# THE ITALIAN LAW OF CULTURAL HERITAGE

## A DIALOGUE WITH THE UNITED STATES

**edited by**
**Jennifer Celani, Alessandra De Luca, Giacomo Pailli, Lucrezia Palandri, Andrea Pessina, Massimo Tarantini**

**TUTELA & RESTAURO**
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MINISTERO DELLA CULTURA
Soprintendenza archeologia belle arti
e paesaggio per la città metropolitana
di Firenze e le province di Pistoia e Prato

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*The black and white pictures in the background of the pages that divide the various sections of this book are taken from the photographic archives of the Soprintendenza of Florence. They refer to two dramatic moments in Florentine history: World War II (monuments covered in wood, bricks and/or sandbags for protection against bombshells) and the flood in 1966, reminders that conflicts and natural disasters are also a risk to cultural heritage.*

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*Barbara Pasa*

# Artistic, transformative, and commercial reproduction and reuse: an Italian perspective

## 1. Reuse: observation of practices for expanding access to cultural heritage

In this paper, I advocate for reuse in the cultural heritage sector, for a new sensibility in working with everything we find 'around us', from monuments and *spolia* to humble objects, from antiquities to paintings, drawings, sculpture, and design works. I would like to bring forward the demands of practitioners and scholars of contemporary architecture and the arts, who are calling for a radical rethink of re-production, re-use, and re-mix in the cultural heritage sector.

*Digitarian* generations – Gen Z and Gen Alpha – are today producing the protected material that will be the heritage of the future, often taking inspiration from the national treasures[1] of different States and communities and from the works of others. Inspiration has no bounds, and nor do transformative practices (Section 2), whereas legislation imposes limits and restrictions – working with tangible and intangible things that are already in circulation in our cultural complex has, indeed, become tricky. The combination of different rules in the Italian legal system prevents us from fully 'accessing' cultural heritage and creative content in general, even when the works are in the public domain (Sub-sections 1.1. and 1.2). The intertwining of private rights and public interests in artistic, historical, archaeological, and ethno-anthropological preservation and promotion of cultural objects (Sections 2-3), in the wake of digitisation and database construction (Sections 4-5), and the intricate interplay between cultural heritage law and copyright law, with the imposition of the traditional duty of preserving tangible cultural objects (*e.g.,* when the works are cultural goods that cultural heritage institutions hold in their collections) result in a strict regulatory framework that leaves little room for reproduction and use (Sections 6-7). Such regulation imposes many limits on artistic, transformative, and commercial reproduction and reuse also for works of visual art in the public domain. It is not always clear whether a cultural heritage institution is claiming the application of legal cultural heritage rules, or whether it is instead invoking copyright law as a 'privilege' to allow or prohibit the reproduction and use of the permanent collections in their possession (Section 8). But regulations and their interpretations by the courts (Section 9) need to keep abreast of contemporary developments, and it is only by observing new meanings and subversive practices, such as hacking, copying, modifying, tuning, and remixing, that an appropriate legal framework can be set out.

Despite the growing consensus for open access and open culture[2], where a proactive approach has already been adopted by a number of institutions for raw data and metadata (CC0) and for content (CCBY 4.0) to ensure that content in the public domain remains public once it is digitised[3], the use of digital works in the public domain is only permitted under certain conditions at least in Italy, as is the reproduction of material belonging to the permanent

1. Art. 10, paragraphs 1 and 2, and art. 13 of Legislative Decree No 42 of 22 January 2004, known as the Italian Code of Cultural Heritage and Landscape (*GU n. 45* of 24 February 2004*, Suppl. Ordinario n. 28*). The legal source is available at https://www.normattiva.it/ in open access. On what is and what is not a cultural object that can be classified as a "national treasure," including such vague notions as 'culture,' 'history,' 'artistic value,' 'age value,' 'use value,' etc., which tend to be interpreted as flexible guidelines by domestic courts on a case-by-case basis, see Graziadei M., Pasa B., *The Single European Market and Cultural Heritage: The Protection of National Treasures in Europe*, in Jakubowski A., Hausler K., Fiorentini F. eds., *Cultural heritage in the European Union: a critical inquiry into law and policy*, Leiden: Netherlands and Boston, MA: Brill, 2019, pp. 79-112.

2. OpenGLAM, *A global network on sharing cultural heritage – OpenGLAM*, 2022, available at openglam.org (last accessed 10 February 2024). Only a few Italian cultural institutions participate (see the Open Glam Survey, an ongoing informal survey of open access policies in the GLAM sector: galleries, libraries, archives and museums, led by Douglas McCarthy and Andrea Wallace, CC BY 4.0, 2018 to present, available at https://douglasmccarthy.com/2022/03/four-years-of-the-open-glam-survey/ in open access), *e.g.,* Museo Egizio di Torino, Torino Musei, BEIC Milano, Museo nazionale di Matera, GAM Torino, some libraries and universities, and some private archives, and not all of eligible data is published in open access as a matter of policy. Cf. Valeonti, F., Terras, M., & Hudson-Smith, A., *How open is OpenGLAM? Identifying barriers to commercial and non-commercial reuse of digitised art images*, Journal of Documentation 76(1), 2019, p. 4.

3. Europeana Pro., *Rights statements from* RightsStatements.org – *Europeana Pro.*, 2022, available at pro.europeana.eu/page/rightsstatements.org (last accessed 5 February 2024). See also Europeana domain usage www.europeana.eu/en/rights/public-domain-usage-guidelines (last accessed 10 February 2024) Rightsstatements.org, RightsStatements.org, 2022, available at rightsstatements.org/en/ (last accessed 21 February 2024).

collections of museums, archives, film or audio heritage institutions, and other public and private cultural heritage institutions – even after attempts at EU harmonization through Directive (EU) 2019/790[4].

As I explain in this paper, the Italian legislative framework discourages Digitarians (as well as older generations) from adopting practices of reuse, adaptation and change, appropriation, and remix. Tangible and intangible objects deemed to be of «cultural interest for artistic, historical, archaeological or ethno-anthropological reasons», whether owned by a public institution (the state, region, a municipality, or any other public body and institution), a private entity (a corporation or not-for-profit organisation) or an individual, as well as certain time-dated works by living artists, cannot be used by people as material for their own creative works, unless they embark on a long, often opaque, bureaucratic process to obtain the required forms, permits, and authorisations. Yet ever since the early 1980s, artists and designers have been creating artworks, design works, and multimedia works based on existing works[5], not to mention the historical experience of ready-mades and Pop art[6]. By incorporating the materials of others into their works, they have undermined the traditional distinction between creation and copying, production and consumption.

### 1.1 *The vastity of cultural property and the uncertainty of copyright*

The multi-faceted dimension of cultural heritage is such that it eludes simple demarcations. Beyond the rules produced either by national or supranational legislators, or by way of self-regulation, there are further interests and claims of a various nature – those rooted in moral questions of equity and justice reflected, for instance, in the restitution of property to Holocaust victims or to indigenous populations and communities; those reflected in our sociability, that is, in our need to live as a community of people, which are closely related to the knowledge and communicative function of cultural heritage; or claims based on overt economic interests. In this paper, I look at these last two points, to address the issues cultural heritage institutions usually raise, concerning their goals of preserving and protecting cultural objects for the utility of the public (*publica utilitas)* and the insufficient resources (money) and insufficient (time of) staff at their disposal to ensure their permanent collections are valued and enjoyed, for which they need to rely *also*[7] on the proceeds of their exclusive rights of reproduction (material, photographic, tv, digital) publication, display, and distribution.

The scope of investigation is even more challenging if we consider the notion of «cultural property», which encompasses a vast array of objects. In Italy[8], all immovable and movable things possessing artistic, historical, archaeological, ethno-anthropological, archival, or bibliographical interest, belonging to the State or other public entities, or to not-for-profit organisations, or even to private individuals, qualify as cultural property, unless the Ministry of Culture, at the initiative of one of its local offices, deems them to have no such «cultural interest». In addition, under legislative amendments introduced in 2008 and 2017[9], works made by non-living authors between fifty and seventy years ago can be declared of cultural interest, along with works by non-living or living artists produced more than fifty years ago, if they hold an «exceptional interest» for the integrity of Italian cultural heritage. All these things are subject to cultural heritage protection in our legal system. Yet they have clearly all been touched by the breakthroughs of the digital revolution, with infinite new frontiers opened by digital reproduction and the reuse of analogical material and postproduction[10], even though most experimentation with reproduction, remix, and reuse is *de facto* unfeasible within our legal system.

