertising materials – among others – would be excluded from the notion.

[25] *See* the decision of the German Federal Supreme Court of 20 December 2018 – I ZR 104/17, case *Museumfotos*, stating that faithful reproductions of painting in public domain collected by a museum were protected under Sec. 72 Copyright Act.

[26] *Bridgeman I* decision: *Bridgeman Art Library, Ltd. v. Corel Corp*, 25F Supp 2d 421 (SDNY 1998), in which Judge Kaplan decided to analyze the copyright status of faithful reproductions of museal works in a British and American law perspective (since the photographer was British): "one need not deny the creativity inherent in the art of photography to recognize that a photograph which is no more than a copy of the work of another as exact as science and technology permit lacks originality. That is not to say such a feat is trivial, simply not original", since this would imply skill and labor, but not creative choices. It is

Directive 2019/790 on copyright and neighbouring rights in the Digital Single Market,[27] according to which mere reproductions of works of visual art (embedded into cultural goods) have to remain free of protection. In other words, in the attempt to rebalance protection and freedom, the EU solution provided by Art. 14 DSM Directive is to imply that original copies of these works can be protected by copyright, while faithful and thus non-original reproductions cannot enjoy copyright or neighbouring rights, including the neighbouring rights in non-creative photographs.[28]

The practice shows that the copyright (or masquerading as such) licensing models of many CHIs on images are adopted. The extent of such licences varies. Authors have already studied different scenarios in which copyright overreach in different forms has been demonstrated.[29] For instance, some licences are given for images that may be considered as original due to an existing interpretation that favours a low originality threshold, as may typically happen in the case of 3D reproductions.[30] This is an example of how copyright has been stretched to have a very broad reach; thus, *per se* the licence is a mere copyright licence, while the rationale of an excessively stretched protection may be challenged in front of the court with jurisdiction. However, in some other cases, copyright notices or terms of use have been put on the websites of CHIs in a vague fashion, and in this way the same platform or website may include both protected and unprotected material. Within this context, some licences end up in covering non-original reproductions for different reasons, i.e. either because the concerned CHI is unaware of the legal rules in an accurate way, or because it consciously introduces a deterrent to reuse of images, even while lacking a valid legal ground. Further, some other licences may cover only protectable works, but use very broad terms that go beyond the economic rights deriving from copyright. With reference to these cases where copyright is claimed but should not be, it is possible to use terms such as either "copyfraud" or "para-copyright". Copyfraud[31] is the term used in the case of copyright claims that have no ground, such as non-original reproductions falling under Art. 14 DSM Directive. Para- or quasi-copyright is the term used when individuals or

Footnote 26 continued
worth noting that Judge Kaplan added that the same result would have been reached under UK law, that back at the time was adopting the skill and labor-based "sweat of the brow" doctrine, since the photographs were simply copied from other works. On decisions related to the creativity of photographs in the US *see* Crews and Brown (2011).

[27] Hereinafter the DSM Directive.

[28] On Art. 14 DSM Directive, European Copyright Society (2020), discussing also different neighbouring rights including the protection affecting audiovisual works. *See also* Sappa and Widła (2023), showing how the protection of literary and artistic critical and posthumous editions can still be ensured by copyright and, to a lesser extent, by the related neighbouring right, if any.

[29] Crews (2012) illustrates all the mentioned scenarios.

[30] *See supra* note 22. In particular. On the role of 3D reproductions, which are supposed to foster the number of expressions of information and knowledge (instead of being locked by protection) *see* Cronin (2022).

[31] The term is accredited to Mazzone (2006), p. 1026 ff.

organizations unilaterally set policy terms on the use of materials, crafting rules that are not necessarily accountable to third parties.[32] The main critical impact of this practice is the introduction of a deterrent for potential images users, the risk of a loss of interest in some of the images, and, again, the erosion of the space that is supposed to stay within the public domain.

To avoid turning into copyfraud, any excessive copyright outreach or any para-copyright regime needs to find its justification in a legitimate legal ground. Some scholars have already noted how different grounds have been used at various times to justify the mentioned control of production of images of cultural goods and, to some extent, circulation. Concepts such as possession, property and personality rights[33] as well as the principle of unjust enrichment have been referred to[34] beyond the property-based economic rights of copyright.[35] In this line of thought, some countries – Greece[36] and Italy[37] in particular – have introduced national provisions

[32] Crews (2012) discusses asserting rights to the public domain, but also asserting rights that go beyond copyright. In addition, he discusses asserting rights that museums have not (but that the right owners, donors may have) and eventually simulating claims of moral rights. *See* p. 819 in particular. As an example, *see* the conditions of reuse of images of works collected at the Louvre museum, and namely Art. 4.1.1(b) Terms of Use, at https://collections.louvre.fr/en/page/cgu#ART4_EN. For some examples *see* Minio (2018), referring to the policies of the Tate Gallery as well as the Louvre museum, among others. The author also refers to the policy of the Orsay Museum, where it is possible to take pictures for personal uses, but not for commercial purposes.

[33] Charpentier (2009) points out to the fact that the issue has come out repeatedly in time and both property and personality rights have been used to address it. Sometimes, property rules have been stretched enough to cover images of goods too. For instance, a debate on a broad interpretation of property rights that could cover the image of buildings too has occurred in France and Germany, as studied by Resta (2009). The reasoning can potentially extend to tangible cultural goods. French Supreme Court (Cass. Civ. 1ère), 10 March 1999, No. 96-18.699, case *Café Gondrée*. *See also* Cour de cassation, Rapport 1999, Paris, La documentation française, 2000, staring that the protection is grounded on the right of property and not on an independent right on the image of goods. *See* on this again Charpentier (2009). *See also* Cour des comptes (2019) suggesting that the image of museums would not be sufficiently protected. In Germany *see* Kirchmaier (2019), tracing the cases of the Federal Court.

[34] Scognamiglio (1999), argues that the unjust enrichment could be a valid ground for sanctioning non-authorised (because the authorisation has not been requested) uses of museal goods, such as exploitation of the related images, any time that the latter would deprive the museum of revenues that it could have earned. As a consequence, the museum could be entitled to request and have "financial utilities (*i.e.* money) back", under the criterion of the price of consent, often used by Courts with reference to unauthorised use of individuals' names or images.

[35] Ubertazzi (2000) argues that copyright finds its ground in the constitutional right of property (and more precisely in Art. 42 Italian Constitution).

[36] *See* the current Art. 46 Greek Act 4848/2021, pointing out to Art. 4A. A first comparison of the Italian and Greek laws can be found in Morando and Tsiavos (2011). For an analysis of the current technologies for the authors comment on the former version of the Greek rules on cultural heritage, before the reform occurred in 2021. According to McCarthy (2007) and Stanek (2008), in the first decade of 2000 an attempt to introduce a control-based legal framework aiming at controlling the creation and exploitation of pyramids and other ancient cultural goods can be noticed in Egypt.

[37] It is worth note that Communia, Policy Paper #20 on the right to use public domain heritage, 17 June 2024, reports that other countries have similar provisions, *i.e.* Portugal, Slovenia, Bulgaria and France. Arts. 3.1 and 3.2 Portuguese Administrative Order 10946/2014, mentioning the need of having a preliminary authorization for the purpose-bound use of image (also reminded at Art. 15.2). Arts. 177 and 179 Bulgarian Cultural Heritage Act, as modified in 2019 refer to both immovables and goods collected by CHIs. Article 44 Slovenian Act on the protection of cultural heritage of 15 February 2008, stating that the use of a monument is under the condition of the consent of the owner and potentially a fee as agreed

that establish a control-based policy, such as the above-mentioned para- or quasi-copyright practices, but in a more intensive fashion because they do not introduce mere *ad personam* obligations via contractual tools, whose cause lies on property or other rights and principles. In Italy these para-copyright written rules find their rationale in the public property paradigm underpinning Art. 9 of the Italian Constitution, while the (limited) case law in the field interprets such provisions in a very broad way also introducing a personality right. The following paragraphs will illustrate how the judicial interpretation of the already suboptimal Italian quasi-intellectual property right[38] system puts in danger the delicate balance between protection of assets and free circulation of images,[39] and raises some operational questions concerning its outreach, as well as doubts on its partial legitimacy and compliance with higher norms.

3 The Italian Legal Framework Governing Preservation and Valorisation of Cultural Goods: A Two Legged Para-Copyright Form of Protection

3.1 Expressing the Public Property Paradigm: A First Description of National Rules on Cultural Goods Aiming at Controlling Related Images

The current provisions aimed at controlling the commercial exploitation of cultural goods and related images are deeply rooted in the past. Their design has been elaborated across a complex series of legal texts, some of which have become milestones. The Royal Decree of 1913 on antiquities and arts already contained some provisions conditioning the ability to take photographs of goods collected in public "artistic institutions" to the authorization of the authority with jurisdiction on the matter. The reason of such a condition is not explicitly explained; however, it is possible to get an understanding by reading Arts. 15–20 of the same Decree that the preservation of goods as well as their dissemination for cultural purposes via photographic copies had to be considered as its main target.[40] In a similar way, the Act of 1939 on the protection of goods of historical and artistic interest focused on their conservation. The Act did not mention the term valorisation, but with particular reference to rules on reproduction, it was observed already at the time that "the concerned cultural goods obviously have a public destination" to be taken into

Footnote 37 continued
with him or her. If read together with Art. 38, the provision seems mainly targeting preservation, and potentially embedding a compatibility element. No case law exists in Slovenia on this provision; and France. As to France, Art. L 621-42 Cultural Heritage Code merely refers to immovables only and may be related to the case law on the right of property as reported *supra* note 33.

[38] The term is used by Caso (2023a). *See infra* note 55.

[39] Such a tension was already described in Bertacchini and Morando (2013).

[40] *See* Arts. 15–20 (and in particular 16 and 18) Decree 30 January 1913, No. 363, on the implementation of Act of 20 June 1909, 364 and in particular Art. 21. It is worth noting that in Art. 23 of the same Act there is a reference to the revenue from authorized photographs, which is however unsurprising in an era where the use of goods was mainly *intra muros*.

account while thinking about the conceptual framework affecting them.[41] Thus, even then, the ultimate goal of universal use made conservation a functional step to access. As a reaction to this impetus towards broad access, in the era of the "technical reproduction"[42] the later Act of 1965 on some services falling under the scope of the public mission related to arts, and the connected implementation regulation of 1971 expressly introduced the idea of controlled uses. More precisely, these rules referred to allowed uses of reproduced cultural goods (such as those related to conferences or other cultural demonstrations), to the grant of gratuitous authorizations in case of some non-commercial uses, and, in particular, to the need of uses compliant with the integrity and decorum of an object.[43] In the mid-1980s, time was ripe to begin thinking about economic-oriented valorisation of cultural goods, since general programs to fund culture and the finance bills of the time considered them as tools for cultural growth (via a broad accessibility), but also for economic development and for boosting (social) productivity.[44] The turning point for the introduction of market-oriented methods to valorize and subsequently better preserve cultural goods occurred in 1993, with the archetype of current rules aimed at establishing self-funding principles in CHIs for valorisation purposes.[45] Under the so-called Ronchey Act, any citizen became a potential user by paying to visit a cultural goods collection, but also an entrepreneur supplying additional services, or a sponsor of the CHI along with tax advantages. Also, and most importantly, the Act introduced fees for the exploitation of images of cultural goods and eliminated the references to uses and to compatibility of a use with the cultural destination of the good, announced more than 20 years before. This approach opened the door to two main perceptions: (i) it suggested the complementary role that any citizen can play together with the State in contributing to the conservation and valorisation of cultural goods, and (ii) at the same time it indicated cultural goods as inputs for market assets, to be largely reused in different ways, against a mere compensation. Any step that followed could be considered as a fine-tuning exercise of this approach. One year later, as a follow-up initiative to the Ronchey Act, a tariff scheme was introduced and one can observe that it left quite some room for discretion to each CHI in asking for a fee.[46] Then, in 1999, with the attempt of

[41] Grisolia (1952) on Act of 1st June 1939, No. 1089 and more broadly on the need to revise the traditional theory underpinning public goods, because of the ties with the protection of arts. *See* in particular Art. 52 of the same Act 1089/39 referring to the prohibition of selling goods owned by the public sector if such an alienation affects their use.

[42] The quote is a tribute to Benjamin (1936).

[43] Act of 30 March 1965, No. 340 and Presidential Decree of 2 September 1971, No. 1249.

[44] Camardi (1999), specifies that already according to the Finance Bill of 28 February 1986, No. 41 and the related implementation Decree of 27 March 1986, cultural goods are not turned into market goods, but their valorisation needs to be driven by economics and in this perspective cultural goods are managed in an entrepreneurial fashion.

[45] *See* the Ronchey Act, *i.e.* Act 14 January 1993, No. 4 and the related Decree of 31 January 1994, No. 171 (then cancelled and replaced by the Ministerial Decree of 24 March 1997 No. 139). Monti (2020) briefly describes the Act that was approved at the unanimity, and putting things into perspective, suggests reconsidering its approach to boost the quality of services provided, with the aim of enhancing the social benefits and to put the lights on all museums (and not only to the superstars of the CHIs' system).