Finally, the challenge becomes almost unsurmountable if we consider that the copyright status of these creative materials is uncertain in many jurisdictions for many reasons. The protection of derivative works varies across legal systems. Different rules govern their reproduction and reuse, their distribution and communication, with the U.S. fair use doctrine being 'unique' in the international legal framework and subject to great debate[11]. Extensive moral rights

4. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92-125. Cf. copyrightexceptions.eu (last accessed 9 February 2024).
5. Bourriaud N., *Postproduction. Culture as Screenplay: How Art Reprograms the World* (translated by Herman J.), Cambridge, MA: MIT 2006.
6. Cf. Ferraris M., *From Fountain to Moleskine: The Work of Art in the Age of its Technological Producibility*, Art and the Law series, Leiden/Boston: Brill, 2019; Pasa B., *Industrial Design and Artistic Expression. The Challenge of Legal Protection,* Art and the Law series, Leiden/Boston: Brill, 2020.
7. In addition to what they earn from loans for exhibitions, tickets, merchandising, etc.
8. Articles 2 and 10, Code of Cultural Heritage and Landscape, cit ft. 1.
9. Italian Legislative Decree No 62 of 26 March 2008; Italian Law No 124 of 4 August 2017 available at www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2008-03-26;62 (last accessed 9 February 2024).
10. An updated list of subject repositories is available at canberra.libguides.com/c.php?g=599341&p=4148816 (last accessed 9 February 2024): OAIster, a catalogue of open access resources, includes more than 50 million records that represent digital resources from more than 2,000 contributors available at www.oclc.org/en/oaister.html (last accessed 10 February 2024).
11. Picozzi B., *What's Wrong with Intentionalism? Transformative Use, Copyright Law, and Authorship*, The Yale Law Journal 126, 2017, pp. 1408-1458.

are contemplated by some civil law jurisdictions (such as the right of attribution, the right to object to false attribution, the right of integrity, the right of withdrawal, and the right to disclosure) without any possibility of waiver (in Italy, for example), while in common law jurisdictions moral rights are very limited, or for visual artists only, such as in the U.K. Copyright Designs and Patents Act (CDPA) and the U.S. Visual Artists Rights Act (VARA). Then there are photographs protected by copyright and by neighbouring rights, and the *sui generis* protection for databases, found in common law as well as in civil law, which are not always well-balanced with the concerns of users who, for example, cannot obtain the material elsewhere from another source. The relationship between term limits in Italian copyright law and time thresholds in Italian cultural property law is also problematic[12]. Cultural heritage institutions are often in a position to deny access or to charge monopolistic prices for licenses to their collections and access to databases, with a corresponding monopoly extending to any work derived from those original sources, even if the work falls within the public domain.

### 1.2 *Intricacy of other legal rules*

Other legal rules lock up digital and analogical content and restrict access to tangible objects (*e.g.*, paintings, sculptures, and drawings, but also scientific material and ethnographic objects, as well as design works, etc.), time-based medium works (audio-visual works), buildings and gardens (contemporary buildings designed by architect 'stars' who hold copyright), and to digital images of works in the possession of cultural heritage institutions.
This is a non-exhaustive list of the barriers found in global dynamics and Italian law[13]:

- contractual clauses (website terms and conditions and other contractual arrangements with third parties; see for example Facebook and YouTube, which can decide what counts as 'inappropriate' under their policies, and can consequently take down and remove, or ban and destroy content, eliminating it from collective memory[14];)
- intellectual property rights claims (copyright under Arts. 4 and 18 of the Italian Copyright Law, and the IPR of third parties, such as the author, or creator, of a database, and the maker of a database under articles 64-*quinquies* and 65-*sexies* of Italian Copyright Law, or photographers under articles 87ff of the Italian Copyright Law, as amended by Italian Legislative Decree 177/2021[15]; and trademarks under article 17(3) of the Italian Industrial Property Code[16], permitting local authorities and governmental bodies to register an image of a cultural property as a trademark);
- privacy and data protection rules (user privacy and the privacy of the person featured in a photograph – Italian Data Protection Code, as amended by Italian Law No. 205 of 3 December 2021)[17];
- regulations governing open data and the reuse of information in the public domain (commercial or/and non-commercial purposes and licensing practices under Italian Legislative Decree 36/2006, as amended by Italian Legislative Decree 200/2021)[18];
- cultural heritage rules (articles 107-108 of the Italian Code of Cultural Heritage and Landscape of 2004[19], which assign cultural heritage authorities control over the reproduction and use of cultural property and responsibility for controlling the authenticity and meaning of national cultural property)[20];
- cultural rights claims (for example, the model provisions developed by UNESCO and the WIPO for the protection of traditional cultural expressions of folklore, or TCEs, that have a relevant impact for example in fashion design in assessing cultural appropriation issues, in relation to the recognition of the cultural identity, dignity, and specific rights of communities).

12. Arisi M., *Digital Single Market Copyright Directive: Making (Digital) Room for Works of Visual Art in the Public Domain*, Opinio Juris in Comparatione, 2020, pp. 119-144.
13. Wallace A., Euler E., *Revisiting Access to cultural Heritage in the Public Domain: EU and the International Developments*. IIC, 2020, pp. 823-855; Wallace, *Surrogate Intellectual Property Rights in the Cultural Sector*, Journal of Law, Technology and Policy 303 (2023), pp. 303-371.
14. See, for instance, the updated Facebook T&C 2020, point 4(2) available at www.facebook.com/terms.php (last accessed 10 February 2024).
15. GU n. 283 del 27.11.2021. Available at www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2021-11-08;177 (last accessed 10 February 2024).
16. GU n. 52 del 04.03.2005 Supplemento Ordinario n. 28. Available at www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-02-10;30 (last accessed 10 February 2024).
17. GU n. 174 del 29.07.2003 Supplemento Ordinario n. 123. Available at www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-06-30;196 (last accessed 10 February 2024).
18. GU n. 174 del 29.07.2003 Supplemento Ordinario n. 123. Available at www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2006-01-24;36!vig= (last accessed 10 February 2024).
19. GU n. 45 del 24.02.2004 Supplemento Ordinario n. 28. Cit. ft. 1. Available at www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2004-01-22;42 (last accessed 10 February 2024).
20. Casini L., *Riprodurre il patrimonio culturale? I "pieni" e i "vuoti" normativi*, Aedon, 2018 available at www.aedon.mulino.it/archivio/2018/3/casini.htm (last accessed 10 February 2024); Casini L., *Il patrimonio culturale e le sue regole. Oltre la mitologia giuridica dei beni culturali*, Aedon, 2012, available at www.aedon.mulino.it/archivio/2012/1_2/casini.htm (last accessed 10 Feb 2024); Cerrina Feroni G., Torricelli S. eds, *Il regime giuridico dei musei*: *profili comparati*, Bologna: Il Mulino, 2021.

All this needs to be unpackaged to create a framework for rethinking the complex meaning of 'accessibility and inclusion' to make culture and heritage more meaningful for people, and to enable new forms of participation for younger generations and recognisable creative processes, including Do It Yourself (DIY) works, collective laboratories, co-designed works, and so forth[21].

## 2. Tech innovation combined with social innovation: new glossary needed

In producing works such as 'born-digital artifacts' embedded in software-based art works or multiple infrastructures, such as the Internet, or smaller infrastructures, such as servers and hardware, digital product design objects, mobile apps and data visualizations, digital film, videogames, and emojis, immersive media and social media, interaction and interface design, computer programming and new media[22], Digitarians encounter intricate layers of intellectual property rights – where rights-holders cannot be easily identified and authorship is difficult to track down, especially with the proliferation of open source licenses and open access materials, or in orphan works where the author is described as collective, distributed, fragmented or unknown – as well as numerous obstacles raised by legislation on cultural heritage. Risk and uncertainty thus form the weak canvas on which creative workers move.

In respect to 'not born-digital artifacts', new generations of creative workers stress how the social stigma and repulsion which took hold during the 20th century against reproduction and reuse are essentially nonsense. In our material culture, copying is central, enshrined in almost all creative practices[23], where change happens through small alterations rather than by disruptive leaps of invention. Literature, music, painting, performance, audio-video, and multimedia products thrive off the perpetual reinvention of copying. Today, we are neurotic about being original[24], yet the fear of being seen to copy can stop a good idea from taking shape.

*Reproduction* is considered suspect when it is associated with imitation, duplication, or multiplication. The oppression of originality and authorship, and what has been called the «tyranny of invention»[25], obscures the history of things and of our material culture, which emerged decentred and in anonymity. Yet beneath the fear of using somebody else's work, there is the hint of something more promising, going back to the Latin term *copia,* meaning plenty, abundant, as in *cornucopia*, the horn of plenty. Furthermore, *reuse*, as in using an item again and again (this can be an object, an edifice, building material, a law, a style, a concept), represents a practice for understanding the relationship between the past and the present, establishing continuity with tradition and a new legacy of participation in the cross-border flow of ideas and objects. It is a deliberate and selective process, in which existing elements are borrowed and taken out of their surroundings, to be applied in fresh new contexts. For this to happen, a disruption in meaning must happen, where the creative combination of old and novel elements takes the meaning of the item or the concept further[26]. Borrowing, appropriation, and assimilation are all forms of social interaction well-known to comparative law scholars, ever since Watson's seminal work on Legal Transplants elucidated these dynamics, followed by others: reuse reinforces connections between people, places, and things.

*Remixing* is an activity that enhance and enrich our ways of interacting with things. Remixes maintain some aspects of the original, a recognisable element, as, for instance, in music (a beat, a vocal line). The fluid relationship between the original and the remixed version is a key feature (and measure of success) of the remix[27]. It does not destroy the original; it 'appropriates' the original. Remixing quotes the original and situates the new remix in its place, and ensures it is understood, because «it is precisely about knowing and sourcing the original material and placing it in a new context» as Graeme Brooker noted. Sometimes, the reference is disconnected, and the process is regenerative. This emphasises the work of the remixer, rather than the authorship of the referent, shifting the focus onto how the extracted or mined components are redeployed[28].