[46] *See* Ministerial Decree of April 1994, in Official Journal No. 104 of 6 May 1994.

rationalizing the Ronchey Act into a Consolidated Text,[47] a combination of new and more demanding conditions for exploiting images emerged. Under this Text, on top of a fee, the administration managing a object could grant or reject the use depending on whether, according to a discretionary decision, it finds it compliant with the reintroduced notion of good's integrity and decorum. Eventually, in 2004,[48] the so-called "Urbani code", i.e. the ICCGL, confirmed this highly control-based approach. The provisions embedded in this code are still in force, as modified across the years and in particular in 2014 and 2017.[49]

More precisely, this concerns rules found in Arts. 106–108 ICCGL. According to them the State is entitled to control the exploitation of cultural goods hosted and managed by a CHI on Italian territory that does not fall under the scope of a different jurisdiction.[50]

Article 106 ICCGL concerns the authorization to use cultural goods for goals that are compatible with their cultural destination, in exchange of a fee.[51] Article 107 ICCGL concerns the authorisation to reproduce and allow a precarious and instrumental use of goods, in compliance with the needs related to conservation and copyright principles. Both rules have been designed while thinking about the needs related to the protection of the object. This explains why the consent shall be given

[47] The "Testo Unico" was issued thanks to the Legislative Decree 29 October 1999, No. 490 enhancing the conferred delegated powers by Art. 1 of Act 1997, No. 352.

[48] Meanwhile, between the introduction of the Consolidated Text and the one of the Urbani Code other initiatives have been taken, such as Act 410/2001 on the privatization and valorisation of public immovable cultural goods, *i.e.* the liberalisation of cultural goods to enhance the concession of use of archaeological and monumental areas for events with a cultural character.

[49] Ciani Sciolla (2021) p 479 ff., goes through the different steps of the evolution of the here studied ICCGL provisions and includes a reference to a Ministerial Decree of 20 April 2005, in Official Gazette 2 July 2005, No. 152, on modalities and criteria for reproducing cultural goods. On the reform introduced via the Decree of 31 May 2014, No. 83, converted by Act 29 July 2014, No. 106, *see* Gallo (2014), who also provides concrete examples about allowed uses that visitors could do in museums, such as taking photographs and sharing them on social networks or on the web, whereas hotels could share museums' pictures in their premises, but for instance they could not sell printed versions to their clients without an appropriate authorisation. For an explanation of the Act 4 August. 2017, No. 124, *see* Minio (2018), who compares the authorized uses under Art. 108.3 bis to copyright exceptions, and still underlines that copyright is autonomous and independent from the protection of images of cultural goods. On the "revolution" that the Act of 2014 brings along (but does not conclude yet), *see* Sbarbaro (2016).

[50] For instance, the Vatican legislation remains independent and autonomous from the Italian one, even though some common denominators are there and many of the cultural goods falling under Vatican rules are located on the Italian territory. On rules governing cultural goods (and goods located outside of the Vatican) *see* the Act on cultural good, 25 July 2001, No. CCCLV, and the executive Regulation adopted with a Decree of the Cardinal - President of the Pontifical Commission for the SCV, 26 July 2001. On the scope of application of the regulation and the jurisdiction and the tasks of the different bodies, such as the Governorship or the Commission, *see* Benigni (2017), spec. footnote 22. Also, for some information on Art. 12 Act 121/1985 according to which the Vatican has the "disposal" of the Christian catacombs in Italy, and therefore is in charge of the related costs, *see* Mayr (2020).

[51] On the compatibility of the use *see also* Art. 20 ICCGL according to which "Cultural goods cannot be destroyed, deteriorated, damaged or used in ways that are not compatible with their historical or artistic character or detrimental to their conservation". And also Art. 2.2 Ministerial Decree of 13 April 2023, No. 161, thanks to which were adopted the Guidelines for determining minimal fees for the use of cultural goods collected by State CHIs (*Linee guida per la determinazione degli importi minimi dei canoni e dei corrispettivi per la concessione d'uso dei beni in consegna agli istituti e luoghi della cultura statali*).

by the Ministry or other public sector bodies. In addition, it lays down that the fee connected to the exploitation has to be interpreted in this light, and not through the perspective of valorisation, meant as a commodification of the good. Nevertheless, it is essential to note that the fact of conditioning the authorisation to use an object in a fashion that is compatible with its historical-artistic value under Art. 106 (and Art. 20) ICCGL stresses the social – almost sacred – importance of cultural goods, limiting somehow the ability to use objects[52] and recalling – once again – the notion of integrity and decorum as initially introduced in 1965, when the exploitation was not meant to be economically-oriented in any way, and the technological and social framework was totally different.

Article 108 ICCGL then describes fees that can be requested and paid *ex ante* when cultural goods are reproduced for commercial purposes, while excluding copies made by private individuals for personal or study purposes or by public or private bodies for non-profit-making valorisation purposes.[53] This rule is therefore to some extent different from the two others described briefly above. It mainly answers a need of valorisation,[54] meant as a way to extract commercial value from the cultural good (to be reinvested at a later stage in preservation or further educational activities).[55] Within this framework, a central role is played by the determination of fees, which has to be decided by the administration on the basis of certain criteria mentioned in the same text,[56] but in a discretionary way.

For a long time, different CHIs have imposed varying prices for exploiting – reusing – objects, thus affecting, in different ways, consumers, businesses in the field and also the actual use of some objects. In April 2023, a Ministerial Decree introduced a unique tariff scheme[57] for determining fees to be requested according

[52] The authorization of the public sector body or of the State may be granted on the basis of an assessment that takes into account the purpose of the reproduction, also in terms of its compatibility with the historical-artistic dignity of the good, the number of copies to be made and the tolerability of the method on the copy to be reproduced. These criteria are expressly pointed out by Art. 3.1 Ministerial Decree 20 April 2005, in Official Journal No. 152 of 2 July 2005. *See also* Art. 20 ICCGL.

[53] This cannot (and does not) exclude however the refunding of the body that granted the use: *see* Art. 108.3 ICCGL, in line with provisions of the Directive 2019/1024/UE.

[54] Article 108.4 and 5 ICCGL, however, can still be interpreted in the perspective of cultural goods protection.

[55] Because of this approach, some authors define these rules as a quasi-IPR. *See* Caso (2023a). In a comparative perspective, it may be possible to refer to a quasi-"right of publicity", *see* Wallace (2022).

[56] The criteria for determining the fees are the character of the activities for which the authorisation is requested, the means and modalities for use, the destination of reproductions, and the economic benefits that the user gets. Similarities can be found in the Greek homologue, *i.e.* Art. 4A Greek Act 4848/2021.

[57] Ministerial Decree of 13 April 2023, No. 161, cit. Such a Decree raised perplexities that were discussed in a Parliamentary question because it shows a turnaround compared the positions expressed via recent national recommendations. *See* the resolution of the VII Permanent Commission at the Chamber of the Parliament, *Sulla riproduzione digitale dei beni culturali*, 2021, at https://documenti.camera.it/leg18/resoconti/commissioni/bollettini/pdf/2021/06/16/leg.18.bol0607.data20210616.com07.pdf; and the *Linee guida per l'acquisizione, la circolazione e il riuso delle riproduzioni dei beni culturali in ambiente digitale nell'ambito del piano di digitalizzazione del patrimonio culturale del Ministero della Cultura*, 2022, at https://docs.italia.it/italia/icdp/icdp-pnd-circolazione-riuso-docs/it/consultazione/index.html, stating that images can be provided without fees because of the necessary combination of both the commercial and literary aspect in a literary work and because of the many requests of images uses for publishing purposes that do not lead to any profit for their authors, excluding in this way the lucrative

to Art. 108 ICCGL and applying to different ways of the temporary exploitation of cultural goods. This includes when such exploitations happen via new technologies, and thus among others, through the minting of NFTs obtained via blockchain, as well as potential AI-related initiatives. This Ministerial Decree confirmed the approach of Art. 108 ICCGL and the will of maintaining self-funding systems for different CHIs, so that these institutions can close the financial gap left by increasingly limited public funding. The text reflected the national political priority calendar to be implemented in 2023 and for the 2023–2025 timeframe.[58] In the face of strong criticism since the criteria for calculating fees were not easy to interpret,[59] the modalities for determining the charges in Annex I of Decree 161/2023 have been changed by two other Ministerial Decrees in May 2023[60] and in March 2024.[61] This last Decree has a narrower scope of application compared to the former one, because it applies only to goods managed by the Ministry of Culture, which in fact comprise the vast majority. It distinguishes the acquisition of images from the use of images and determines fees, if any, accordingly. It expressly mentions that it has been introduced in compliance with the national transposition of Directive 1024/2019 on Open Data,[62] that is referred to in the introduction (as well as in the section related to the acquisition of images), where it is specified that fees apply to material that is not covered by third-party copyright, thus expressly mirroring the Public Sector Information (PSI) reuse regime. To some extent the Annex of the March 2024 Decree seems to be easier to read than the former one. However, this Decree replaces the Annex only of Ministerial Decree 161/2023 rather than the entire Decree. This means that part of the text of the former Decree of April 2023 is still in force and, in any case, still applies to goods under the Ministries not covered by the Decree of 2024. This text stated that CHIs are able to set fees beyond those indicated in the Annex. The result means leaving room for discretion to the bodies that want to impose higher prices and not completely eliminating the risk of a non-equivalent treatment for potential users.

Footnote 57 continued
purpose from this scenario. On the Parliamentary question *see* Manzi, Orfini, Zingaretti, Berruto, *Interrogazione a risposta immediata in commissione 5-00951*, 6 June 2023. The answer of the VII Commission of 7 June 2023 says that the national plan for digitization (*Linee guida*) is not a source of law and indicates a mere trend of a ministerial office; therefore, under the current legal framework it is not possible to make cultural goods images available for free and with no control, because this would be against the ICCGL.

[58] *See* Priority II.3 Ministerial Decree of 13 January 2023, No. 8. *See also* the reference to the economic meaning of the term valorisation (Priority II.2, II.4, II.8 and V.I).

[59] Even though it is important to recognize that an effort was made to give some order to the discrepancy of prices chosen by different CHIs from the introduction of the first tariff scheme in 1994 up to then. *See supra* note 46. The complexity of the framework on tariff was also increased because of the existence of regional complementary initiatives for determining fees: *see* for instance the Decree of the DG in the Sicily Region of 30 May 2011, No. 846, partially modifying the one of 27 September 2005, No. 7597.

[60] *See* Ministerial Decree of 1 May 2023, No. 187, aimed at removing "material mistakes" as mentioned in its main text.

[61] Ministerial Decree of 21 March 2024, No. 108, that modifies Ministerial Decree 161/2023.

[62] Directive 2019/1024/UE (hereinafter the "Open Data Directive") has been transposed into the national law with the Legislative Decree of 8 November 2021, No. 200, that modifies the Legislative Decree of 24 January 2006, No. 36.

Overall, the State is able to grant the authorization to create an image or allow it to be circulated for specific purposes upon two different (and partially discretion-based) elements, i.e. a fee and a positive decision on the compatibility of the image's use with the historical/artistic aim and value of the cultural good. Such rules are traditionally presented as an implementation of Art. 9 Italian Constitution, according to which the protection of historical and artistic cultural heritage aims at "promoting the culture" of the community.[63] This norm reflects the interest in disseminating culture, as well as of protecting it in a way that generates income to be reinvested in preservation and further education activities. In other words, it reflects public property rules.[64]

3.2 Adding a Personality Right to the Public Property Scheme: Focus on Case Law Related to Arts. 106–108 ICCGL

In the last decade, the above-mentioned rules of the ICCGL on the exploitation of images of cultural goods were enforced via a few decisions.[65] In each case, the

[63] Merusi (1975). The position is however strongly criticised by the doctrine that focuses on the civic and spiritual "elevation" of individuals in line with the principles embedded into Arts. 2 and 9 Italian Constitution, and therefore perceives the faithful reproduction of cultural goods as a vehicle for broadening the access to knowledge that should always be justified, except for reasons related to the preservation of the good. On this Tumicelli (2014) who specifies that this position does not imply freeing copies for commercial purposes automatically.

[64] *See* Casini (2018) states that public law scholars need to clearly elaborate on the reasons that justify the public power to limit reproduction when copyright is no longer there. Within this framework the public interest to authenticity would be covered by the public power to produce justice.

[65] The list of the decided cases provides an asymmetric and non-comprehensive scenario. For the sake of completeness, it is worth noting that the existence of other litigation on which information could not be collected cannot be excluded. In addition, some disputes may have not been decided yet or may have been settled out of court. Among the most renown example, it is possible to refer to the photomontage of Michelangelo's David holding a rifle with the header "a work of art" on a US magazine in 2014. The campaign generated debate, culminating in the Italian government threatening a legal action according to the Superintendent for the Historical, Artistic and Ethno-Anthropological Heritage and for the Museum Complex of the City of Florence, in a communication of 14 March 2014, available at the link http://www.polomuseale.firenze.it/comunicati/2014-03-12. The campaign was withdrawn and a statement of apology issued. The Superintendent, with another communication of 12 March 2014, available at the same link, reported that many interventions were carried out in recent years (*e.g.* the removal of Michelangelo's David and Botticelli's Venus from chemical toilets; an agreement with a ham producer to remove the product carried like a rucksack by the David and to design a more sustainable juxtaposition). A less known example is the opinion of the Legal Office of the Ministry of Culture 11 March 2015, No. 0005585 stating that the use of a self-portrait of Leonardo da Vinci cannot be authorized by the company Ravensburger, even if there is a doubt on whether the case concerns the original one hosted by the Royal Library in Turin has been used, or its authorized copy hosted in France. This solution is explained, in the wording of the opinion, by the fact that no sub-licence of use is authorized. Another renown example is the 2021 "Classical Nude" project, in which images of masterpiece paintings were placed side by side with their photographic versions staged with actors, in an adult entertainment website, as part of a commercial with a notorious actress starring as Botticelli's Venus was also published. Uffizi Galleries, followed by Prado and Louvre, contested the initiative, and obtained the spontaneous removal of the contents. On the contrary, paintings from Musée d'Orsay, National Gallery and Metropolitan Museum of Art remained part of the project. The issue is reported by Wallace (2023). Another is the one of the "Le Musée" capsule collection of 2022, realized by a renowned French stylist via the use of Botticelli's Birth of Venus from Uffizi Galleries. Following a warning letter, Uffizi Galleries sued the fashion label. *See* the museum's statement available at the link https://www.ansa.it//sito/notizie/cultura/2022/10/10/gli-uffizi-

factual background is substantially similar. The defendant is generally a private body exploiting – mostly in the Italian territory – a reproduction of a cultural good for commercial purposes, without any prior authorisation or any payment of the required fee. Sometimes the private body is based in Italy, sometimes it is not. The plaintiff is systematically the Italian Ministry of Culture (hereinafter, the Ministry) or, in some cases, the CHI in possession of the cultural good. Plaintiffs generally request both injunctions and damages before of the court of the place where the reproduced cultural good is located.[66]

Notwithstanding the limited number of such rulings, mainly interim orders providing interim measures or first instance decisions, it is possible to make some initial remarks on the trend followed by such a case law, which reflects a partial transition from a qualification completely founded on property-based rules to one based on both the latter and a personality right. In case after case, it is also possible to notice a clearly progressive intensification of the control-based approach over the years, as opposed to the increasing ability to share and elaborate images thanks to more and more advanced technological capabilities. Such an intensification of the protection – also assisted by the recently confirmed personality right – can be perceived in different steps.