Today, *de-reification* – a practice involving *agency*, with the power not only to penetrate reified appearances, but also

21. For an example in the field of product design, see the POSTA project Available at www.postaproject.org/ (last accessed 10 February 2024).
22. Arrigoni G., Kane N., McConnachie S., McKim J., eds, *Preserving and sharing born-digital and hybrid objects from and across the National Collection*, 2022, p. 14 available at vanda-production-assets.s3.amazonaws.com/2022/01/20/12/49/45/92b733d4-929e-429e-9fd1-82d134405465/VA-ResearchReport-Jan22.pdf (last accessed 10 February 2024).
23. Kubler G., *The shape of times. Remarks on the history of things*, New Haven and London: Yale University Press, 1962. See also The why factory. Research, Workshops, Design studios. *Copy Paste. Evolution of the Species* available at thewhyfactory.com/project/copy-paste (last accessed 15 February 2024).
24. Harper P., *Call us dull, call us sellouts, call us gentrifiers – just don't call us copycats*, 2017 available at www.dezeen.com/2017/07/18/phineas-harper-opinion-copying-originality-architecture-assemble-cineroleum/# (last accessed 10 February 2024).
25. Brooker G., *50/50 Words for reuse*, London: Canalside press, 2021.
26. *Ibid.* Hegewald J., Mitra S. eds., *Re-Use. The Art and Politics of Integration and Anxiety*, New Dheli: Sage Publications Pvt. Ltd., 2012.
27. Lessig L., *Remix. Making Art and Commerce Thrive in the Hybrid Economy*, New York: Penguin Books, 2008. Navas E., *Remix Theory. The Aesthetics of Sampling*, Wien: Springer-Verlag, 2012.
28. FCRBE project partners, *We proudly present: the Reuse Toolkit*, 2022 available at rotordb.org/en/news/we-proudly-present-reuse-toolkit (last accessed 10 February 2024); Borschke M., *This is Not a Remix. Piracy, Authenticity and Popular Music*, London: Bloomsbury, 2020.

to transform the structures established by cultural institutions[29] – and the transition from tangible to digital artifacts together emphasise a possible new understanding of museums and other cultural heritage institutions as «contact zones»[30], as a «space of encounter»[31], or a «permeable space of experimental research», within which the notion of 'curating' also expands[32].

In this context, I argue that our heritage construction narrative can benefit from a fresh lexicon, a renewed vocabulary capable of shaping a mindset of reuse. Practices of reproduction and reuse are clearly at the forefront of our contemporary century in many different disciplines and fields, and I suspect we cannot stop them, because our environments, our economies, and our communities depend on a nurturing relationship of care between people and heritage as a shared social practice. Museums, as with all cultural heritage institutions, are a social construct, and as such they are debatable, disputable, multivalent, permeable, and have the potential to attract a wide variety of audiences. If we let that happen.

## 3. Cooperative approach: a common playing field for cultural heritage institutions and cultural and creative industries

I wish to focus on the challenges encountered by cultural heritage institutions (CHIs) – as defined at the European level as any «publicly accessible library or museum, an archive or a film or audio heritage institution»[33], meaning all spaces of public trust that we, as a collective and as individuals, recognize as being of cultural interest to us – when opening up permanent collections in their possession *vis-à-vis* the creative/uncreative reuse of heritage by established artists, would-be artists, workers in creative industries, and people who post user-generated content on online platforms (such as social media and wikis).

Professionals in creative and cultural industries (CCIs), such as architects, designers, multimedia and entertainment workers, artists, freelancers in the heritage sector, and social media users, are exploring the potentiality of copying and reuse and developing fascinating practices which engage closely with our legacies, re-reading basic notions such as adaptation, alteration, collage, copy, intervention, insertion, installation, reproduction, reuse, and remixing[34]. However, balancing all the various interests and rights in play is a hot topic.

Starting from copyright rules, over the last ten years European exceptions and limitations have been framed as incidental derogations to exclusive rights or, in contrast, as affirmations of the interests of online users[35]. The EU Copyright in the Digital Single Market Directive 2019/790 grants new or reaffirmed exceptions, which become mandatory and prevail over derogatory clauses. My suggestion is that CHIs and CCIs together, in dialogue and in cooperation, should exploit this ambitious European programme to experiment as much as they can, taking advantage of its incompleteness and inconsistency[36], and to rethink how they relate to their audience. As the authority that has the property in its possession of anti-rivalrous goods, which are inclusive if my enjoyment grows with the number of other users who 'access and consume' the same goods, CHIs know that the more people use heritage goods, the easier and more powerful it becomes for all users to do so, because their utility increases with how much the goods are used by others[37]. Of course, opening up access and the reproduction and reuse of the digitized collections of CHIs conflicts with the traditional declared mission of CHIs as gatekeepers of authoritative cultural contents and leading players in guaranteeing the authenticity, integrity, and contextualization of physical cultural objects. In my view, it is not so much a question of striking a balance between outreach and financial sustainability (monetizing digitized collections or digital artifacts to directly increase revenues does not appear to be particularly profitable)[38], as a matter of the power and control of CHIs, especially over the

29. Hohendahl P., *Art Work and Modernity: The Legacy of Georg Lukács*, New German Critique, 1987, pp. 33-49 (also published in Hohendahl P., *Reappraisals. Shifting Alignments in Postwar Critical Theory*, Cornell University Press, 1991); Feenberg A., *The Philosophy of Praxis*, London: Verso, 2014.
30. Pratt M-L., *Arts of the Contact Zone*, Profession, 1991, pp. 33-40.
31. Macdonald S., Basu P., *Exhibition Experiments*, Hoboken, New Jersey: Wiley-Blackwell, 2007.
32. Martínez F. ed, *Ethnographic Experiments with Artists, Designers and Boundary Objects. Exhibitions as a research method*, 2021, pp. 121ff. open access PDF available at discovery.ucl.ac.uk/id/eprint/10137013/1/Ethnographic-Experiments-with-Artists-Designers-and-Boundary-Objects.pdf (last accessed 15 February 2024).
33. Art. 2. Directive 2019/790, cit. ft. 4.
34. Brooker, 2021 cit. ft. 25.
35. Okediji R.L. ed., *Copyright Law in an Age of Limitations and Exceptions*, Cambridge: Cambridge University Press, 2017.
36. Dusollier S., *The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition*, Common Market Law Review, 2020, pp 979-1030.
37. Weber S., *The Success of Open Source*, Harvard University Press, 2004; Lessig L., *Do you floss?*, London Review of Books, 2005 available at www.lrb.co.uk/the-paper/v27/n16/lawrence-lessig/do-you-floss (last accessed 15 May 2022).
38. Bertacchini E., Santagata W., Signorello G., *Individual Giving Support to Cultural Heritage*, International Journal of Arts Management, 2011 available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1844292 (last accessed 15 Feb 2024). But see the decree of the Italian Minister of Culture, of April 2023, *Guidelines for Determining the Minimum Amounts of Fees and Charges for the Concession of Use of Assets on Consignment to State Institutes and Cultural Sites*, available at https://www.beniculturali.it/comunicato/dm-161-11042023 (last accessed 15 February 2024).

cross-border circulation of online contents, which leads us back to the major debate over the significance of the freedom of expression and censorship in the web space, and over the public mission of CHIs.

Cultural heritage institutions and cultural and creative industries professionals need to find a common playing field for pioneering experiences outside the traditional strategies based on copyright and related rights, contractual provisions, and administrative law, for example by reconnecting knowledge and information regarding CHIs objects through tags and metadata to track how CCIs and users generating content for social media integrate those objects in their works, by expanding the participation of private enteprises in cultural sectors, and by engaging people and society at large in supporting new forms of cultural and artistic expression built on existing tangible and intangible heritage. The challenges and strategies in managing access to and, in particular, reuse of digital material are crucial and require more empirical evidence to be solved. From a legal perspective, as I said above (§1.1 and 1.2), there are many rules to consider. Furthermore, both CHIs and CCIs are highly varied and distinct in their purposes, scope, and organisation, and they often overlap. This overlapping can be appreciated through the well-known 'three-circles model' developed for the European Commission[39]. The model is built around: i) a small circle, which contains 'core creative activities' (non-industrial cultural products, such as the arts and heritage, museums, libraries, archaeological sites, and archives), which radiates outwards as those become combined with other inputs to produce a wider range of products and services; ii) a first circle, which contains 'cultural industries' where those outputs are exclusively cultural (cultural industries such as book publishing, film and video, television and radio, videogames and music); iii) a second circle, of 'creative industries', where the use of creativity is essential to their performances (fashion design, product design, graphic design, interior design & architecture); iiii) a third circle, that encompasses activities, which incorporate elements from the previous two layers into the production process (such as the ICT sector and the manufacturing sector). Although the model is rather static, and arguably unable to grasp all the overlaps between professions, it suggests that these creative outputs, both goods and services, become concrete commodities once they are protected by copyright. Thus, professionals in the cultural heritage sector, ranging from experts in art history and heritage preservation, to archaeologists, anthropologists, restorers, curators, scientific personnel – but also photographers, and multimedia developers, and professionals in creative and cultural industries, mainly architects, designers, photographers, multimedia developers, artists, and performers – share one common legal element, which is copyright. As I said, CHIs are both users and creators of catalogues, advertising materials, audio-guides, merchandising, digital photos, and copyrighted works, and may find it difficult to attribute copyright[40]. CHIs usually produce such material with internal staff or by engaging external professionals. In legal terms, these professionals can be 'employees,' if they are subordinate workers, or 'employers,' if they are self-employed, under various legal arrangements. Thus, another order of problems is determined by the intersection of labour law and intellectual property law. In most of these cases, copyright is assigned or licensed by law (a work made for hire), by a staff contract (scientific personnel; internal photographers), or by commission contract (express or implied transfer to external authors or curators). Furthermore, copyright transfer and licensing practices vary in time, scope and extension, the copyright clause is often vague or non-existent, and the costs for clearing the rights usually fall to the CHIs.

Like CHIs, CCIs use copyrighted material and produce new copyrighted material for cultural institutions like museums, archives and libraries and therefore face comparable difficulties.

## 4. Technocratic threats and database logic: who will govern access to knowledge and culture?

Cultural heritage, as I said, is a complex construct. It is the expression of social and cultural values through artistic, historical, and scientific artifacts, both tangible and intangible, which have solidified with time, and which relate the past to the present, for future generations[41]. The vast domain of cultural heritage is not entirely represented by the totality of tangible cultural objects held by museums, archives, and other CHIs in their permanent collections. It further includes oral traditions, patronymics, choreographies, rituals

39. *The Economy of Culture in Europe*, Study prepared for the European Commission (Directorate-General for Education and Culture), 2006, p 53 available at ec.europa.eu/assets/eac/culture/library/studies/cultural-economy_en.pdf (last accessed 15 February 2024).

40. Benhamou Y., *Revised Report on Copyright Practices and Challenges of Museums*, WIPO SCCR/38/5, 2019, available at www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_5.pdf (last accessed 16 February 2024).

41. Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention 2005).The Convention was ratified by Italy through Law 2020/133. *Ratifica ed esecuzione della Convenzione quadro del Consiglio d'Europa sul valore del patrimonio culturale per la società, fatta a Faro il 27 ottobre 2005*. GU Serie Generale n. 263 of 23 October 2020. Available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2020;133 (last accessed 16 Feb 2024).

and ceremonies, social practices, folk festivals, traditional craftsmanship, landscapes, and cultural spaces created by communities and groups in response to their environment. Moreover, in our age of unprecedent interactivity and reproduction involving 3D and 4D printing, virtual and augmented reality, and other forms of digital technology, our heritage is becoming more and more intangible, digitised, searchable, and dependent upon a «database logic»[42], which pervades our way of understanding and experiencing reality.

Every cultural unit is being transformed by the 'datisation' process, becoming part of the information economy we live in. The digitisation of cultural heritage over the last fifteen years has led to the coining of a new neologism, 'technoheritage', the union of technology and cultural heritage[43]. As various commentators have pointed out, this offers immense possibilities, but there is also an array of legal conflicts and disagreements over reproduction, digitisation, and reuse around the intersection between cultural heritage law, copyright law, and other IPR claims, between copyright and cultural appropriation, and between copyright and freedom of expression.

The role of the museum as an archive, assembling information and shaping our memory, has been a topic of exploration since the 1990s, ever since Derrida's *Archive Fever: A Freudian Impression*. Archives are physical spaces, often located in basements, sometimes in beautiful buildings, where they are grounded in physicality and bring together disparate elements facilitating their access to the public. Archives can be part of the identity of a museum, but they can also be independent and autonomous in structure and in governance. Both museums and archives can be queried, updated, and accessed by the public at large, through web platforms, apps, and social media. They enable the generative production of knowledge[44], and from a legal perspective they are databases which serve all these functions. Museums and other CHIs in the 21st century are indeed a hybrid between a physical archive and a digital database. The pandemic has placed the accent on digital storage, display, and access in a new «informational appreciation of objects through a screen»[45]. As museums are, among other things, physical archives as well as virtual archives and databases, their collections are both grounded in physicality and in the virtual realm, which enables the massive sharing of information and user interactivity.

So far, that is nothing new. In the meantime, however, the potentiality associated with the development of artificial intelligence, and machine learning in particular, has grown immensely, bearing with it the paradox that complex algorithms, but not people, can collect and reuse many datasets without the need to ask for authorisation or permission or to pay fees, after Directive (EU) 2019/790[46] introduced the possibility of text and data mining (TDM), where TDM is allowed for scientific research purposes, where carried out by research organizations or cultural heritage institutions, or for non-research purposes, unless rightsholders make an explicit declaration or insert metadata disabling any reuse of data. Fortunately, data do not replace the objects in the collections of museums or other cultural heritage institutions, so we can still 'experience' them. We can also experience digital objects, which have a *different ontological status.* Digital texts, sounds, and images are information, not things, which is something we should consider. Using them means accessing them, not owning them. But the more culture becomes 'information and data,' the more it becomes an economically valuable 'brand,' losing touch with people as a community of individuals[47]. To re-establish that contact before it is lost altogether, more inclusive regulation of cultural heritage is needed, one that brings cultural heritage closer to people within a public community that is more online, public, and performative, one that can substantiate new opportunities, and not just threats. Regulation that enables cultural heritage to continuously renew itself and become embedded in our educational practices, playing a key-role in shaping our knowledge. So the question is: how can we open up the infosphere[48] to which we belong, and which is reshaping our human reality – driven by images, characters, paintings, stories from our literature, but also from the artistic, historical, archaeological, and scientific collections owned by museums, archives and other CHIs – so that it can be experienced not only by artificial intelligence(s), but also by artists, creative industry workers, and people who post user-generated content to create new multimedia artworks and products (such as videos, films or videogames), and services (such as, for instance, apps facilitating access to culture for people with disabilities)?

42. Pepi M., *Is a Museum a Database?. Institutional Conditions in Net Utopia*, E-flux journal, 2014 available at worker01.e-flux.com/pdf/article_8992811.pdf (last accessed 16 May 2022); Manovich L., *The Language of New Media*, Cambridge, Mass: Mit Press, 2001.
43. Katyal S., *Technoheritage*, California Law Review, 2007, pp. 1111-1172.
44. Folsom E., *Reply*. PMLA, 2007, pp. 1608-1612.
45. Caponigri F., *Cultural Heritage Law between Truth and Power: Law's Evolution and our Collective Cultural Interest in an Informational Economy*, Notre Dame Law Review Reflection, 2021, pp. 163-180.
46. Arts. 3 and 4, Directive 2019/790, cit. ft. 4. See Margoni T., Kretschmer M., *A deeper look into the EU text and data mining exceptions: harmonisation, data ownership, and the future of technology*, GRUR International, 2022, pp. 685–701.
47. Byung-chul H., *Non-things: Upheaval in the Lifeworld* (transl. Steuer D.), Cambridge: Polity 2022.
48. Floridi L., *The Fourth Revolution: How the Infosphere is Reshaping Human Reality*, Oxford: Oxford Univ Press, 2014.

## 5. The skeleton of the linear economic model

In the wake of digitisation and database construction, the role of CHIs as public trustees committed to openness deserves critical attention, considering the bias, ideologies, market-orientated organisation, and proprietary concerns implicated by the business model introduced by the technology companies that provide digitisation services, also known as *tech-leading information providers* (such as Google, or photographic stock agencies such as Getty Images), all of which can disable public access[49]. Can the database logic, which aligns the institutional interests of museums with the traditional marked-based interests of Silicon Valley enterprises be reframed? Can a balance be found between the preservation and protection interests of CHIs, CCIs, and the interests of public access and open culture?

Generating value from intangible assets through copyright licensing represents the traditional way for creativity to flourish in our Western capitalist economies. Even the scientific community depends for its research on copyrighted works such as software, database books and journals, all of which are covered by copyright regulations. But a strong copyright regime can adversely affect creativity by raising the «cost of expression»[50]. Empirical research on copyright and its implications suggests that for copyright laws to be conducive to economic development, copyrighted creations must spread widely, and their economic potential utilized without adversely slowing down the rate of creation[51], so copyright protection must not be too strong as to shelter copyright owners from competition and the need to stay innovative. Empirical research has also found that there is no strong, direct influence of copyright protection on national productivity, particularly where patent rights are protected, as manufacturing production and innovation depend in practice on proprietary rights over inventions. This in part explains why copyright regimes are subject to such an intricate scheme of exceptions and limitations in Europe, and to a fair use doctrine in the U.S.A.[52].

Focusing, therefore, on a traditional market-orientated and proprietary approach, implicated by a business model based on a conventional definition of 'commercial activities' provides a narrow view, where so called 'non-commercial sectors', such as education and research, shape human capital development, which in turn shapes production and innovation. The solution thus lies outside the copyright framework, both in liberal trade policies that make internal markets more competitive and capable of containing the market power of copyright holders, and in subsidies to CHIs, so that the public can have a stake in the copyright system.