At a first stage, in the early years of the ICCGL's introduction, no cases are observed on the issue.[67] In the two first cases involving Arts. 106–108 ICCGL, (surprisingly) the Supreme Court in 2013 did not recognize any relevant infringing reproduction for the reconstruction of an archaeological artefact, with highly

Footnote 65 continued
contro-gaultier-per-abiti-con-la-venere-di-botticelli_adcf4d5e-50be-4313-b2f8-e0eafd05ac2e.html.
Finally, it has been recently pointed out that an airline company apparently did not request permission to use the image of Michelangelo's David in a summer 2024 advertising campaign. *See* the report, which includes a museum communication, available at the link: https://www.linkedin.com/pulse/david-di-michelangelo-easyjet-lo-utilizza-senza-pagare-aliprandi-wzovf/.

[66] In the rulings, the place where the cultural good is located is generally considered where the harmful event occurred. *Cf.* Cass. Civ. No. 21661/2009; Cass. Civ. No. 22586/2004. *See also* Art. 7.1.2 Regulation 1215/2012.

[67] Some decisions in the late 2000s concerned the topic studied, but the here referred articles of the ICCGL were not applied by Courts for different reasons. *See* Cass Civ. 4213/2012, on photographs depicting Roman catacomb sites in the possession of the Pontifical Commission for Sacred Archaeology and published in some volumes. The court affirmed that the ownership of relics and places implies the right to regulate (a paid) access for visits, to charge a fee to depict the places themselves in photographs or on other media, as well as to charge a fee for issuing copies. The lack of reference to the ICCGL reflects the lack of jurisdiction since the case concerned goods belonging to the Vatican. *See also* Trib. Milan No. 5417/2008, commented by Avanzi (2010), on an unauthorised use of commissioned photographs of watercolour paintings by 16th century author Ulisse Aldrovandi. The existence of a related rights of the photographer enabled the court to affirm the unlawfulness of the commercialisation of such photographs via the internet. As the Altamura case, *infra* note 68, the court focused on copyright and neglected the ICCGL.

copyright-oriented interpretation.[68] Next, the Court of Milan in 2016 did not recognize damages for an unlawful low-resolution reproduction of drawings ascribed to Caravaggio in an informative book, due to the absence of a concrete harm.[69]

One year later, in 2017, the first decisions were issued confirming some sanctions in two cases concerning the use of a cultural good for advertising purposes. The Court of Palermo issued a decision related to an image of the Massimo theater. It confirmed the request for pecuniary damages,[70] but rejected non-pecuniary ones because, despite the commercial use, the representation was considered as promotional for the beauty of the monument and not as disparaging or detrimental to the historical and artistic value of it. The Court of Florence, in a case involving a reproduction of Michelangelo's David, issued an injunction with EU-wide effects, but did not consider the plaintiff's argument for damages, grounded on an illicit use of the name and image of David and, more broadly, on unfair competition.[71] However, the precautionary measure was considered as admissible also because on the one hand, the "indiscriminate" use of the image of a cultural good was

[68] Cass. Civ. No. 9757/2013, commented by Mastrolilli (2013). The case concerned the reproduction of the skull of the "Altamura (Neanderthal) Man", based on technical and graphic measurements and then produced and marketed. The court stated that a hypothetical reconstruction of the entire cranial structure involves an autonomous creative activity that leads to the creation of a distinct and different work from the archaeological artefact; however, in this case it did not find that the exercise resulted into an intellectual work. Eventually this led the court to admit that there was not a reproduction, and therefore not any infringement either. The court interpreted the notion of "reproduction" under Arts. 107 and 108 ICCGL referring to the one provided by Art. 13 Italian Copyright Act. The outcome has been criticized by Sbarbaro (2016). The author considers that because of the independence of copyright from provisions on images of cultural goods, and because of the broad meaning of the term "reproduction" under the latter, the lack of intellectual work would imply lack of copyright protection, but not a lack of infringement of the concerned ICCGL rules.

[69] Trib. Milan No. 53327/2016. The case concerned the use of low-resolution images of some drawings from the Fondo Peterzano collection located in the Castello Sforzesco in Milan by a student for study purposes; these images, together with others, came then into the hands of two art historians, who marketed an e-book containing 161 images that they found in the same CD-ROM they received by the student, concerning drawings attributed to Caravaggio. The request to use the images for the book, as well as the payment of the fee, were made only after the publication. The court confirmed the unlawful use of the images because of the existence of purposes other than those initially declared and because of an injury to the dignity and artistic value of the works due to their low-resolution. However, the court rejected both the claims for damages and for the injunction aimed at stopping the commercialisation of the book, because of three elements: (1) the failure to clarify under which conditions the authorization would have been denied or granted; (2) the irrelevance of the low-resolution in the context of an informative text; and (3) a late payment still occurred. As of today, such a use would be compliant with the current Ministerial Decree 108/2024 and, in a copyright perspective (should there be any), with Art. 70.1 bis Italian Copyright Act, providing an exception for low-resolution images (already there in 2016).

[70] Trib. Palermo No. 1371/2014, commented by Franceschelli (2018). The Court used, in absence of any prior determination, the parameters provided for by the Ministerial Decree of 8 April 1994, as adapted to the specific case.

[71] Trib. Florence No. 13758/2017, commented by Hoeren (2017) and Casaburi (2018). The case concerned the use of Michelangelo's David by a company offering guided tours in museums that used it on leaflets and on its website (Visit Today). On top of the injunction that prohibited the reproduction of the concerned image for commercial purposes, the judges ordered the destruction of all the related advertising material, the removal of any total or partial reproduction of such an image from all the websites connected to the defendant, and the publication of the decision in various newspapers, setting also a penalty for any delay.

considered to affect and undermine its attractiveness. From this specific perspective, the Court of Florence took a position that is different and more protectionist than the one of the Court of Palermo.

Eventually, out of the five remaining published cases, decided between 2022 and 2024, three concern the image of Michelangelo David's.[72] More precisely one concerns the use of a copy of the David in tuxedo for advertising purposes;[73] one involves the use of a model's image on a magazine cover which turns into the David via lenticular (3D) printing technique;[74] and a final one concerns David (or its replica) in an online image repository.[75] In addition to these decisions, another one issued by the Court of Venice concerns the reproduction of Leonardo da Vinci's

[72] As a general remark, it is possible to note that many of the reported decisions were taken by the Court of Florence and concerned the image of Michelangelo's David. While recognizing that this work is one of the most famous worldwide, it is possible to wonder whether all other CHIs do not react in this way because they do not have the same issues or because they do not believe in such an approach based on a broad control of cultural goods exploitation.

[73] Trib. Florence No. 1910/2022, commented by Pirri Valentini (2023). The case concerned the realisation of a copy of Michelangelo's David by a company operating in the artistic marble manufacturing sector and the subsequent loan of the copy, without any consideration and any explicit form of endorsement, to a well-known fashion brand. The latter created an international advertising campaign by dressing David in a tailor-made suit. Both the manufacturing company and the fashion brand were sued. The defendants promptly removed the infringing content, so the Court refused the grant a precautionary measure: *see* Trib. Florence No. 15147/2018. However, the trial on the merit for damages continued and, in August 2023, the Court of Florence issued its decision, in which it confirmed the jurisprudential trend that would have emerged in a short time. It condemned the manufacturing company and the fashion brand to both economic and non-economic damages. *See* on this already Trib. Florence No. 2992/2021. In the meantime, in 2022, the Ministry noted that some images of David's copy were still accessible on the manufacturing company's website and requested for another interim order, as well as compensatory damages in connection with each past and present conduit. The court ordered the removal of all the images and the publication of the decision. As to the urgency to provide, the court affirmed that, although the action was filed four years after the abusive conduct, a constant web monitoring was impossible, and at the same time it was not proven that the Ministry monitored the defendant's websites. On the contrary, once it became aware of the conduct, it took legal action in order to avoid the stabilisation of the possible damaging consequences.

[74] Trib. Florence No. 1207/2023, commented by Caso (2023a) and Bartolini (2023). In August 2020, an interim order inhibiting the use was granted. Meanwhile, the proceeding on the merit for damages continued. For the first time, the court concretely condemned the editor not only to pecuniary, but also to non-pecuniary damages. In particular, it confirmed the existence of an image right of the cultural goods similar to the one on individuals and legal persons.

[75] *See* the press release of 23 February 2024 at the link: https://wiki.gettyimages.com/michelangelos-statue-of-david/. *See* also the official statement of 1 February 2024 at the link: https://photoarchivenews.com/news/italian-ministry-of-culture-court-order-forces-getty-images-italia-to-remove-any-content-depicting-michelangelos-david/. After an initial rejection, at the reclamation stage, the Court deemed to grant a provisional order to immediately cease the making available of all content uploaded on the local Italian websites. The order covered not only the copies of the original statue, but also any replicas scattered in other cities in Italy and around the world. The interesting point is that, in this case, the internet service provider hosting the content has been directly condemned.

Vitruvian Man on jigsaw puzzles.[76] In these last four cases, the concerned courts recognised the infringement for non-authorised use, both pecuniary and non-pecuniary damages, and even an image (personality) right related to the concerned cultural goods. The latter has also been recognized in a case decided by the Court of Appeal of Bologna, on the reproduction of the portrait of the Duke of Este in a trademark for vinegar[77] In addition to that, in the decision on the Vitruvian Man the Court of Venice stated that Arts. 106–108 ICCGL are overriding mandatory provisions and reaffirmed[78] an extra-territorial outreach. That was contested by the German Court of Stuttgart in a recent case within the same litigation.[79]

4 How Some Public Property-Based Rules Comply with Higher Norms, While the Personality Right Does Not Find Legitimacy

As the above examples illustrate, cultural goods are protected by public and private law and in particular, they may be protected by both the ICCGL and copyright, either at the same time or in a diachronic way. Thus, while studying the topic, it is important to read and understand both these independent and autonomous[80] sets of rules as interacting in the same ecosystem in a complementary fashion.[81]

[76] Trib. Venice No. 5317/2022, commented by Caso (2023a), Bartolini (2023), Kurcani (2021). Since 2009, a German board game company marketed outside Italy a jigsaw puzzle reproducing, without modifications, Leonardo da Vinci's Vitruvian Man. In 2021, the Ministry and the museum sued the company and asked for precautionary measures. The Court of Venice eventually decided to prohibit the commercial use of both the image and the name of the Leonardo da Vinci's Vitruvian man in any form and in any product, including on websites. To justify the precautionary measure, the court considered the (likelihood of) existence of both pecuniary damages – because of the lack of payment of the fee under Art. 108 ICCGL – and non-pecuniary damages – because of the debasement of the image and the name of the cultural good resulting from an uncontrolled commercial use of the reproduction against Art. 106 ICCGL. The latter would justify the urgency to provide an interim order, despite the fact that the puzzle was marketed for years. Notwithstanding the long-time of protraction of the non-authorised use, the court still held that there was urgency to provide with a precautionary measure with the purpose of avoiding the continued debasement of the good. Interestingly, the Court expressly recognised that a cultural good does not have any subjectivity and, consequently, this justifies the capacity to bring proceedings of the person supposed to manage it.

[77] Trib. Venice No. 5317/2022, *supra* note 76, justifies such a right on the ground of Arts. 6, 7 and 10 Italian Civil Code (right to the name and right to image of individuals), while the Trib. Florence No. 1207/2023, *supra* note 74, find its ground in Art. 9 Italian Constitution and on provisions of ICCGL. *See also* Appeal Bologna No. 1792/2024, stating that this is a civil code-related issue and therefore specialized chambers in Civil Courts do not have jurisdiction on the matter

[78] Since this was already affirmed by Trib. Florence No. 13758/2017, *supra* note 71.

[79] Regional Court of Stuttgart No. 170247/22. With reference to the Venice decision, some doubt on the viability of that position was already expressed by Ricolfi (2024). On private international law aspects *see infra* 5.

[80] Pojaghi (2014), talks about a parallel track of protection. Musso (2010), refers to the different aims of the rules and on the necessary coordinated parallelism between the two set of provisions, also confirmed by the copyright mention in the ICCGL. Resta (2009), p. 587, states that the interest of authority that manages the good is independent from the interest of the copyright owner.

[81] Evidence of their independence and complementarity is illustrated by cross-references in the norms. Copyright is mentioned in different ICCGL provisions: *see* Arts. 107 and 108 ICCGL, Arts. 3.1 and 5.2 Ministerial Decree 20 April 2005, as well as Ministerial Decree 108/2024, distinguishing the ground of

Provisions on cultural goods have sources and aims and reflect interests that are different from those of copyright. These two legal sources have a protected subject matter of a different nature: tangibles in the first one, and intangible and non-rivalrous for the latter, even though some provisions on cultural goods aim at applying to non-rivalrous assets, such as images. Multiple individuals can use and enjoy a single work at the same time, although they may have to do so through different copies of the work. Unlike those potentially framed by copyright, mere copies of cultural goods are of comparatively little value. Also, the purpose of national provisions looks at the past and mainly focuses on preservation and valorisation.[82] Instead, copyright laws focus on how to incentivize creativity via the control over the reproduction, the communication to the public, the distribution and the elaboration of the works. Thus, copyright looks towards the future.

However, similarities between national rules on cultural goods and copyright do exist. Both forms of protection concern barriers to reduce infringement at both the national and – ideally – international scale. Because it is no longer possible to rely on national measures alone, there is an increasing request of supra-national solutions (including enforcement) in both areas. Overall, both types of protection seek to enable the rights holders to exert control via a request of authorisation system over the protectable tangible or intangible subject matters and the related financial revenue generated by such a control. Ultimately, in both legal frameworks, there is a concern for integrity, even though with a different focus.

That being said, the Italian provisions on cultural goods, acting on top of or as an alternative to copyright protection, impose a control broader in scope than the one offered by it. This creates non-negligeable transaction costs, mainly connected to the impact these rules have on the compression of the public domain. Therefore, the main question remains whether such a system finds a reasonable legal justification, and in particular whether it complies with higher principles and norms. With the aim of identifying the legitimacy of current legal instruments that apply to images of cultural goods, the exercise in the following will be to use copyright as a benchmark for two sets of protection, i.e. firstly, some written ICCGL provisions based on public property (4.1), and then the personality right in images of cultural goods as interpreted by courts (4.2).

Footnote 81 continued
fees for reproducing cultural goods (copyright or refunds). At the same time Art. 32 quater Italian Copyright Act, transposing Art. 14 DSM Directive into national law, refers to the ICCGL. As to case law *see* Trib. Milan, order 18 April 2006, in AIDA 2006, Rep. VIII.2., stating that two different authorisations are needed for reproducing images of cultural goods; and Trib. Florence No. 1910/2022, *supra* note 73, states that these two different sets of rules do not interfere with each other. Copyright aims at protecting original works of art and therefore their authors, while provisions on cultural goods aims at preserving the memory of national community, its territory; they also aim at promoting the cultural development under Art. 9 Italian Constitution.

[82] *See* Yu (2022) refers to the aims of "retention, repatriation, preservation, and authentication" of "cultural relicts" (cultural property) and add that "by contrast, except for moral rights, certification marks, and geographical indications, intellectual property laws rarely share the same focus".

4.1 Comparing and Contrasting Different Property-Based Regimes: Written Rules on Images of Cultural Goods and Copyright Law

4.1.1 Tariffs and Fees vs Copyright

Article 108 ICCGL introduces fees for reproducing cultural goods beyond those that may be introduced by the right owner in case copyright protects the concerned work or image. Such fees and copyright royalties have a different cause (consideration), remain independent and may be destined to two different subjects. Notoriously, copyright has become the object of numerous critiques recently, across different market sectors. So has Art. 108 ICCGL with reference to the area of mere images of cultural goods.

The Italian Court of Auditors stated that the approach chosen by Art. 108 ICCGL is not in line with the times and needs and that it would be ideal to open data up for free.[83] Commentators and the civil society have raised some perplexities as to the efficiency and suitability of this rule.[84]

Article 108 ICCGL appears to be inefficient for two main reasons. First, the provision aims at enabling CHIs to earn substantial return on investment from the practice of controlling the production and exploitation of images; presently this is not very easily achievable because of the presence of private operators that are on that market and neutralize the ability of CHIs to earn substantial income from this activity.[85] Secondly, excessive costs are related to this compensation-based approach. Such costs are connected to the higher price that, first, the market operator, and then the consumer will have to pay for exploiting and using images. Leaving exceptional circumstances aside – consider the mentioned higher price – operators and consumers may prefer to replace such a "product" with something cheaper. In addition and for sure, it is not always easy to identify when a fee is due, because it is not clear how to distinguish between commercial and non-commercial uses, and activities such as study, research, free expression of thought, creative expression, and promotion of knowledge of cultural goods[86] that may still be

[83] Court of Auditors, 12 October 2022, No. 50/2022/G considered that: "[…] the transformation that the digital produced invite to abandon the traditional 'proprietary" paradigm' and favour a vision of cultural heritage that is more democratic", while focusing on a return of investment on a single image seems to be merely anachronistic. Also, according to Court of Auditors, 20 October 2023, No. 76/2023/G, expressing its criticism on the Ministerial Decree 161/2023. The fact of opening data up would work as a multiplier of wealth for the entire community and consequently foster the GDP.

[84] Caso (2023b); Dore and Priora (2024). *See* with particular reference to the Vitruvian Man decision Dore (2023). *See also* on behalf of the Communia Association De Angelis and Vézina (2023).

[85] *See* Sappa (2023). For some numbers related to the income earned thanks to the fees under Art. 108 ICCGL of Italian museums and archaeological sites *see* Tarasco (2017), spec. p. 247. *See also* the report of the French Court of Auditors: Cour des comptes (2019) stating that the income from the sales of cultural goods reproductions do not constitute a substantial return of investment.

[86] Art. 108.3 bis ICCGC.

conducted for profit.[87] This uncertainty could result in a reluctance, especially on the part of minor reusers, to use Italian cultural goods in their creative process.

Some of the here referred to costs are also shifted on CHIs, since they will have to take care of the enforcement of any payment-based exploitation. With reference to this, from an operational perspective, the complexity of a systematic reading of the concerned provisions shall be taken into account. On the one hand, two means are easily used by CHIs that want to impose fees according to Art. 108 ICCGL. Property rights owners could easily exploit their control over the tangibles to limit the right to freely reproduce works of visual art collected in CHIs, including those in the public domain;[88] and contracts could be useful tools for anyone that would like to control the production of images in these works.[89] On the other hand, two tools could leverage the fees as requested by the CHI under Art. 108 ICCGL. Article 108.3 bis 2 ICCGL introduces an exception, stating that the circulation of lawfully acquired images is free when it is not possible to reproduce them for commercial purposes. However, the conditions (lawfulness requirement and the non-commercial purpose) limit much of the impact of such an exception. In addition, the picture could be completed by also considering the interaction of a ban on reproductions with freedom of panorama, i.e. the liberty of reproducing cultural goods when their view is accessible to the public, such as buildings, monuments and archaeological sites. Such a freedom, if any,[90] would provide a valid argument favouring the production and circulation of images of at least some cultural goods. However, even in case of a national recognition of the exception, such as via the transposition of Art. 5(3)(h) InfoSoc Directive, the question remains as to whether the property

[87] *See* Manacorda (2021), saying that in the digital age, the profit/non-profit distinction has very contradictory aspects; Morando and Tsiavos (2011), p. 3, stating that the distinction between commercial and non-commercial use does not consider the existence of content that has frequent non-commercial use, but which would be rendered less useful by the "sterilization" of potential downstream commercial reuse. *See also*, in a comparative perspective, U.S. Supreme Court 1994, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569; U.S. Supreme Court 1985, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539.

[88] On the other hand, on the property right owner a duty to care on exhibited works may be recognized as mentioned by Motti (1999). In this perspective, the right owner may be pushed to reproduce the managed cultural goods. However, he could still aim at limiting the circulation of such prepared images.

[89] This is possible also because Art. 14 DSM Directive can be derogated by contractual provisions, while a different position was taken in the preparatory works of the same text.

[90] As explained by Mayr (2019) such a freedom is not harmonized in the EU. In Italy for instance there is no codified principle, nor case law on it. So works accessible without barriers are not exploitable irrespectively of copyright. According to Pastore (2010), p. 488, economic rights of the authors cannot be limited even when the work can be viewed by a publicly accessible place. Magnani (2016) refers to the topic as a source of uncertainty. Casini (2018), points out that Art. 16.2 of the Royal Decree 363/1913 referred to the ability to freely reproducing immovables or movables exhibited to the public view, while nowadays the issue is still under debate. On connection elements between the copyright exception on freedom of panorama contained in the InfoSoc Directive and Art. 14 DSM Directive *see* Dore and Turan (2024). On the overlapping between freedom of panorama and r 14 DSM Directive Arisi (2021).

owner could be limited by such a freedom,[91] and therefore how CHIs would be able to react to it. All this is to state that it remains unclear how to keep track of images that circulate online (without) infringing Art. 108 ICCGL. Further, the costs of a case-by-case analysis to assess infringements from a quantitative perspective are certainly not limited. Overall, in order to ensure an appropriate enforcement strategy, CHIs need an adequate number and quality of resources, that the public sector in particular often lacks. In the era of the user- and AI-generated material, it is hard to imagine that CHIs would be able to check each and every use of images that circulate on the internet – and not only there.[92] This is the main reason why some museums have already introduced the practice of free access to digitized material for any purpose.[93]

That being said, this paper also aims at studying the legitimacy of such a provision from a legal perspective. More precisely, such an analysis has to pursue an understanding of whether the rule is compliant with EU rules on copyright and reuse of PSI.

A quick reading of Art. 108 ICCGL may suggest that the rule is in violation of Directive 2006/116 on the term of protection of copyright and some neighbouring rights (codified version), since it would create *de facto* a perpetual protection of works embedded in cultural goods.[94] In addition, it is worth noting that Art. 32 quater Italian Copyright Act that transposes Art. 14 DSM Directive, concludes adding an express reference to the reproductions of cultural goods under Legislative Decree 42/2004, i.e. implicitly Arts. 106–108 ICCGL. It is therefore appropriate to ask whether Art. 108 ICCGL and also Art. 32 quater Italian Copyright Act *in fine*, while reconfirming what is supposed to fall within the public domain from a copyright perspective, are in violation of EU law on the same copyright. This article argues that Art. 108 ICCGL may be (rightly) criticized from a political and economic perspective, but it still complies with the EU copyright framework.

As a first and general remark, governing cultural goods is a national prerogative. Thus, it is up to the States to introduce and manage provisions on their conservation, protection and valorisation. The Italian rules referred to here do not lengthen copyright protection, nor do they impose a protection on non-original works in the public domain. These legal rules in a sense bring copyright to mind, but they are different in nature. Article 108 ICCGL is conceptualized as a tool for fostering the

[91] In case a copyright exception was introduced to transpose it would still be unlikely that a property owner would enjoy more protection than an author. This approach would be in line with the arguments elaborated by Romano (2001), studying the conflict between the copyright owner and the owner of the tangible in different perspectives, including the one related to the access to the unique copy of a protected work. In particular at p. 114, the author quotes the decision of the Italian Constitutional Court, 6 April 1995, No. 108, in *AIDA* 1995, 297 ff. stating that the interests of authors have priority on those of users and of market operators acting in the sector, among which it is possible to identify the right owner of the tangible that aims at exploiting it.

[92] In this sense *see also* Ricolfi (2024).

[93] Tanner (2023). *See also* Kelly (2013). It is worth noting that both studies concern common law countries. *See also supra* note 12 *in fine*.

[94] In this sense *see* Regional Court of Stuttgart No. 170247/22, *supra* note 79. On the other hand, Trib. Florence No. 1910/2022, *supra* note 73, denied the presence of the conditions for a preliminary ruling to the European Court of justice.

public property of cultural goods. As mentioned, *de facto* it may be inefficient with respect to fostering the freedom of conducting a business; however, it is unlikely that the design, application and enforcement of Art. 108 ICCGL deter from the aim of managing cultural goods as public property in order to enhance education and cultural development through access to information on cultural goods. From this perspective, there is a solid constitutional ground in Art. 9 Italian Constitution. Such a constitutional legitimacy justifies the presence of Art. 108 ICCGL, even after the introduction of Art. 14 DSM Directive, because the latter creates an exception to copyright subject-matter and not to valorisation of cultural heritage through self-funding mechanisms for boosting conservation and educational initiatives. The different source, constitutional basis and purposes of Art. 108 ICCGL makes it compliant with higher EU norms on copyright. Certainly, it is appropriate to ask whether and to what extent national initiatives – such as in this case – can ease circumventing principles introduced by EU Directives in different but complementary fields. However, it remains difficult to imagine that the Directive on the term of protection or Art. 14 DSM Directive have an impact on a national code regarding cultural goods,[95] mainly for the abovementioned different respective goals and underpinning.

The tariffs imposed by CHIs under Art. 108 ICCGL should be in compliance with the Open Data Directive of 2019.[96] *In abstracto* national rules appear compliant with the EU framework, while *in concreto* a constant follow up may be necessary to verify and confirm this.

The Open Data Directive applies to PSI, thus also to the here concerned images, under two conditions at least. Images have to be made accessible and they cannot be covered by IPRs belonging to third parties. This last condition means that the Directive applies when the PSI is in the public domain; however, according to an extensive interpretation, it also applies when a PSI is covered by IPRs that belong to the public administration. This means that such a Directive applies to images that are in the public domain, like those that fall under Art. 14 DSM Directive, as well as to the protected reproductions, whose rights belong to the CHI hosting them. IPRs are owned by the CHI when it carried out the digitization project or when the contract negotiated with the third party that had to deal with the digitization is sufficiently clear on the rights resulting from the digitized outcome. Concretely, this means that the Open Data Directive does not have a wide scope of application, since – as explained in the Section 1 – even through a lack of copyright in the concerned cultural goods, there is quite some room for copyright in images of cultural goods, and most of the time it is owned by the third party that digitized the goods, and not by the institution.