## 6. Digitising cultural property, between preservation and promotion

From a different perspective, it can also be noted how digitising can mean very different things. To begin with, it can simply mean the *preservation* of cultural heritage through the digital scanning of objects, something expressly permitted under article 6 of Directive (EU) 2019/790[53], and which cannot be overridden by contract. Digitised books and manuscripts, audio files (wav, mp3), video files (mp4), photographs (jpeg, tiff, gif), 3D model replicas, datasets (downloadable statistical information) etc., are useful for recording and documenting a work's conservation status, while at the same time providing an immense digital reservoir of information and imagery, all available on call. This separation of digital objects from physical objects offers benefits for preservation, as multiple digital copies can be stored in several different locations, but at the same time it raises issues concerning the authenticity and integrity of the information encoded in digital form. Information in digital format is weak in nature, as any informational content encoded as streams of 0s and 1s can be copied from one storage medium to another and transmitted over networks. For digital objects to exist in multiple copies and be ubiquitous across space, the lack of fixity and the separation of descriptive metadata from content files makes it difficult to determine authorship and provenance[54]. As

49. Manovich, 2001 cit. ft. 42; Katyal, 2007 cit. ft. 43.
50. Landes W., Posner R., *Economic Structure of Intellectual Property Law,* Cambridge, Mass.: Harvard University Press, 2003, pp. 213-22; Valkonen S., White L, *An Economic Model for the Incentive/Access Paradigm of Copyright Propertization* working paper no. 06-15, New York University: Center for Law and Economics, 2006.
51. Park G.W., *The Copyright Dilemma: Copyright Systems, Innovation and Economic Development*, Journal of International Affairs, 2010, pp. 53-68, p. 64.
52. Fair use allows sampling and reuse by consumers and eventually promotes greater sales. Depoorter B., Parisi F., *Fair Use and Copyright Protection: A Price Theory Explanation*, International Review of Law and Economics, 2002, pp. 452-473; Brennan T., *Fair Use as a Policy Instrument*, in Takevama L. Gordon W., Towse R. eds., *Developments in the Economics of Copyright*, Cheltenham, UK: Edward Elgar, 2005, pp. 80-102.
53. Recital 53 of the Directive: preservation means: «to address technological obsolescence or the degradation of original supports or to insure such works and other subject matter». This definition does not exclude to preserve them in a preventive manner, to migrate to a more sustainable format, or to archive them better.
54. Xie I., Matusiak K., *Discover Digital Libraries. Theory and Practice*, Amsterdam: Elsevier, 2016.

blockchain technologies continue to mature, they could find application also in this sector.

A second meaning of digitisation is *promotion* as value creation. Digitised and born-digital works can be vulnerable to obsolescence (storage and migration), loss of historical context or authorial intent (emulation and reinterpretation), and loss of expertise, particularly in the case of interactive works, where the user experience may be more important than the item itself. However, the potential weakness of digitised 'cultural units' can be transformed into a strength when value creation and promotion are pursued through the definition of workflows and processes. Open access and participation can be even more powerful ways of creating and promoting value. The Culture 3.0 framework, translated into policy guidelines, encourages new forms of decentred experimentation. It recasts the notion of «cultural and creative industries» from a specific macro-sector of the economy to accommodate it in terms of «the demand side as a partially market-mediated pool of practitioners, increasingly interested in active cultural participation and access»[55]. The hallmark of Culture 3.0 is the transformation of audiences into practitioners, thereby defining a new, manifold notion of authorship and intellectual property rights. In other terms, accessing cultural experiences increasingly challenges individuals to develop their own capabilities to assimilate and manipulate in personal ways the cultural contents to which they are exposed. That is the «power of cultural participation» and of the so called «8(+1)-tier approach»[56].

Thus, can access and participation be construed to be compatible with the preservation and promotion of cultural heritage, with the traditional idea of protecting authors' rights to what they create, and with the need to support emerging authors, who have no bargaining power? Is proprietary control an efficient way for cultural heritage institutions to keep control over their collections, by imposing rules on participants regarding access, reproduction, and reuse?

Every author is both an earlier author and a later author, building on previous creative works, and can only be constrained by existing copyright, by the need to pay royalties or licensing fees to cultural heritage institutions, by restrictions regarding the time, place, and manner of accessing tangible collections, and by the transaction costs for obtaining the permissions to access them. For without permissions of the authority that has the cultural property in its possession and payments to the copyright-owner, no reuse or reproduction is allowed.

55. Sacco P.L., *Culture 3.0: A new perspective for the EU 2014-2020 structural funds programming*, EENC Paper, 2011 available at www.interarts.net/descargas/interarts2577.pdf, p. 10 ff. (last accessed 15 February 2024).

56. Sacco, 2001, cit. ft. 55.

## 7. Reproduction and reuse in the European framework and in the Italian law

With respect to all the above-mentioned issues, my investigation focuses on two aspects: the digital and analogical reproduction *in situ* of material belonging to the permanent collections of museums and archives; and on the reuse of digital works, not only those in the public domain. My research builds on observation, based on an educational project at the IUAV University of Venice, where we are mapping out the legal and policy measures adopted by some major CHIs in Venice. The engagement of art, architecture, and design students in this educational and research project has been of the utmost importance precisely because, on the one hand, they produce the protected material that is the heritage of the future, but at the same time they are inspired by the works of other, better-or lesser-known artists, works that belong to museums and archive collections and which they copy and appropriate, and reuse, adapt, and change as material for their own creative works, protected in turn as derivative works depending on their originality – a requirement construed in the European Union by the European Court of Justice as the «author's own intellectual creation» (AOIC threshold). The research methodology includes case studies, interviews, and desk-based research and combines functionalism, which emphasises law-as-rules, with hermeneutics, in which rules are the signifiers of concepts and of a *mentalité* (cognitive structures that support and anchor positive law).

The aims of this project are to open a conversation with cultural heritage institutions and cultural and creative industries in Venice, build confidence, find new partners, such as, for example, in the technology field, and create new professional profiles with a renewed educational offer, targeted at hybrid curatorial and archival figures, who are able to move easily and sensitively in the CHI and CCI sectors, are capable of enhancing creative materials and developing cultural strategies, and are able to interact both with public and private institutions, such as for example business and family archives.

Many questions are to be answered – How can we know whether a work is out-of-copyright in the public domain, or not? Why is a work resulting from the transformation and adaptation of an original work, but without «altering its original sense with a semantic discrepancy»[57], defined as a «derivative work», such that it must be authorised by the author of the original work? Who has the power to decide

57. See Tribunale civile – Milano, 2011. *Fondazione Alberto e Annette Giacometti v. Fondazione Prada, Prada S.p.A. and John Baldessari*: "*l'opera è frutto della c.d. arte appropriativa, che si concreta nel realizzare opere artistiche che reinterpretano 'immagini preesistenti tratte dell'arte e dalla cultura di massa, cambiandone totalmente il significato*" available at https://https://www.robertocaso.it/wp-content/uploads/2023/02/Trib.-Milano-13-luglio-2011_Fond.-Giacometti-c-Fond.-Prada-copia.pdf (last accessed 15 February 2024).

whether the reproduction and reuse of a cultural property are obscene and whether the dignity (*decoro*) of the Italian cultural property has been violated (of which express reference is made, for instance, in articles 45(1), 49(1) and (2), 52(1-ter); 96, 120(2) of the Code of Cultural Heritage and Landscape cited above), and the original sense has been altered (judges, experts in these fields, etc.), and based on what conditions and thresholds?[58]

How can we obtain a more predictable judicial application of the European system of exceptions and limitations to copyright? Do we, as a collective and as individuals, deserve more transparent rules? How can the use of digital reproductions contained in archives be facilitated? Would it be advisable to consider including in databases clear policies and examples of how the digital reproductions can be used for personal and commercial purposes? Can the duration of copyright protection be shortened, and standards of infringement relaxed in the digital world? Should commercial uses of images of cultural properties be subject to a "compatibility check" by the Italian Ministry of Culture or any of its designated agents, through the application of articles 107 and 108 of the Code of Cultural Heritage and Landscape (mentioned above), as stated (in this journal) by Felicia Caponigri?

Coming to the Italian legal system, the framework does not appear to be any better equipped, even after the transposition, at the end of 2021, of the system of exceptions and limitations to copyright law introduced by Directive (EU) 2019/790[59]. Although a balance was sought for both access and protection, the combination of different legal rules prevents full access to cultural heritage and creative content in general, even when the works are in the public domain. Furthermore, license agreements are not standardised[60] and continue to differ regarding their terms, purposes, and scope, depending on the type of object licenced – tangible objects, time-based medium works such as audio-visuals, digital images, born-digital and hybrid objects, buildings – and the different collecting institutions.

As I will illustrate below, Directive (EU) 2019/790 and the Italian national transposition recognise that digital technologies permit new types of reproduction and reuse, and provide for exceptions and limitations to foster research, innovation, education, and the preservation of cultural heritage. However, further clarity is needed on both sides of the fence – on what CHIs can do with the tangible and intangible objects they hold in their permanent collections, both as creators and copyright holders themselves, and as users of the copyrighted works of others, and on what CCIs and users of social platforms can do in relation to those same objects.