A careful reading shows that tariffs as introduced by the Ministerial Decrees 161/2023 and 108/2024 are *in abstracto* in line with Art. 6.5 Open Data Directive and with the national norms transposing it. This EU rule introduces a ceiling on tariffs that can be imposed for the use of information extracted from a collection of a museum, archive or a library open to the public, that must correspond with the cost

[95] Sciullo (2021).

[96] *See supra* note 63.

of "collection, production, reproduction, dissemination, archiving of data, conservation and management of rights […]". On the top of such a price, it is possible to add "a reasonable profit on the investment". This notion was defined by the Italian provision transposing it as "a percentage of the total tariff, on top of the one needed to recover reasonable (literarily: admissible) costs, not exceeding five points over fixed interest rate of the ECB".[97] This means that CHIs have a good margin of flexibility to establish the cost of exploitation images of cultural goods within this ceiling. The same Ministerial Decrees 161/2023 and 108/2024 state that such tariffs are compliant with the provision of Legislative Decree 200/2021 transposing the Open Data Directive at the national level. However, besides the lack of transparency of the criteria to determine the calculation,[98] Ministerial Decrees are not easy to interpret and therefore it is not intuitive for the average user to say whether prices *in concreto* are compliant in the medium and long term, mainly because they have to adapt to the periodical change of the fixed short term rate of the European Central Bank (ECB). This means that only a factual constant analysis can confirm compliance with the provision *in concreto*. The cost related to this check is then shifted to the reuser, who will react to a potentially excessive and non-compliant tariff only when appropriately informed. For the reasons explained above, the Decree of March 2024, replacing the criteria for determining fees established by the Decree of April 2023, is easier to interpret than the former one, but does not necessarily change the risk assessment, nor the general situation, considering that CHIs are still able to go beyond the fees indicated, let alone the exceptions introduced by the law. In any case, compliance should also be studied in light of Art. 11 Open Data Directive, which lays down a principle of non-discrimination for similar uses. The Ministerial Decrees 161/2023 and 108/2024 and the related Annex do not mention anything opposing this principle. However, under such regime only a case-by-case examination could exclude the risk of a non-equal treatment among market operators entirely.

4.1.2 The Discretionary Power of Authorities vs Exclusivity in Copyright

Both copyright law and national rules on cultural goods enable control. Thus, both sources identify the subjects with the ability of such a control over use and display of the materials, and those preventing others from exploiting the protected works without the rights holders' authorization.

According to Arts. 106–107 ICCGL, the publication and commercialization of such images of goods is subject to an authorisation from the authority with jurisdiction, i.e. the one that manages the cultural goods whose image is concerned. In general, this is the body hosting the goods, such as the Galleria dell'Accademia in Florence, which holds the Michelangelo's David. As mentioned, these rules concern goods and images that are protected by copyright or other neighbouring rights, as well as images that are not protected by copyright or by any other rights.

[97] Article 2.1.1 bis Legislative Decree 36/2006, as modified by Art. 1.8.n Legislative Decree 200/2021.

[98] For instance, it is not clear which terms and criteria have been used to determine coefficients, multipliers and other elements of the tables of Annex I of the Ministerial Decree 161/2023 Guidelines.

The administrative authority with the power to grant or reject authorisation of use has full discretion as to its decision on the matter. Such an authorisation is not provided via an administrative process, and this means that there is no redress mechanism possible in case of a rejection.[99] This calls to mind the discretionary power left to a copyright owner, who can choose whether or not to authorise the use of a creative work protected by an exclusive right. In the case of copyright, such a discretion may be limited by principles of competition law, that however are not automatically enacted or enforced.

The discretion left to the authority is grounded in Arts. 20 and 106 ICCGL. These provisions indicate that only uses compliant with the historical-artistic character of the object, with its cultural and value profile can determine an authorisation to produce and use images. This is in line with a conventional approach according to which CHIs protect the integrity of art,[100] but it may also lead to give a sort of sacral value to cultural goods.[101] Such an approach is reflected in the wording of the case law referred to above, stating that an uncontrolled dissemination of an image of a cultural good implies its debasement.

Imposing conditions on circulation has an impact on freedom of expression, as does the fact of identifying the authority hosting the concerned cultural good as the only subject able to ensure the adequacy of the production and uses of related images. Legal certainty is also at stake, since in any case, it is difficult to interpret which elaborations for advertisement or merchandising purposes could be considered as compliant to the needs. Certainly, it is not possible to consider as suitable or legitimate any decontextualized use of images that associates the cultural good with unconstitutional values, such as violence and discrimination. In this context, lack of compliance is more intuitive. On the contrary, the question remains open for other uses: is a T-shirt reproducing Michelangelo's work or board games reproducing da Vinci's Vitruvian Man able to cause debase?[102] Is the reconstruction of Florence in the Renaissance in which the Dome appears that makes the latter degraded? Apart from this, questions certainly arise as to decontextualized images generated by AI, for which it is not possible to identify provenance or attribution, nor it is possible to anticipate the scale of the impact.

It should also be added that the notion of decorum should be taken into account while discussing this issue. Articles 45, 49, 96 and 120 ICCGL refers to decorum, without providing a clear definition of the term.[103] This notion enables development of reasoning similar to that elaborated so far, if applied to the image of goods without taking into account commercial aims of uses (and thus being even further in contrast with freedom of expression). This notion is closely tied to the dignity of

[99] The discretionary power of the authority with jurisdiction on the issue was confirmed by a decision of the Italian Supreme Court, *i.e.* Cass. 9 January 1997, No. 93, on the ground of Arts. 7.2 and 8 Presidential Decree of 2 September 1971, No. 1249, *i.e.* the Regulation implementing the Act of 30 March 1965, No. 340 on Regulation for enacting the Act of 30 March 1965, No. 340, on some of the services under the jurisdiction of State Administration of Antiquities and Fine Arts.

[100] Carpenter (2011).

[101] On the "value" of cultural heritage, Petraroia (2014).

[102] Hamma (2005), on Mona Lisa.

[103] Casini (2018)

cultural goods.[104] It seems that it applies mainly to cultural goods as such and not necessarily to their reproductions, unless a very extensive interpretation of the notion and related rules is used.

More broadly, the lack of transparency and certainty regarding the criteria for choosing whether or not to consider a use appropriate is in conflict with the promise to free the dissemination of reproductions of cultural goods for the sake of "free expression of thought", as already established by Italian Law 106/2014[105] while aiming at enhancing fundamental freedoms. In a nutshell it is very difficult to reconcile freedom of expression on the one hand and the ability of stating which uses are or not adequate *ex ante*.

Copyright does not prevent *ex ante* uses of a protected work on the ground that it may be offensive or may imply a quality that is not in line with the initial work. However, as mentioned, the moral right of integrity can affect the ability to use a work in a way that is detrimental to the honour and the reputation of the author.[106] Such an assessment is made *ex post* and therefore its impact is less invasive on freedom of speech than rules on images of cultural goods.[107]

Overall, it is possible to state that the approach of the rules on images of cultural goods enable control over all derivative uses of goods, including the commercial uses. Article 106 ICCGL provides the administration hosting cultural goods the ability to limit their uses when this affects the significance they have for the community. Article 106 (and Art. 20) ICCGL does not aim at controlling economic revenues, but it may be used with that goal in mind. In the same way, moral rights were introduced to protect the substance of a work of art and in general to protect non-economic interests. Nonetheless, they can also be instrumental in the economic exploitation of the work.[108] This deviated purpose of both rules on cultural goods and moral rights is one of the ways in which para-copyright manifests itself, with related implications on the erosion of free circulation of images and public domain.

Even though the scope of application has become broader due to the above-mentioned distorted interpretations, these provisions traditionally find their basis in

[104] On this Manacorda (2020), spec. at p. 49 ff. On the very flexible notion of decorum, that may also cover the historical and artistic meaning of the cultural good, *see* Mondini (2023).

[105] Italian Law 29 July 2014, No. 106, so-called "Art Bonus" because it introduces a tax credit for payment in money to support culture, so to boost patronage in the sector of cultural heritage.

[106] Caponigri (2021), p. 167, according to whom: "similar to a moral right to control the integrity of a work of visual art, the notion of "decorum" centers on the integrity of a cultural property". The parallelism is valid with reference to those cultural goods that are, were or could have been copyrightable. Motti (1999) refers to moral right infringement in case of change of color or format in the reproduction (but also in case of lack of exhibition of the work). According to the reading of Sbarbaro (2016), Art. 23 Italian Copyright Act would state that the moral right of integrity can also be used for protecting the immaterial value of cultural goods, and to defend such a value from some uses that would endamage the image of the same good.

[107] In a comparative perspective, it is worth noting that the French moral right of integrity intervenes any time that the use affects a work in its form of expression and in its spirit ("*dans sa forme et son esprit*"), which enlarges the scope of application of the right of integrity and therefore the impact on the freedom of speech.

[108] On the different facets of moral rights *see* Gendreau (2023), spec. p. 527, where she explains the role played by moral rights in maintaining the value of a work ("who wants to pay a high price for a work that is not valued by its author?").

Art. 9 Italian Constitution, together with Art. 108 ICCGL. The comparison with moral rights, however, forces a shift in focus regarding personality rights. Along this line of thought, while moral rights as personality rights find their legitimacy in fundamental norms, as do the written rules on images of cultural goods, it seems possible to criticize the interpretation by Italian courts favouring the introduction of an additional personality right.

4.2 Comparing and Contrasting Personality Rights Related to Provisions on National Cultural Goods and Copyright Law

The existence of a personality right related to cultural goods was affirmed for the first time in 2022 by the Court of Venice in the case involving the Vitruvian Man.[109] Several arguments were put forward to justify it. First, the court stated that the closed list of derogations embedded in Art. 108.3 bis ICCGL is evidence of the protection of a non-economic interest reflected in the current legislation. This consists in the destination of cultural goods to be enjoyed by the entire community, free of charge and in ways that lead to the development of culture and to the promotion of knowledge on the nation's historical and artistic heritage.[110] From this perspective, the payment of a fee is not sufficient to justify a use, while the essential element for this is the consent given by the administration at the outcome of a discretionary assessment on the compatibility of the requested use with the "cultural destination and the historical artistic character of the good".[111] This personality right was confirmed one year later by the Court of Florence,[112] which reiterated the arguments mentioned above and added that the ICCGL uses in different provisions the specific terminology of image rights via the notion of "decorum".[113] Moreover, the court stated that in the specific case the juxtaposition of the image of David with that of a model and its subjugation to advertising and editorial promotion debased its "high symbolic and identity value". Consequently, by emphasizing a link between Art. 2 (right to individual identity) and Art. 9 of the Italian Constitution, the Florentine judges identified an offence to the collective identity of Italian citizens, who are supposed to recognize themselves as belonging to the same nation through their cultural heritage.

Overall, from an operational perspective, such a personality right seems to be aimed at justifying the existence of non-pecuniary damages, the removal of the

[109] Trib. Venice No. 1910/2022, *supra* note 76.

[110] According to the same Court of Florence, this would also be confirmed by Arts. 1.2, 3.1, 6.1 and 106 ICCGL.

[111] Using the words of the Court, cultural heritage expresses and preserves the intellectual, political, social, religious, ideological heritage of the community, the protection of which is implemented in connection with the single cultural goods. According to the Court, this position would be supported by the fact that in Cass. Civ. No. 23401/2015 granted the protection to the image of legal persons, non-recognized associations without legal personality, and that Cass. Civ. No. 18218/2009, granted the protection to mere goods too. *See*, for a complete commentary of these decisions of the Italian Supreme Court, Resta (2010); Garaci (2011); Romanato (2010).

[112] Trib Florence No. 1207/2023, *supra* note 74.

[113] As referred in Arts. 45.1, 52.1[ter], 96 and 120.2 ICCGL.

unauthorized reproductions from the market even in case the fee was paid, and the urgency to provide with an interim order even a long time after the beginning of the illicit use. This right may call to mind authors' moral rights, and the right of integrity in particular. Just as with the Italian moral right of integrity,[114] the personality right related to cultural goods would be, inalienable, indispensable, imprescriptible, and *in abstracto* perpetual. The subject entitled to enforce it would be the Ministry of Culture. The basis of this right, however, remains uncertain.[115] Courts oscillate between two approaches.[116] The first reflects the extension of personality rights to cultural goods, in the form of an image right of the cultural good itself. The second approach identifies an identity right of the community of citizens evoked through the cultural good. The section below highlights the inconsistencies of these positions and casts doubt on their legitimacy, taking authors' moral right of integrity as a benchmark.

4.2.1 The Distortion Introduced by Accepting a Right in the Image for Cultural Goods

Under a first interpretation, the cultural good itself would be protected by an image right. Currently, there is no explicit image right harmonised at the international or EU level. Consequently, the forms and levels of protection differ in each national legal system that recognizes it. In Italy, the legal basis of the image right are Art. 10 Civil Code on the image of persons and Arts. 96 and 97 Copyright Act on portraits.[117] Such a prerogative is classified among the personality rights and is generally applied to physical persons. However, it has been repeatedly stated that personality rights are applicable also in relation to entities, even if the nature of the latter imposes certain limitations.[118] On the contrary, at first sight, it would seem obvious to exclude the possibility of granting a personality right to cultural goods.

[114] In Italy, Art. 20.1 Italian Copyright Act. *See* Caponigri (2021), p. 167, according to whom: "similar to a moral right to control the integrity of a work of visual art, the notion of decoro centers on the integrity of a cultural property". The parallelism is valid with reference to those cultural goods that are, were or could theoretically have been copyrightable.

[115] Rosati (2023), who points out an open issue in these terms: "is the rationale of image rights such that the resulting protection can be invoked not just by natural persons, but also by legal persons and even cultural heritage assets?".