### 7.1 *Cultural heritage institutions vs. rightsholders*

Times would never appear to have been rosier for both cultural heritage institutions and right-holders under Directive (EU) 2019/790 and its transposition in Member States. Negotiations via collective licensing systems have become less costly; protection and usability seem more balanced; provisions on the remuneration of authors and performers seem more appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights; and a mandatory system has been introduced, based on transparency, for contract adjustment mechanisms, and alternative dispute resolution procedures.

The own material that CHIs produce does not necessarily contain pre-existing copyrighted material. For example, works or specimens are not protected in science museums, or they may incorporate works in the public domain, although in this case, paradoxically, museums may often negotiate a license on a case by case basis, in order to maintain good relations with the estate (which may contain pre-existing copyrighted work) and other rightsholders, such as family members and collection management organizations[61]. When CHIs produce their own copyrighted works, the copyright may or may not cover all economic rights. Preservation, scientific and educational uses, publication, and display are most commonly covered by individual or collective license agreements, either free or for a fee, whereas commercial purposes are usually licensed for specific projects, such as merchandising posters or t-shirts, advertising, etc., always for a fee.

Below is a schematic overview of the European and Italian regulatory framework.

Reproduction activities undertaken *by CHIs* are permitted when:

(i) *reproduction has the meaning of «preservation»* (*supra,* § 6): art. 6 (exception for preservation) and art. 8 (exception for out-of-commerce works) of Directive (EU) 2019/790 -> For the *faithful* Italian transposition see art. 68 paragraph 2-*bis*, Italian Copyright Law, as amended by Italian Legislative Decree 177/2021.

58. See Tribunale civile – Firenze, 2023. *Ministero della cultura v. Studi d'arte cave Michelangelo srl e Brioni Spa: «Nel caso di specie la società convenuta ha gravemente leso tali interessi, poiché, con la tecnica lenticolare, ha insidiosamente e maliziosamente accostato l'immagine del David di Michelangelo a quella di un modello, così svilendo, offuscando, mortificando, umiliando l'alto valore simbolico ed identitario dell'opera d'arte ed asservendo la stessa a finalità pubblicitarie e di promozione editoriale»,* available at www.robertocaso.it/wp-content/uploads/2023/12/Tribunale-Firenze-26-agosto-2023-David-Brioni.pdf (last accessed 16 Feb 2024).

59. For the other national transpositions see the EU official site at eur-lex.europa.eu/legal-content/IT/NIM/?uri=CELEX:32019L0790 (last accessed 20 February 2024).

60. Benhamou, 2019, p. 24.

61. *Ivi*, p. 25.

(ii) *reproduction has the meaning of «text and data mining» (TDM) for the purposes of scientific research and innovation, and for any undefined purpose when works and other subject matter are «lawfully accessible» or "publicly available online"*: articles 3 and 4 of Directive (EU) 2019/790 (with various caveats and some uncertainty as to the definition of what is «lawfully accessible» according to articles 3(1) and articles 4(3). For example, scientific research activities carried out with the assistance of digital technology are permitted -> The Italian transposition in this case deviates from the text of the Directive, specifying that «TDM applies to *large* amounts of *digital text, sounds, and images*», and adding that «the communication of research outcomes is permitted only where *expressed in new original works*», adding further that «rightsholders, including the holders of *related rights*, and rightsholders of the *sui generis database protection* may, even by express *unilateral deed*, prevent the operation of the exception»: see articles 70-*bis*, 70-*ter*, and 70-*quater* Italian Copyright Law, as amended by Italian Legislative Decree 177/2021.

### 7.2 *Cultural heritage institutions vs. potential-rightsholders*

The relationship between cultural heritage institutions and potential rightsholders (e.g., CCIs, social media users, etc.) is conflictual because the limitations and exceptions to copyright law envisaged by the European Directive to foster research, innovation, education, and the preservation of cultural heritage are not user-friendly in construction, remaining broadly incomprehensible. Thus, individuals do not understand exactly what they can or cannot do.
Below is a schematic overview of the European and Italian regulatory framework.
Reproduction activities undertaken *by anyone* are permitted when:

(i) *for purposes of illustration for teaching*: art. 5 (digital and cross-border teaching activities) and art. 24 of Directive (EU) 2019/790, which amended Directives 96/9/EC and 2001/29/EC by introducing a new mandatory exception for educational establishments in relation the their enrolled students, or anyone else (artists, authors, etc.) when using works or other subject matter in digital illustration and teaching activities, including online and cross-border teaching activities, as long as a) the source is indicated (only if the source appears on the reproduced work), b) the electronic environment is secure, c) the specific accessibility needs of people with disabilities are assured, and d) that the use of the works is limited to the extent justified by the non-commercial purpose to be achieved. Member States may provide for fair compensation for rightsholders for the use of their works or other subject matter under that exception. The exception cannot be waived by contract, but Member States can authorise rightsholders to allow for digital educational uses through a licensing system, either in whole or for some types of works or subject matter (*e.g.,* sheet music) -> The Italian transposition is *a copy-and-paste translation* of the Directive: see art. 70 (1-*bis*) and art. 70-*bis,* Italian Copyright Law, as amended by Italian Legislative Decree 177/2021, reiterating that no exception or limitation is granted for commercial uses.
Art. 70 (paragraph 1-bis): «Publication over the Internet is permitted, free of charge, but only of low-resolution or degraded images and music, for educational or scientific use, and only if such use is not for profit and only with the correct citation». The next article, art. 70-*bis* (1), permits free publication over the Internet also of normal and high-resolution images or music or other materials (quotations, reproductions, translations and adaptations of passages or parts of works) only for educational institutions for the purposes of illustration for teaching, in relation to their enrolled students, and in a secure electronic environment under their responsibility, and within the limits of what is justified by the non-commercial purpose of the publication.

(ii) *for purposes of scientific research*: art. 3, art. 4 (TDM for the purposes of scientific research and innovation), and art. 24 of Directive (EU) 2019/790, which amended art. 6 (2), point (b) and art. 9, point (b) of Directive 96/9/EC and art. 5(3), point (a) of Directive 2001/29/EC; the provisions introduced a text and data mining exception as long as the source is indicated (unless that turns out to be impossible) and to the extent justified by the non-commercial purpose to be achieved -> The Italian transposition is contained in art. 70-*quater* Italian Copyright Law, as amended by Italian legislative Decree 177/2021, and *deviates* from the European Directive text by adding: «*unless the use of the works has been reserved to the copyright owners and holders of related rights*».

(iii) *to protect freedom of expression*: art. 17 of Directive (EU) 2019/790 states that the online content-sharing service provider, when uploading and making available content generated by users on the online content-sharing service, is required to obtain relative permission from the rightsholders, except in the two cases contemplated by art. 17(7): (a) quotation, criticism, review; and (b) use for the purpose of caricature, parody or pastiche (an exception already present in art. 5(3) h) of Directive 2001/29/EC) -> The Italian transposition is found in art. 70, art. 70-*bis*, and art. 71-*nonies*, Italian Copyright Law, as amended by Italian Legislative Decree 177/2021.
Art. 71-*nonies*, in particular, reiterates the three-step test introduced by the Berne Convention: «The exceptions and limitations governed by this Chapter and by any

other provision of this Law, when applied to works or other protected materials made available to the public so that everyone can have access to them from the place and time individually chosen, cannot be in contrast with the normal exploitation of the works or other materials, nor cause unreasonable prejudice to the legitimate interests of the copyright owners or holders of related rights».

(iv) *for the promotion of culture and access to cultural heritage*: art. 14 of Directive (EU) 2019/790 addresses reproductions of works of visual art in the public domain when the term of protection of a work of visual art has expired. Also known (possibly unduly) as the 'freedom of panorama rule,' the true (optional) exception for the reproduction of cultural goods which are permanently located and so visible from public places was introduced by art. 5(3)h of Directive 2001/29/EC, but it was not transposed into the Italian legal system at the time -> The Italian transposition is now contained in art. 32-*quater*[62], Italian Copyright Law, as amended by Italian Legislative Decree 177/2021.