[116] *Cf.* Ricolfi (2024), p. 17 states that it appears noteworthy that a claim may come by the subject supposed to safeguarding the good or, in alternative, the right can refer to the image of the good itself.

[117] *See* Art. 10 Italian Civil Code on the image of persons and Arts. 96 and 97 Italian Copyright Act on portraits of persons.

[118] *See*, on this, Resta (2010), p. 479. The expression "image rights" of entities could be misleading and, referring to the social, political, and ideological heritage of an entity, it would be more appropriate to use "identity".

Indeed, an object is by definition different from a subject.[119] However, an analysis appears necessary, as the idea of personalising objects has emerged periodically in different times and jurisdictions.[120]

The discussion on the protection of the image of things, despite its long tradition,[121] has been scarcely afforded in Italy.[122] The doctrine has generally excluded the possibility of applying image rights as intended to persons to goods. Already at the beginning of the 19th century, it was pointed out that the façade of a building is something different from the face of a person.[123] Afterwards, a right to the image of one's belongings alongside the right to one's own image was expressly excluded.[124] This conclusion has also been recently restated,[125] and the limited case law on this point differentiates between the image of a thing and that of a person.[126] From a comparative perspective, some countries have discussed the issue of the ownership of the image of a good, without, however, invoking personality rights,[127] while others have expressly denied its existence for some time.[128]

[119] Subjectivity and personality coincide with regard to natural persons, while they remain distinct for legal persons. Entities that are unwilling or unable to acquire personality are generally nevertheless subjects. Indeed, they are holders of rights and obligations and constitute a center of imputation of interests autonomous and distinct from the individual members.

[120] *See* Stone (1972), arguing in favor of legal rights for natural objects; Brilliant (1991), arguing in favor of legal rights for art objects.

[121] *Cf*. Charpentier (2009) according to whom the issue of the image of things appears primarily as a problem of legal qualification, reflecting the values of a society at a given time. Indeed, depending on the period, justifications for controlling the image were sometimes sought on the idea of freedom, sometimes on the personality rights of the owner, and sometimes on the right to property.

[122] *See*, pointing out this circumstance, Resta (2010), p. 452; Pastore (2010), p. 487.

[123] *See* Fadda-Bensa (1901), p. 655; Campogrande (1904), p. 919, according to whom there is: "a profound difference in treatment that needs to be made between what is part of the human person and what is part of things, between the human face and the facade of a building".

[124] *See* Carnelutti (1938), p. 55, stating that: "the enjoyment of the body is granted to its owner with greater intensity and extent than the enjoyment of things"; Ferrara (1942), p. 103; De Cupis (1944); De Cupis (1959) stating that: "the legal opportunity to object to the dissemination of their image may exist, but not with the generality found for the right to personal image"; Crugnola (1973).

[125] *See*, with specific reference to an image right of the good itself, Fusi (2006); Resta (2009); Resta (2010); Garaci (2011); Resta (2014).

[126] *See* Cass. Civ. No. 542/1968, in Dir. aut., 2, 1971, 270, and in Il Foro italiano 91(9), 1968, 2236, concerning the publication of a patented fuel reduction tool in a technical journal. The Court stated that the question of whether there exists in the Italian system a regulation of the reproduction of things assimilable to that protecting the image of a person must be negative, since it cannot be extended to inherently different hypotheses the protection of the portrait of a person, which moves from the consideration of interests strictly inherent in the sphere of personality. *See also* Trib. Napoli, 25 July 1958, in Giust. Civ. 1959, I, 389, and in *Dir. aut.*, 3, 1959, 408; Trib. Milano, 28 January 1993, in *AIDA* 1994, 325.

[127] *See supra* note 33.

[128] In France *see* Cass. Civ. 1re, 10 May 1999, case *Café Gondré*. *See also* Rapport de la Cour de cassation 1999, Paris, La documentation française, 2000, according to which: "the solution should in no way be understood as establishing an image right of the good, in the same way as a person has a right to his or her image. It is simply a manner of exercising the right of property". However, it is not excluded that a personality right takes on the scene via Art. L. 621–42 French Cultural Heritage Code, which requires a prior authorization and the payment of a fee for the commercial use of the image of the buildings that constitute the national domains defined by Art. R. 621-98 French Cultural Heritage Code

Arguing that cultural goods would enjoy an image right similar to that provided to persons seems to entail several relevant distortions in the legal system as currently designed. First, an object as such does not have a legal reputation like a person would have. Evidence for this statement is the offence of defamation,[129] which is intended to protect the honour of persons and is unrelated to goods.[130] In the same sense, the right of authors' integrity does not protect the work in itself.[131] Second, from the point of view of the entitlement to bring proceedings, the right owner is the only subject entitled to enforce the unalienable image right. However, as a cultural good has no legal capacity, the entitlement to bring proceedings needs to be conferred to another subject. At a first glance, this could bring to mind the case of the image of a minor or of an incapacitated person. Nevertheless, even in these hypotheses, the power of the legal representative is not limitless, as the exploitation of the image may only be authorized in the absence of damage and in the presence of some benefits for the person concerned. On the contrary, the administration's authorization power seems nearly absolute. Third, from a teleological perspective, on the one hand, the need to protect the confidentiality of the person is the main ground of the image right in the civil law tradition, and such an aim is completely absent with reference to cultural goods. On the other hand, the ICCGL seems to have been designed with a main reference to physical assets and is imbued with materiality.[132]

Footnote 128 continued
(such as Palais de l'Elysée, Domaine du Louvre et des Tuileries). This article was deemed constitutionally compliant by Cons. Const. No. 2017-687, commented by Caron (2018) and Anger (2018). *See supra* note 33.

[129] *See* Art. 595 Italian Criminal Code.

[130] *Cf.* Art. 19 (2000) according to which: "Many countries have laws designed to safeguard the honour of certain objects, including national or religious symbols. Inasmuch as an object, as such, cannot have a reputation, these laws do not serve a legitimate aim".

[131] Moral rights authorize restrictions on uses likely to damage the author's image. Indeed, the moral rights and the economic rights respond to different logics. In other terms, not every modification or miscommunication of a work entails an infringement of the right of integrity, but only the ones which damages the honor and reputation of its author. This would occur when a utilization may lead the public to form a judgement about the author's artistic and professional identity significantly different from the one which would result from the correct perception of the work.

[132] In particular, the notion of decorum does not seem to have been introduced with reference to the use of images. *Cf.* on this Manacorda (2023), p. 227.

4.2.2 *The Improbable Existence of an Identity Right of the Citizens' Community Evoked Through the Cultural Good*

Under a second interpretation, an identity right of the citizens' community manifested through the cultural good would exist.[133] Theoretically, an infringement of a personality right of a subject through the reproduction of an object that evokes such a subject seems admissible.[134] Indeed, the personality right involved would not be that of the object itself, but that of the subjects identified through the said object.

However, several requirements appear necessary to embody such a situation, in particular when cultural goods are concerned.

First, a subject holder of personality rights is needed. As seen above, no particular problem arises with regard to physical persons and, albeit some limitations, with reference to entities.[135] However, the identification of a right owner seems more problematic when talking about an indistinct group of people recognizing themselves as belonging to the same nation. Indeed, this would imply the existence of a widespread and homogeneous interest[136] in not misrepresenting a collective identity, fixable at a given time,[137] through the unauthorised commercialization of the reproduced cultural good. This appears doubtful in relation to very vast groups, whose boundaries are difficult to define and in which members cannot actually decide whether to be part of or not. Moreover, if the Ministry is recognised as having legitimacy to bring legal action as guarantor of such vague interest, also other associations could be guarantors for the protection of the same, and even individual citizens may play that role for the defence of their identity.[138] In sum, a

[133] In Italy, the personal identity right is a jurisprudential creation that originated in the mid-1970s from the right to the image and the name. According to Cass. Civ. No. 3769/1988, it can be defined in the interest in not seeing one's intellectual, political, social, religious, professional, etc. heritage altered, misrepresented, obfuscated or challenged externally, as it had been expressed or appeared, on the basis of concrete and unequivocal circumstances, destined to be expressed in the social context. The Court applied this right to disparate situations with reference to persons, commercial companies, political parties, professional orders, etc. *See*, for an overall analysis, Pino (2005).

[134] *See* Pret. Rome, 18 April 1984, in Foro it. 1989, I, 2030, and in Giur. It. 1985, I, 2, 544, referring to the use of the accessories habitually used by a person in an advertising campaign; Trib. Milan, 21 January 2015, No. 766/2015. *See* in the same sense Ascarelli (1954). *See also* Mosert and Sheyna (2022), pp. 555–556, arguing in favor of the protection of digital avatars through image rights.

[135] Some decisions have even stated that States, intended as administrative apparatus, enjoy the right to the integrity of their own reputation. *See* Cass. Civ. No. 12951/1992; *Id*., No. 7641/1991; Trib. Rome, 28 February 2001, in Dinf. 2021, 464–470.

[136] Cass. Civ. No. 10125/2011, on the legitimacy professional orders in relation to defamatory conducts directed toward all potential members of the category. Cass. Civ. No. 20819/2021, on the legitimacy of labor unions.

[137] On the contrary, even at the individual level, this notion is, now more than ever, recognised as particularly mutable. *Cf*. Morbidelli (2014), according to whom the "common sense" is something composite and subjective, in line with the fact that culture is in incessant transformation due to the action of individuals. It cannot fit with a legal category or regulation and owners cannot be identified, except in very rare cases (*e.g.* historical reenactment events).

[138] *See*, in this sense, Caso (2023a), p. 2287.

problem of legal certainty is at stake, and national identity risks becoming more important than that of the individual.[139]

Second, an explicit connection between the object and the subject is necessary. While there is an obvious link between an author and her work, doubts subsist as to whether the mere reproduction of any cultural good can in itself unequivocally point to Italy, Italians or the CHI hosting the goods. In the cases analyzed, the reproductions do not appear to have been used in such a way as to support such a connection. This also makes doubtful the presence of the subjective element of intentionality or negligence in referring to the injured person, which is required to have liability.

A third aspect is damage due to the reproduction of the object that is suffered by the subject.[140] According to the Italian decisions referred to, the mere use of a reproduction of a cultural good for commercial or advertising purposes violates this identity right, while it would be completely secondary whether or not any modification occurred. This would lead to incongruous consequences. Courts have repeatedly stated that the use of a work for commercial or advertising purposes does not automatically violate the moral right of integrity.[141] In other words, the presence of damage should be verified in a case-by-case analysis, since it cannot be excluded that the work itself remains neutral in the eyes of the public.[142] The same reasoning can be extended to modifications, which do not necessarily imply a violation of non-economic interests.[143] This appears consistent with freedom of expression, especially long after the author's death. In brief, the unauthorized commercialization of a work, would not be detrimental to authors' honour or reputation as such. However, that would be the case for the community of citizens. This conclusion also does not correspond with practice, since the authorisation has already been provided

[139] *See*, in the same terms, Opinion AG Bobek, 23 February 2021, Case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:124, para. 84. *See also* Caponigri (2021), pp. 166–168: "While the Italian State might, under the law, step into the shoes of a community for practical, administrative reasons, it cannot replace the community for whom cultural property is preserved and valorized. That community, and its cultural dialogue, is embodied as much in non-commercial academic uses as in magazine editorials, puzzle creation, and online marketing".

[140] *Cf.* in a comparative perspective, in France, Cons. Const. 2017/687 QPC, 2 February 2018, para. 12, according to which the authorization for the commercial use of the image of the buildings of national domains may only be refused if the proposed commercial exploitation is detrimental to the image of this good.

[141] App. Roma, 9 October 2013; Trib. Milan, 22 July 2016; *Id.*, 29 May 2006; *Id.*, 6 July 2004; *Id.*, 10 June 2002; *Id.*, 16 November 2000; Trib. Roma, 12 May 1993; Trib. Milano, 25 January 1993; Pret. Roma, 30 July 1985.

[142] Cass. Civ., 2 June 1998, No. 5388. *Cf.* Modolo (2021), p. 32, which raises doubts about indiscriminately invoking the argument of decorum in relation to cultural goods even in the context of the most flagrant commercial use of images, *i.e.* advertising.

[143] Trib. Torino, 24 February 2010; Trib. Milan, 5 July 2010; Trib. Turin, 26 June 1997.

to both private and public subjects for combining the image of cultural goods with merchandise or advertisement.[144]

4.2.3 Focus on Inconsistencies of the Case Law Introducing a Personality Right

Despite some divergences between different States, personal rights are commonly understood as "personal", i.e. to be assessed individually with respect to specific persons.[145] Consequently, it is difficult to identify both an image right in the cultural good itself and an identity right on the part of the community of citizens related to cultural goods without disproportionately extending the limits of personality rights.[146] This asset-centerd or nationalistic approach appears to raise systematic uncertainties and to lack legal basis in higher norms.

In particular, divergences regarding the right of integrity of authors do not seem justified, even assuming a different underlying finality, as this prerogative neither protects the work in itself nor does it sanction its mere commercialisation. It is interesting to notice how, in different jurisdictions, the right of integrity is perpetual and after the death of the author may be enforced by the State administration.[147] This approach also seems to be in line with the aim of controlling cultural goods.[148] However, this possibility has been rarely used, if at all. This is coherent with the fact that, even if affirmed as perpetual, moral rights diminish in scope after the death of the author.[149] On the contrary, this personality right in cultural goods stands as intrinsically eternal and could gain significance over time, because of an increasing

[144] *E.g.* the Botticelli's Birth of Venus reproduced on a famous watch model: the announcement of the collaboration is available at the link https://swatch.com/it-it/watches/art-watches/museum-collaborations/uffizi-galleries.html; the image of the Colosseum that has been matched with the logo of a luxury company that financed the restoration works: the announcement at the link https://www.todsgroup.com/it/sostenibilita/colosseum-restauro-ipogei; the Open to Meraviglia campaign, *supra* note 18.