The provisions permit the reproduction (any reproduction) of works of visual art «as identified in article 2 of the Italian Copyright Law»[63] in the public domain, unless they constitute an original work. So for now, only non-original reproductions of works of the visual arts in the public domain are, therefore, not protected by copyright or related rights; technically this means only mere documentary photographs as faithful reproductions of an existing work, and not all photographs, thus excluding «artistic photographs» (*foto artistiche*) covered by copyright and «simple photographs» (*fotografie semplici*) that can be protected by neighbouring rights in accordance with the Term Directive (as in Germany, Austria, and other EU countries). Thus, the reuse of digital works in the public domain keeps posing problems. How can we know whether a work is out-of-copyright/in the public domain, or not? And, how can a documentary photograph be distinguished from a simple one, when only the first is in the public domain? Normal users do not know copyright rules. art. 32-*quater* also states: «Without prejudice to the provisions governing the reproduction of cultural property set forth in Legislative Decree No 42 of 22 January 2004 […]» with reference to articles 107-108 of the Italian Code of Cultural Heritage and Landscape. According to Italian jurisprudence, these two articles must be intepreted in line with articles 9 («The Republic promotes the development of culture and of scientific and technical research. It safeguards the natural landscape and the historical and artistic heritage of the Nation») and 33(1) («The Republic guarantees the freedom of the arts and sciences, which may be taught freely») of the Italian Constitution. As said above, these rules give the authorities that have the property in their possession control over the reproduction and reuse of cultural property. Under art. 107 (as amended in 2006 and 2008), public authorities who hold cultural property may consent to its reproduction and use; art. 108 (as amended in 2014) allows private individuals to freely reproduce cultural property so long as such reproduction is not for commercial purposes, and in particular it allows reproduction for non-commercial uses related to freedom of expression or thought or creativity, the promotion of the knowledge of cultural heritage, and the generation of value from cultural properties by public authorities who do not possess the cultural property in question. A subsequent amendment in 2017 introduced art. 108(3)-*bis*, which exempts certain activities, such as the reproduction and dissemination of images, when performed not-for-profit (*senza scopo di lucro*), from the need to obtain prior authorization from the relevant entities, where such activities must be related to study, research, or free expression of thought and creative expression, or the promotion of knowledge of national cultural heritage. All this without prejudice to the provisions of copyright law. Such a rule is effectively used as a 'privilege' by CHIs to inappropriately extend copyright law well beyond its scope of application and terms of expiration, and it seems in sharp contrast with the constitutional protection of freedom of expression. Commercial uses without permission (i.e. authorization and the payment of a fee) always remain expressly prohibited[64].

62. Art. 32-*quater*: «*Alla scadenza della durata di protezione di un'opera delle arti visive, anche come individuate all'articolo 2, il materiale derivante da un atto di riproduzione di tale opera non è soggetto al diritto d'autore o a diritti connessi, salvo che costituisca un'opera originale. Restano ferme le disposizioni in materia di riproduzione dei beni culturali di cui al decreto legislativo 22 gennaio 2004, n. 42. Sono fatti salvi i contratti conclusi e i diritti acquisiti fino al 6 giugno 2021*».

63. The reference to Annex 3, Dir. 2012/28 is not excluded, nor the larger meaning of 'visual', as perceived visually by anyone; however the notion of visual art recalls *in primis* the category of *arti figurative* of the Italian Copyright law (*le opere della scultura, della pittura, dell'arte del disegno, della incisione e delle arti figurative similari, compresa la scenografia*): works of sculpture, painting, drawing, engraving, and similar figurative arts, including scenic art.

64. See the case in 2014 of an Illinois rifle company that superimposed an AR-50A1 rifle on an image of Michelangelo's David and used it in an advertisement: the Italian Ministry of Culture alleged a violation of the *decoro*/dignity of its cultural property under the law: Caponigri cit. ft. 45 at p. 172. See the other decisions of the Italian courts, one concerning the precautionary proceedings against the German private company *Ravensburger*, prohibiting the commercial reproduction of Leonardo da Vinci's Vitruvian Man on jigsaw puzzles, which seem to endanger the cultural good itself and its cultural value and purpose (*Tribunale di Venezia sez. II, Ord., 22.10.2022*), and a second one (which reaches the same result by applying a different set of rules) against the publisher of GQ, *Condè Nast*, for infringement of the "right of the image of cultural heritage", because the cover of GQ was realised by superimposing the image of a model, Mr. Boselli, *posing like* Michelangelo's David (*Tribunale di Firenze sez. II civ, Sentenza n. 1207, 20.4.2023*), a decision that led to the compensation of the pecuniary and non-pecuniary damages suffered by the Galleria dell'Accademia.

## 8. Observation of phenomena and case studies

It would now seem appropriate to present a few episodes concerning Venetian museums and archives, to illustrate the constraints and difficulties that students, researchers, and creative workers in general experience in their own research or artistic practice. These cases tell of how time-consuming, annoying, and discouraging the 'culture of permission' is (where reuse or digital reproduction is not permitted without the authorization of, or payment to the copyright owner and to the cultural institutions) and of how poor and of little help the system of exceptions and limitations to copyright law is, as implemented by Directive (EU) 2019/790 and transposed in Italy in 2021.

### 8.1 *Case 1: museums*

MUVE, the *Fondazione Musei Civici di Venezia*, is a private entity responsible for eleven Venetian museums[65]. With only one founding member, the City of Venice, it reports to a Board of Directors that manages the public cultural heritage and self-finances all its activities. MUVE boasts an immense cultural heritage, with over 700,000 works of art, five specialist libraries, a photographic archive, and a well-equipped warehouse in the Vega Stock in Marghera. Collections can be consulted online for a part of the materials through the *Catalogo delle Collezioni* online database[66].
A couple of art students at our University IUAV of Venice, who are also founders of an art collective and a contemporary art lab, engaged in the production and sharing of multimedia artworks, wrote to the Foundation to request permission to produce video and photographic materials in the Natural History Museum of Venice (which is part of MUVE), in order to create an audio-visual work, combining artistic and documentary requests for the work's distribution in galleries, festivals, and other similar cultural events. They declared their intent was to focus their research on the relationship between knowledge, visual culture, and power, emphasizing the relationship with what is perceived as different, with what is biologically different, and what is historically and geographically distant. To this end, they requested access to the De Reali and Miani collections, which have not been digitised by the museum and are not visible except by going to the museum itself. They inquired about the fees charged by the institution for the rights to the images and videos they wished to produce inside the museum and whether they could shoot on the museum's closing day, so as not to disturb museum visitors. The MUVE replied that the payment of the fees depended on the purpose of the shoot and on the need for additional guardians during their stay on the premises, enclosing a form on which the students had to specify all these details. In subsequent phone calls, the person in charge of the museum's promotional office clarified that the price to be paid only depended on the total number of hours needed for filming, and that in any case a discount would be applied (with respect to commercial use), given that their purpose was artistic/didactic. The final price came to 1,200 euro (+ Value Added Tax – VAT). What is the likelihood that students could afford such steep fees (the equivalent to one year of academic fees)? It is museums that are more likely to have the resources to address the complex issues of preservation and promotion.

### 8.2 *Case 2: archives*

ASAC, *Archivio Storico delle Arti Contemporanee*, is the Historical Archives of Contemporary Arts that collects, catalogues, expands, and evaluates the conservation and documentary assets of the Venice Biennale, gathered since 1895, in the field of contemporary arts, including visual arts, architecture, cinema, music, dance, and theatre[67]. It also promotes the circulation of documentary material produced by the *Biennale* in institutions, cultural associations, schools, and universities. The ASAC is a multi-disciplinary and multimedia organisation that holds the following collections: a historic collection, photo, film, and media libraries, a poster collection, documentary material, a collection of music scores, and an artistic collection. The collections can be consulted online for a part of the materials through ASAC Data, a unified computerized database for the management and access to archive materials.
A colleague of mine at the Department of Architecture and Arts wrote to ASAC to make an appointment to consult the Green Theatre-Isola di San Giorgio material, to research the figures of Luigi Vietti and Brenno del Giudice and their respective projects for the Green Theatre for the island of San Giorgio in Venice. After some difficulty due to limited opening hours and limited space for on-site consultation, the professor managed to visit the Archive to do his research. He then informed the Archive that the results of his research on the Green Theatre of San Giorgio would be published in an essay, within an open access series, and asked permission to insert two images of tables from the

65. The Doge's Palace; the Museo Correr; the Torre dell'Orologio; Ca' Rezzonico – Museum of the eighteenth-century Venice; Palazzo Mocenigo – Centre for the History of Textiles and Costume; the Casa di Carlo Goldoni; Ca' Pesaro – International Gallery of Modern Art; Palazzo Fortuny; the Museo del Vetro di Murano (Murano glass museum); the Museo del Merletto di Burano (Burano lace museum); the Natural History Museum of Venice.
66. www.visitmuve.it/en/fondazione/presentazione/ (last accessed 15 February 2024).
67. www.labiennale.org/en/asac/introduction (last accessed 15 February 2024).

archive, which are part of «Teatro Verde – Isola di S. Giorgio ½ BIAP / 1/35» collection, consisting of an axonometric sketch (61112) and a perspective sketch (61113) by Brenno Del Giudice from 1939, which my colleague had personally photographed. ASAC replied it could not authorise the use of his photographs, as only the Archive is authorized to provide such images, even for the purposes of scientific publication, and that the cost for high-definition images was 100 euro (+ VAT) each. If he was interested, there was a form to be completed for the payment procedure with the administration. They added that a fair amount of time would be needed to obtain the material, given the additional time their photographer would need to photograph such large format sketches. At that point, our colleague turned to the archives of the Institute of Theatre and Opera (*Istituto per il teatro e il melodramma*), and the digital archive of the Giorgio Cini Foundation[68], which promptly provided the images free of charge. The Ca' Pesaro library (which is part of MUVE, *supra* §8.1), on the other hand, which holds the Brenno del Giudice collection, never replied to the online request form submitted by my colleague through its website.

Thus, it turns out that many Venetian CHIs require significant paperwork to authorize access to their collections and to permit people to participate in promoting our cultural heritage, and are still charging fees for the reproduction and reuse of out-of-copyright works. Yet it is not clear whether they are claiming the application of legal cultural heritage rules or whether they instead invoke copyright law (copyright in most of Europe lasts for seventy years after the death of its longest living creator). Additionally, it remains uncertain whether reliance is placed on the compatibility between the use of a cultural property's name and image with its intended purpose (be it commercial, non-commercial, creative, or academic). This ambiguity poses a further threat to the public domain, as the scope of personality rights – traditionally associated with natural persons – is now expansively applied by Cultural Heritage Institutions (CHIs) to safeguard the *decorum* of cultural heritage assets. Of course, the difficulties they encounter are not insignificant. The reproduction of material belonging to the permanent collections of CHIs is limited by the fact that the transfer of ownership (purchase, gift) or the loan of a work to a CHI does not automatically imply the transfer of copyright. Furthermore, as I said above, a digital archive is a database, and its authors have the right to grant or decline permission for, *inter alia*: a) permanent reproduction, total or partial, by any means and in any form; b) the presentation, communication, translation, adaptation, different arrangement, and any other modification of the content of the database itself, with the exception of cases of teaching or scientific research purposes, within the limits of what is justified by the non-commercial purposes pursued, also on behalf of the copyright holders (art. 64-*quinquies* and art. 65-*sexies*, Italian Copyright Law). The protection of databases is therefore measured *vis-a-vis* the exceptions to copyright law and open access.

## 9. Italian Courts' interpretations

Even once the reproduction and reuse of CHIs material is opened – for example, by including in online databases clear policies and examples of how the latter can be used for personal and/or commercial purposes; and once CCIs and we, as a collective and as individuals, have access to more transparent rules, we still have to confront the interpretations of the European Court of Justice and Italian courts on these matters. Thus, we discover the current legal meanings of concepts such as *parody*, *public domain*, *fair use* (directly imported from U.S. common law), *scientific research purposes,* and so forth.

In a case from 2015, the Court of Venice[69] – interpreting the meaning of *parody* – ruled that «Samson Kambalu physically appropriated Sanguinetti's work to make it available again for the free enjoyment of visitors to the art exhibition, in sarcastic tune with the Sanguinetti's situationist ideal», quoting a precedent of the European Court of Justice[70]. In a case from 2010, the Court of Rome[71] – giving its interpretation of the meaning of *public domain*

68. The mission of the Institute of Theatre and Opera is to study the history of the performing arts, especially in various specific areas, such as performers, opera, dance, stage design, and theatrical and musical iconography. It has a rich thematic iconographic archive, see www.cini.it/en/institutes-and-centres/teatro-e-melodramma (last accessed 15 February 2024).

69. Tribunale Sez. spec. Impresa – Venezia, 2015. *Gianfranco Sanguinetti, v. Fondazione La Biennale di Venezia & Samson Kambalu*. Artist Kambalu used about three thousand photographs depicting documents, writings, drawings, and photos of Gianfranco Sanguinetti, taken from the Beinecke Rare Book & Manuscript Library Archive, which in turn had purchased Sanguinetti's situationist archive at auction. *«L'installazione si fa veicolo di un messaggio creativo, originale ed autonomo chiaramente percepibile e che nel suo complesso, utilizzando il linguaggio del movimento situazionista in ragione dell'uso del détournement, dello scandalo e della beffa»*. No copyright infringement. Available at https://www.robertocaso.it/wp-content/uploads/2023/02/Trib.-Venezia-7-novembre-2015-copia.pdf (last accessed 15 February 2024).

70. Case ECJ, C-201/2013 of 3 September 2014. *Deckmyn and Vrijheidsfonds*. ECLI:EU:C:2014:2132

71. Tribunale civile – Roma, 2010. *Gianfranco Carnebianca v. Shen Wei Dance Arts*. According to Carnebianca (Italian sculptor and painter), Shen Wei's performance *Folding* had reproduced peculiar elements of Carnebianca's works (elongated heads of sculptures depicting human figures), accusing him of plagiarism. According to the Rome Court, there are differences between their respective works: one work does not infringe another if the only similar elements between the two are either in the public domain or ineligible

– ruled that «many of [the] elements are not copyrightable because they were generic and formed part of the public domain that is ineligible for copyright, as free-to-copy concepts, ideas, or suggestions described in a work of art». In 2011, the Court of Milan[72] – with its living interpretation of *fair use* – ruled that the transformative intervention of an American artist appeared substantial in terms of features, dimensions, materials, and forms, and «even the use of the image of the woman of Giacometti appears dramatically transformed, from the thinness and tragic expression of the post-war period, to the ecstatic expression of the thin woman, not because of the privations of war, but because of the severe demands of fashion». The Italian Supreme court, in a case from 2022[73] finally gave content to the expression *purposes of scientific research* as follows: «the activity of teaching and scientific research should have a purely illustrative purpose; the reproduction of a work of art cannot be in full; the partial reproduction must be instrumental to the purposes of criticism and discussion; and only non-commercial uses are admitted»[74].

for copyright such in this case; moreover, the authors express themselves in their own personal way. No copyright infringement.

72. Tribunale civile – Milano, 2011. *Fondazione Alberto e Annette Giacometti v. Fondazione Prada, Prada S.p.A. and John Baldessari*, cit. ft. 57. American conceptual artist John Baldessari made an original installation to be featured at the Prada Foundation in Milan. As the name of the project states, *Grande Femme II – The Giacometti Variations*, Baldessari took inspiration from the Swiss sculptor Alberto Giacometti, and created nine oversized female figures stretched to an extremely slender form (4.5 meter-tall sculptures), made out of resin and steel then sprayed with bronze, clothed in garments and objects also designed by Baldessari. Fondazione Prada director Germano Celant asked the Giacometti Foundation for permission to use two works by the sculptor Giacometti that the Foundation refused to give. *«Le opere di Baldessari non riproducono né si ispirano ad una o all'altra scultura di Giacometti (La grande femme II, III o IV), ma all'immagine in genere data dall'artista alla figura femminile, allungata, sottile, ieratica, semplice icona di un'astratta idea di donna, 'scarnificata' per i rigori della guerra nella realizzazione di Giacometti, rivisitata da Baldessari per rappresentare la donna moderna, indotta all'estrema magrezza dalla moda, con una sarcastica riflessione sul moderno corpo femminile e sui riti ed eccessi della moda»*. Precedents cited: *Mattel v. Walking Productions*, 353 F.3d 792, 2003; *Rogers v. Koons*, 960 F.2d 301 – 2nd Cir., 1992; *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

73. Cassazione Civile sez. I, 08.02.2022, n. 4038. *Archivio Mario Schifano, eredi Mario Schifano v Fondazione M.S. Multistudio & Università di Genova*. This case concerned a scale reproduction of twenty-four thousand works by Mario Schifano, within a six-volume work published by the Foundation, dealing with the computer cataloguing of data on some of the artist's works in the Foundation's archives. Available at www.njus.it/upload/news/2006/O_C.C._4038_2022.pdf (last accessed 15 February 2024).

74. The Supreme Court (cit. previous ft.) ruled that the scale reproduction of the works of art competes with the market for the original works of the copyright owner. It basically applied the four fair use factors: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use on the market for the original.

## 10. Conclusions

Culture is something historically produced and is unbounded rather than bounded, contested rather than consensual, incorporated within power structures, rooted in practices, symbols, habits, and patterns of practical mastery, and negotiated and constructed through human action rather than superorganic forces[75]. The concept of originality is becoming blurred and the notion of the «author's own intellectual creation» slowly appears to be fading away in the new contemporary cultural landscape. Although a complex scheme of mandatory exceptions and limitations has been introduced in the European Copyright acquis by Directive (EU) 2019/790, our national legislative framework in the field of cultural heritage, in particular the Italian Code of Cultural Heritage and Landscape of 2004, still includes provisions which limit the reproduction and reuse of cultural goods. Hybridism, syncretism, and pluralism are all concepts that can be used together with reusing and remixing, as a bridge between different generations, different traditions, and different identities, between different cultural and creatives sectors, which are not perceived as antagonistic (where one prevails over the others), but as mutually influencing one another. Facing this horizon, the goal of my educational and research project is to empower people to explore and respond to our cultural heritage in new ways that our legislation has yet to contemplate – ways that are not only (and not so much) concerned with the economic exploitation of material in the public domain (a game that only companies with deep pockets and innovative proprietary technologies can win), but more with the sharing of knowledge, memories, and imagination. A goal that can only be achieved if new professionals, as hybrid curatorial and archival figures, able to move sensitively in the CHI and CCI sectors, are trained, and if younger generations of CCIs and CHIs professionals work together, by sharing heritage, respecting diversity, and pursuing mutual understanding and peace – all of which, incidentally, are UNESCO keywords.

### Nota

This is a revised version of the talk presented at the Florence conference titled "The Italian Law of Cultural Heritage: A Dialogue with the United States" in June 2022.

75. Merry S. E., *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, Political and Legal Anthropology Review, 2003, pp. 55-76; Id., *Changing rights, Changing Culture*, in Cowan J.K, Dembour M.B, Wilson R. eds., *Culture and Rights, Anthropological Perspectives*, Cambridge University Press, 2001; Ayres J., *Inspiration or prototype? Appropriation and exploitation in the fashion industry*, Fashion, Style & Popular Culture, 2017, pp. 151-165.

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