[145] *See*, in the same terms, Opinion AG Bobek, 23 February 2021, Case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:124, paras. 84–85.

[146] *See*, in the same sense, Resta (2023b), p. 152, according to whom neither the structure of the rule nor other considerations on the substance support the existence of a right to the image of cultural goods. According to Modolo (2018), p. 82, the reference to identitarian instances conceals claims on proprietary (and therefore economic) rights on the cultural good itself.

[147] In Italy, pursuant Art. 23 Italian Copyright Act, after the death of the author, it may be asserted by specific relatives (*i.e.* spouse and children and, in the absence thereof, parents and other direct ascendants and descendants) or, if public interest should so require, by the President of the Council of Ministers (even if this competence appears never to have been exercised). However, even in these cases, the object of protection appears to be always the honour or the reputation of the author. *See also* Portugal, Art. 57.2 Portuguese Copyright Act; France, Art. L. 122-9 French Copyright Act.

[148] *See* Dussolier (2010), pp. 37–40, according to whom: "Defending the integrity of works that are considered as cultural heritage of the State is often the hidden purpose of rules of perpetuity applied to moral rights. One indication thereof is the possibility for the State or its representatives, generally the Minister of Culture, to exercise the moral right to defend the integrity of public domain works […]". *See also* Galli (2016), p. 145, which reaffirms the existence of this purpose.

[149] *See* Geiger (2007), p. 720, stating that: "while moral rights are intended to protect the author's personality through his work, it is generally admitted that the personality rights decrease as time passes". *See also* Mayr (2020), pp. 1925–1926, saying that, with reference to the reproduction of the image of an embalmed corpse, implies the prevalence of a historical and cultural interest on the image right of the deceased for the benefit of the public, especially a long time after death.

importance of the cultural good considered. This would bring an advantage of the subject who introduces herself as the true interpreter of the meaning of the good.[150] At the same time, it would also create the same concerns related to an unjustified extension of copyright, because the subsequent restriction of the public domain and freedom of expression.[151]

The court's interpretation as to an existence of a personality right may be challenged on legitimacy-related questions of such a prerogative. In addition, issues on the outreach of the same decisions are also raised and deserve then to be studied.

5 The Outreach of Italian Law on Cultural Goods

Italian rules on the reproduction of cultural goods have some sort of equivalent in a very limited number of States. A typical remark directed at them is that they apply only within the territory of Italy.[152] Following this reasoning, the scope of such provisions would be rather limited, as only the non-authorized exploitations on Italian territory would be sanctioned, while all those occurring in other jurisdictions would escape the control-based system. To assess clearly the operational impact of Arts. 106–108 ICCGL, in particular following the interpretation provided by case law as referred to in this paper, it is crucial to understand whether and under which conditions Italian courts could issue a decision with global reach instead of a merely national scope.[153] The answer seems to depend on the very nature of the prerogatives covering the image of the cultural goods that are involved. The

[150] *See* Resta (2023b), p. 147, stating that a hypothetic symbolic value associated with the cultural good is iridescent and cannot be protected by an exclusive right. *Cf.* Caponigri (2021), p. 168, drawing a parallelism with the controversy over the display of Michelangelo's David in a school in Florida considered to be "pornographic"; Modolo (2021), p. 32, talking about anxiety of control based on the assumption that museums must necessarily be the sole guarantors of the information derived from cultural heritage.

[151] *See* Ricolfi (2024), p. 27, which recalls the words of AG Colmer in CJEU, 27 November 2003, Case C-283/01, *Shield Mark*, EU:C:2003:197, para. 51, who found it difficult to accept: "that a creation of the mind, which forms part of the universal cultural heritage, should be appropriated indefinitely by a person to be used on the market in order to distinguish the goods he produces or the services he provides with an exclusivity which not even its author's estate enjoys", and p. 27, where it is stated that, even if hypothesising a cautious recourse to a collective right to identity, emphasises that it is time to radically change course, also referring to EFTA Court 6 April 2017, Case E-5/16. *Cf. also* Frosio (2012), pp. 18–34, stating that: "public domain enclosure and copyright expansion are very pernicious for the diversity and decentralisation of modern forms of peer information production"; Morando and Tsiavos (2011), p. 12, state that such regulations undermine the public domain, with significant compression of the freedoms of expression and participation in the cultural life of citizens, but without the state deriving any concretely measurable benefit; *Cf.* Geiger (2007), p. 722, stating that: "the guarantee of the effective protection of the freedom of expression and of artistic freedom within the legal system is, together with intellectual property rights, a means of ensuring an effective policy for stimulating creativity […] we should, while waiting to find solutions for paying creators better, at least not discourage them from creating new works at all".

[152] *See* Regional Court of Stuttgart No. 170247/22, *supra* note 79.

[153] Trib. Florence No. 13758/2017, *supra* note 71, and Trib. Venice No. 5317/2022, *supra* note 76, ordered cross-border preliminary injunctions. In the following analysis, a predominantly EU perspective is adopted. Outside this territory, the arguments can be declined according to the specificities of the examined jurisdiction.

problem becomes even more complex when the exploitation takes place via the internet or through different subjects.

5.1 On Jurisdiction and Territorial Scope

First, the court having jurisdiction in the event of an unauthorised reproduction and commercialisation of the image of an Italian cultural good outside Italy needs to be determined.[154] Different scenarios are possible. Under EU law, when the exploiter has a domicile in Italy, Italian courts have jurisdiction, as the same country is the place of the defendant's domicile.[155] When the exploiter does not have a domicile in Italy, Italian courts could have jurisdiction under the condition that Italy is considered the place where the harmful event occurred or may occur.[156] This last aspect has traditionally been interpreted as pointing to either the place where the damage took place or the place from which it originated.[157] In this regard, Italian courts, in the cases referred to here, have stated that the damages occurred in Italy and, specifically, in the place where the cultural good is hosted, and where the CHI in charge of its custody and administration is located.[158]

This is the starting point for understanding subsequent scenarios. Indeed, when the *forum rei* criterion is used, it is irrelevant whether the exploitation takes place within or outside Italy, as protection for the plaintiff can be recognized also at the extraterritorial level. On the contrary, with the *forum commissi delicti* criterion, the protection sought by the plaintiff remains limited within the boundaries of the state of the *forum*.[159]In other words, courts using the second option could claim jurisdiction over any case concerning the reproduction of a cultural good, should it be the Michelangelo's David or the Leonardo's Vitruvian Man, regardless of where it is performed, whether in Italy or in Europe or elsewhere. However, a cross-border outreach of the decision would not be possible if the defendant exploiting the image has no domicile within the territory of Italy. In the cases studied by this paper, Italian courts used, in particular, the *forum commissi delicti* criterion. From this perspective, the territorial scope extending beyond borders would not be ensured.

[154] In this case, no major difference occurs when it comes to a provisional measure and, in particular, an injunction ordering the stop of utilisation or removal from the market, as these are included in the notion of "judgment" pursuant Art. 2.1.(a) Regulation 1215/2012. The only relevant peculiarity is that such a measure may also be issued by a Court that does not have jurisdiction as to the substance of the matter pursuant Art. 35 Regulation 1215/2012. However, in this case, it would have effect only within the territory of the *forum*. *Cf*. CJEU, 6 October 2021, Case C-581/20, TOTO, EU:C:2021:808, paras. 56–58.

[155] Art. 4 Regulation 1215/2012.

[156] Art. 7.2 Regulation 1215/2012.

[157] *See*, *ex multis*, CJEU, 25 October 2011, Joint Cases C509/09 and C161/10, EU:C:2011:685, para. 41; 7 March 1995, Case C-68/93, EU:C:1995:61, paras. 20–21.

[158] *See* Trib. Venice No. 5317/2022, *supra* note 76, which also stated that Italian jurisdiction could have been based on Arts. 8 and 35 Regulation 1215/2012.

[159] *See*, on copyright, CJEU, 3 October 2013, Case C-170/12, *Pinckney*, EU:C:2013:635, para. 45-46; 7 March 1995, Case C-441/13, EU:C:2015:28, *Hejduk*, paras. 36–37. *See*, more in general, CJEU, 7 March 1995, Case C-68/93, *Shevill*, EU:C:1995:61, paras. 20–21. *See also* Bulayenko et al. (2021), p. 13 ff.: "cross-border enforcement in EU is a rare phenomenon".

Given this general rule, some complications could still lead to cross-border effects, such as the presence of multiple defendants and in case of an exploitation over the internet.

Italian courts could have jurisdiction if Italy is the place where one of the various defendants is domiciled, provided that the related several claims are connected enough to consider that a single hearing would avoid the risk of irreconcilable judgments resulting from separate proceedings.[160] Decisions are considered as irreconcilable when divergence in the respective findings arises within the same factual and legal framework.[161] According to EU case law, in case a subsidiary company or a distributor is located in Italy and the holding or the producer is located outside Italy, it could be possible to argue that the same situation in fact exists.[162] However, as mentioned, the Italian provisions appear substantially unique and no harmonization at the supranational level took place. Therefore, divergences do not seem to arise in the context of the same situation of law.[163] As a consequence, decisions related to the use in different jurisdictions of images of cultural goods covered by the ICCGL could be considered not irreconcilable, and a cross-border decision would not be justified. At the same time, it does not appear possible under the Italian jurisdiction to sue only the subsidiary company or a distributor located within the territory and at the same time to claim joint liability for alleged infringements attributable exclusively to the parent company or the producer that is located outside the territory. If this were the case, a subsidiary would risk being held liable for infringements committed in the context of economic

[160] Art. 8.1.1 Regulation No. 1215/2012.

[161] CJEU, 27 September 2017, Joint Cases C-24/16 and C-25/16, *Nintendo*, EU:C:2017:724, para. 45; 21 May 2015, Case C-352/13, *CDC*, EU:C:2015:335, para. 20; 11 April 2013, Case C-645/11, *Sapir*, EU:C:2013:228, paras. 42–43; 7 March 2013, C-145/10, *Painer*, EU:C:2011:798, para. 79; 12 July 2012, Case 616/10, *Solvay*, EU:C:2012:445, para. 24; 11 October 2007, Case C-98/06, *Freeport*, EU:C:2007:595, para. 40; 13 July 2006, Case C-539/03, *Roche*, EU:C:2006:458, para. 26.

[162] *See* CJEU, 13 July 2006, Case C-539/03, *Roche*, EU:C:2006:458, para. 34, stating that in case the defendant companies belonging to the same group have acted in an identical or similar manner in accordance with a common policy elaborated by one of them must be regarded as constituting the same situation of fact; from the same perspective, *see* CJEU, 27 September 2017, Joint Cases C-24/16 and C-25/16, *Nintendo*, EU:C:2017:724, paras. 51–52, according to which: "the existence of the same situation of fact must cover all the activities of the various defendants, including the supplies made by the parent company on its own account, and not be limited to certain aspects or elements of them". *See also* CJEU, 7 September 2023, Case C-832/21, *Beverage City & Lifestyle*, EU:C:2023:635, paras. 36–41, concerning exclusive distribution agreements and according to which: "in order to establish the existence of the same situation of fact, particular attention should also be paid to the nature of the contractual relationship between the customer and the supplier"; CJEU, 12 July 2012, Case C-616/10, *Solvay*, EU:C:2012:445, para. 29.

[163] *Cf. a contrario*, CJEU, 7 September 2023, Case C-832/21, *Beverage City & Lifestyle*, EU:C:2023:635, paras. 28–31; 27 September 2017, Joint Cases C-24/16 and C-25/16, *Nintendo*, EU:C:2017:724, paras. 46–49. *Cf.* Torremans (2016), p. 1641, saying: "the more the national law is harmonized, the stronger are the arguments in favor of the application of Article 8(1) Brussels I Regulation"; Galanti (2020), p. 308. This can be argued even if an identical legal basis does not appear to be necessary according to CJEU, 1 December 2011, Case C-145/10, *Painer*, EU:C:2011:798, paras. 72–84.

activities that have no connection with its own activities,[164] and this would create an excessive legal uncertainty and a subsequent major deterrent for the establishment of legal entities in specific geographic areas.

With reference to online infringements of personality rights, it has been affirmed that the jurisdiction may be established before the courts of the Member State where the person claiming the infringement has her center of interests. In such a case, it would be possible to obtain extraterritorial protection.[165] However, this criterion has been limited only when it is possible to identify, directly or indirectly, the person in question as an individual and not as a person belonging to a vast group.[166] This means that even when the personality rights perspective is taken – as in the decisions issued from 2022 onwards – an extraterritorial scope would be difficult to affirm.[167]

In any case, even if a personality right and its extraterritorial outreach were confirmed, the prerogative related to the payment of fees would still remain at the territorial level, because of its different nature. From this perspective, the question remains as to the amount of the sanction that may be issued by Italian courts for the Italian territory: should this *de facto* take into account the infringement and related impact which occurred extraterritorially and would the outcome be considered proportional (and if so, to what extent)?

5.2 On Applicable Law

Next, the applicable law will be identified. It has to be noted that EU rules for non-contractual obligations do not apply to those arising out of infringement of rights related to personality.[168] In these cases, each national court applies the domestic choice of laws rule,[169] which is likely to lead applying the *lex fori*. This happens mainly because courts could tend to consider that a relevant part of the harm occurs within the territory of the State.[170] It is worth noting that the solution does not seem

[164] *See* however, on competition law, CJEU, 6 October 2021, Case C-882/19, *Sumal*, EU:C:2021:800, para. 72, considering the circumstance of a single economic unit.

[165] *See* CJEU, 21 December 2021, Case C-251/20, *Gtflix Tv*, EU:C:2021:1036, para. 30; 17 October 2017, Case C-194/16, *Bolagsupplysningen and Ilsjan*, EU:C:2017:766, para. 32; 25 October 2011, Joint Cases C-509/09 and C-161/10, *eDate Advertising*, EU:C:2011:685, para. 52.

[166] CJEU, 17 June 2021, Case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:489, para. 46, commented by Muir Watt (2021). A different position was proposed by AG Bobek, Opinion 23 February 2021, Case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:124.

[167] *See also* CJEU, 17 October 2017, Case C-194/16, *Bolagsupplysningen and Ilsjan*, EU:C:2017:766, para. 48.

[168] Art. 1.2.g) Regulation 864/2007. Interestingly, Trib. Venice No. 5317/2022, *supra* note 76, grounds instead its arguments on Regulation 864/2007.

[169] In particular, in Italy, Arts. 24 and 62 of Act 218/1995.

[170] *Cf.* Opinion AG Bobek, 23 February 2021, Case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:124, para. 77.

to change much when the tort perspective is taken.[171] Within the here referred to framework, then, it is not surprising that Italian courts applied the ICCGL. However, with reference to "foreign-to-foreign" transactions, it is reasonable to question whether the claimed offence would not be manifestly more closely connected with a country other than Italy.[172]

In case a foreign law was opted for, anyhow, the Italian courts have stated the overriding mandatory nature of national provisions on cultural goods, considered to protect an essential interest for the State, i.e. the conservation of the national historical and artistic heritage.[173] According to this approach, any reproduction or use of a cultural good falling under the Italian jurisdiction would be in any case subject to the requirements of the ICCGL, irrespective of the law otherwise applicable.[174] However, no distinction has been made between the rules affecting the tangibles from those concerning the related images. As far as tangible cultural goods are concerned, this position is not surprising, since States are in the best position to know which cultural goods located on their soil should be protected and within which framework. However, this argument seems more easily challengeable when referring to their images, since the application of overriding mandatory provisions implies sufficiently strong ties[175] with the *forum*. From this perspective, it is hard to perceive such strong ties between Italy and the sales of images of cultural goods or productions of derivative material based upon such images in a third country. Thus, the overriding mandatory nature of national provisions on images of cultural goods, as stated by the Court of Venice, is not convincing.

5.3 On Recognition and Enforcement

Eventually, the conditions of recognition and enforcement of a judgment in other territories shall be determined.

According to the regulatory framework, a decision is easily enforceable across Member States within the EU, since an *exequatur* is not required,[176] and more broadly the recognition and the enforcement of a decision can be refused only in

[171] *See* Art. 4 Regulation 864/2007. It could be argued that Italian rules could apply directly, abroad too. *See*, on this, Franzina and Jayme (2018), affirming that the reproduction rights of the owner of a cultural good are governed by the law of the state in which it is located and that this applicable law may also affect infringements that have occurred or are to be feared in other countries. However, so far, no lawsuit seems to have been filed directly abroad and, at present, it appears unlikely to be done given major uncertainties.

[172] *See*, on this, Ricolfi (2024), p. 22, who questions the applicability of Italian law, insisting on Art. 4.3 Regulation 864/2007.

[173] Trib. Venice No. 5317/2022, *supra* note 76. The court cited in support also CJEU, 26 February 1991, Case C-180/89, EU:C:1991:78, para. 20.

[174] According to Art. 16 Regulation 864/2007 on non-contractual obligations, mandatory overriding provisions can be applied only when the action occurs in front of the Courts of the state that granted them, while they cannot apply in other states. This makes the difference with Art. 9 Regulation 593/2008 on contractual obligations that admits a certain recognition of these provisions abroad. *See also* Art. 17 Italian Act 218/1995.

[175] Plender and Wilderspin (2009), spec. p. 744.

[176] Art. 39 Regulation 1215/2012.

certain exceptional cases on the application of a party.[177] On the one hand, enforcement cannot be refused on the mere ground of discrepancy between the legal rule applied by the court of the State of origin and the one that should have been applied by the court of the State in which enforcement is sought.[178] On the other hand, the enforcement of a decision in another country could be refused on the ground of being against *ordre public* (public order).[179] Even if this clause operates only in exceptional cases,[180] it could be possible to invoke it against a cease-and-desist order concerning the image of a cultural good falling under the ICCGL – combined with non-pecuniary damages – for the infringement of a personality right, while pecuniary damages for non-payment of fees should make the object of a separate claim and set of remarks. More precisely, the argument could be developed around the remark that, as explained above, such a personality right of the good or of the citizens' community appears to deviate considerably from the common understanding of personality rights. Also, other arguments supporting the contrariety to *ordre public* may related to the inadequate balancing with human and fundamental rights – such as the freedom of expression – the non-proportionality of the remedies provided,[181] as well as the fundamental interest of society to safeguard the public domain.[182]

[177] Arts. 45 and 46 Regulation 1215/2012. Under Art. 51 of the same text, courts could even stay the proceeding due to the pendency of an ordinary appeal lodged in Italy.

[178] *See* CJEU, 11 May 2000, Case C-38/98, *Renault,* EU:C:2000:225, paras. 29–34. *Cf.* Moura Vincente (2009), p. 449. Interestingly, the Court of Stuttgart No. 170247/22, *supra* note 79, omitted any consideration on the recognition and enforcement of the foreign judgment, but limited itself to a negative declaratory relief based only the territoriality and sovereignty principle. In another perspective, pursuant Art. 3 Directive 2000/31/EC, Member States shall not to impose to information society service providers stricter requirements than those in force in their territory of establishment. According to CJEU, 11 September 2014, Case C-291/13, *Papasavvas*, EU:C:2014:2209, paras. 27–29 and 32, this applies also regarding the liability regime for defamation. A possible violation could not be invoked to refuse enforcement by another Member State. However, it could be brought before the Court of Justice by Italian courts, which might also be required to rule on whether public policy grounds could be invoked as derogation pursuant Art. 3.4 Directive 2000/31/EC. In this perspective, CJEU, 21 February 1991, Case 180/89, *Commission v Italy*, EU:C:1991:78, para. 20, stated that: "the general interest […] in the conservation of the national historical and artistic heritage can constitute an overriding reason justifying a restriction on the freedom to provide services". However, it is doubtful that this reasoning could apply also to images of cultural goods.

[179] CJEU, 28 March 2000, Case C-7/98, *Krombach*, EU:C:2000:164, para. 37; CJEU, 2 April 2009, Case C-394/07, *Gambazzi*, EU:C:2009:219, para. 27, stating that recourse to this clause can be envisaged in case of: "variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order".

[180] CJEU, 2 June 1994, Case C-414/92, *Solo Kleinmotoren*, EU:C:1994:221, para. 20; 4 February 1988, Case 145/86, *Hoffmann*, EU:C:1988:61, para. 21; 10 October 1996, Case C-78/95, *Hendrikman and Feyen,* EU:C:1996:380, para. 23.

[181] *Cf.* in the same terms, Opinion AG Bobek, 23 February 2021, Case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:124, paras. 78–81.

[182] *Cf.* on trade marks, EFTA Court 6 April 2017, Case E-5/16, *Vigeland*, para. 96; Norwegian Board of Appeal for Industrial Rights 13 November 2017, Joint Cases 16/00148, 16/00149, 16/00150, 16/00151, 16/00153 and 16/00154, *Vigeland*, para. 25.

All this being said, although the Italian jurisdiction appears as a viable solution in most of the here referred to cases of use of images of cultural goods, a cross-border injunction or compensation for damages when these occurred outside Italy appear doubtful, in particular when the defendant has no domicile in Italy, and including in cases where multiple defendants exist or when an exploitation on the internet occurs. However, if such a decision were issued – as has occurred – a refusal to enforce it appears admissible by invoking contrariety to *ordre public*.[183] As a result, the extraterritorial scope of the ICCGL rules on images of cultural goods would be rather restrained.

6 Conclusion

Cultural goods have never been so much under the spotlight as they have been in recent times. The main reason is that beyond their role in education and cultural development, they have also turned into commodities because of the fast-paced technological evolution that affects the consumption of digital content and causes an increased need for data, and of images in particular. This is especially so in several industries, such as the ever-growing entertainment are. This sector is populated by multimedia platforms and video-game developers, as well as by other subjects that exploit data from cultural goods coming from different countries in the elaboration of their creations. The growing attention in cultural goods may be deduced from this phenomenon, but also by rules and initiatives that aim at their protection and, at the same time, at boosting their exploitation.

This work studies how some Italian provisions on cultural goods limit their reproduction, including when they embed works of art, and this even when the latter is in the public domain. For several reasons, these provisions call to mind copyright law, even though the two sets of rules remain independent and autonomous, with a different purpose, subject matter and constitutional basis. National provisions are designed and interpreted to have a broader outreach than copyright and therefore introduce a para- or quasi-copyright systems, i.e. rules that are not necessarily accountable to third parties, thus affecting potential image producers, users and reusers, as well as the material that is supposed to remain in the public domain.

The production and use of image of cultural good is viable under the condition of a granted authorization by the CHI that manages it. Such an authorisation is given in a discretionary manner, like that which may be granted by a copyright owner for the use of a protected work. Also, the authorisation is given in exchange of some fees, the criteria of which have been fixed by Ministerial Decrees. The presence of a fee may also call to mind of royalties imposed by the copyright owner exercising her economic rights. These prerogatives find their sources in the ICCGL and their constitutional ground in Art. 9 Italian Constitution. They are designed with the paradigm of a public property in mind. They may be criticized from a political and economic perspective because they introduce complexity, as well as the negative impact on the activity of the market operators working with images of Italian

[183] Article 51 Regulation 1215/2012.

cultural goods, and consequently on investments at the local level. Still, their constitutional underpinning is solid enough to state that they are legitimate and compliant with both EU law on Copyright and on Open Data. In addition to that, according to recent case law on the matter, a personality right related to cultural good has emerged. This very doubtful interpretation that may somehow call to mind the moral right of integrity raises concerns as to its consistency and compliance with higher norms. The same case law has raised issues on the potential global outreach of the provisions on images of cultural goods. An analysis on jurisdiction, applicable law, recognition and enforcement of foreign decisions leads to the understanding that Italian provisions on images of cultural goods apply within Italy and not beyond. From this perspective then, the decision of the Court of Venice may be challenged, even though for different reasons than those proposed by the court in Stuttgart. This solution brings with it the advantage of reducing the enforcement costs to be borne by the Italian public administration from the global to the national scale only. At the same time, it is possible to observe that the same limited geographical outreach nullifies the Italian provisions of the (already debated) ability to reach the goal of generating revenue to be reinvested in preservation and valorisation purposes. And concretely, it also creates a discriminatory situation, under which market operators on the Italian territory would be subject to the quasi-copyright regime, while those abroad would not be limited by it.[184]

As a general remark, an existing tension seems to concern control and free circulation of images. The here analysed Italian approach is clearly oriented towards control of such assets, more than aiming at their free circulation.[185] This probably depends on the rich amount and quality of cultural goods that give the country the confidence to have a unique position for generating financial value from the related images.[186] However, this is not in line with the EU trend. EU institutions are now working towards creating a cloud for cultural heritage, ideally hosting functions and tools related to cultural heritage and 3D reproductions of cultural goods,[187] as well as a European data space on cultural heritage,[188] ideally interoperable with all the other data spaces that are being designed and built for different sorts of data. From a legal perspective, at the EU level it is possible to identify copyright as a legal

[184] Questions as to the regime applicable to operators in Italy using sources from abroad would still remain unanswered.

[185] This not entirely free approach can also be witnessed in jurisdictions that embed a public paying domain system, which had already existed in Italy two times, as reported by Marzetti (2019).

[186] In the same sense *see* Yu (2022) explaining that the beneficiaries of cultural property and IPRs initiate these forms of protection, and those who argue for weaker protection of cultural property – or for a broader view of the world cultural heritage – are often those who do not have a lot of protectable treasures within their country. Those who argue for stronger protection, by contrast, are likely those who have objects worth protecting in their country.

[187] On the 3D reproduction of cultural goods *see also* the TwinIt campaign, available at https://pro.europeana.eu/page/twin-it-3d-for-europe-s-culture, that encourages member states to choose and digitize in a 3D format one or more cultural goods. Goods are freely chosen among those at risk, those highly visited and those whose digital information is very limitedly available. This approach is in line with European Commission (2021a).

[188] European Commission (2021b). The implementation of the initiative builds on the Europeana project, launched on 2009 and based upon national initiatives.

instrument to control and then condition, to some extent, reuse of such data,[189] but the main focus of the EU institution is on how designing operational solutions for fostering any kind of reuse of cultural goods-related data.[190] This is why the Italian case represents a counter-trend in the EU scene that might be brought to the attention of the EU Court of Justice.

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[189] Copyright is a legal tool protecting culture, including cultural heritage. Directive 2001/29/EC on the information society first, Directive 2012/48/EU on orphan works then, and Directive 2019/790/EU on the Digital Single Market eventually refer to cultural goods via exceptions and limitations. In the three texts, rules on cultural goods mainly aim at preserving it and making it available. *See* for instance Art. 5.2(c), 5.3(j) and 5.3(n) InfoSoc Directive, Art. 6 OW Directive and Art. 6 DSM Directive. The texts do not take any position as to the reuse, exploitation that follows the making available of images, except for out-of-commerce works or for reproductions falling under Art. 14 DSM Directive.

[190] Some legal measures are also in line with this: *see* already Art. 1.1 Directive 2013/37/EU (revising Directive 2003/98/EC) on reuse of PSI.

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