Forever Young

Celebrating 50 Years of the World Heritage Convention

edited by
Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín,
Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

with the collaboration of Manuel Ganarin and Alessandra Quarta

Volume II

6 *Un'anima per il diritto: andare più in alto*

Collana diretta da Geraldina Boni

Mucchi Editore

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6

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L'orizzonte meramente tecnicistico su cui ogni tipo di riflessione sembra oggi rischiare di appiattirsi non solo non cancella quegli interrogativi fondamentali che si confermano ineludibili per ciascuna disciplina in cui si ramifica il pensiero giuridico: ma li rivela, anzi, in tutta la loro impellenza. È dunque a tale necessità che facciamo riferimento nel cogliere e sottolineare il bisogno che si avverte di 'un'anima per il diritto', ispirandoci in modo particolare a quegli ammonimenti che Aleksandr Solženicyn rivolgeva a studiosi e accademici dell'Università di Harvard nel 1978 e che, a distanza di decenni, mantengono intatta la loro validità. Muovendo dalla domanda «se mi chiedessero: vorrebbe proporre al suo paese, quale modello, l'Occidente così com'è oggi?, dovrei rispondere con franchezza: no, non potrei raccomandare la vostra società come ideale per la trasformazione della nostra. Data la ricchezza di crescita spirituale che in questo secolo il nostro paese ha acquistato nella sofferenza, il sistema occidentale, nel suo attuale stato di esaurimento spirituale, non presenta per noi alcuna attrattiva»* – dichiarazione che si riempie di significato alla luce della vicenda personale, tanto dolorosa quanto nota, di colui che l'ha pronunciata –, l'intellettuale russo individuava infatti con profetica lucidità i sintomi e le cause di tale declino. In questo senso, ad interpellarci in modo precipuo in quanto giuristi è soprattutto l'osservazione secondo cui «in conformità ai propri obiettivi la società occidentale ha scelto la forma d'esistenza che le era più comoda e che io definirei giuridica»: una 'forma d'esistenza' che tuttavia è stata assunta come fondamento esclusivo e per ciò stesso privata dell'anelito a una dimensione superiore capace di giustificarla. Con l'inevitabile, correlata conseguenza che «l'autolimitazione liberamente accettata è una cosa che non si vede quasi mai: tutti praticano per contro l'autoespansione, condotta fino all'estrema capienza delle leggi, fino a che le cornici giuridiche cominciano a scricchiolare». Sono queste le premesse da cui scaturisce quel complesso di valutazioni che trova la sua sintesi più efficace nella seguente affermazione, dalla quale intendiamo a nostra volta prendere idealmente le mosse: «No, la società non può restare in un abisso senza leggi come da noi, ma è anche derisoria la proposta di collocarsi, come qui da voi, sulla superficie tirata a specchio di un giuridismo senz'anima». Se è tale monito a costituire il principio ispiratore della presente collana di studi, quest'ultima trova nella stessa fonte anche la stella polare da seguire per cercare risposte. Essa, rinvenibile in tutti i passaggi più pregnanti del discorso, si scolpisce icasticamente nell'esortazione – che facciamo nostra – con cui si chiude: «E nessuno, sulla Terra, ha altra via d'uscita che questa: andare più in alto».

* La traduzione italiana citata è tratta da Aleksandr Solženicyn, *Discorso alla Harvard University, Cambridge (MA) 8 giugno 1978*, in Id., *Il respiro della coscienza. Saggi e interventi sulla vera libertà 1967-1974. Con il discorso all'Università di Harvard del 1978*, a cura di Sergio Rapetti, Jaca Book, Milano, 2015, pp. 219-236.

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Section III

Cultural Heritage and the 1972 UNESCO Convention in Europe and its State Contracting Parties

Francesco Boldrin

DIGITAL REPRODUCTION OF CULTURAL HERITAGE IMAGES IN THE LIGHT OF THE EU COPYRIGHT DIRECTIVE AND THE ITALIAN CODE OF CULTURAL HERITAGE AND LANDSCAPE*

Abstract: The contribution aims at analysing the issue of digital reproduction of images of cultural heritage in the context of the reformed EU legislation on copyright and of the national legislation contained in the Italian Code of Cultural Heritage and Landscape. The EU legislator has recently amended the European copyright rules by adopting the Directive (EU) 2019/790 (the so-called Digital Copyright Act) which contains some provisions directly concerning the access to cultural heritage in the digital environment. The development of new digital technologies has, in fact, profoundly changed the methods of fruition of the cultural heritage in EU Member States, which are also Members of the UNESCO Convention of 1972. The digital medium represents a valuable tool available to the custodians of cultural heritage as it expands the possibilities and opportunities for access, thus helping to give new life to the past. In this perspective, the diffusion of digital reproductions of artistic works in the public domain can also facilitate «the access to and promotion of culture» as well as «the access to cultural heritage» (as recognised in recital 53 of the Digital Copyright Act). To this end, Article 14 of the Directive has expressly excluded from the protection of copyright and related rights all reproductions, for whatever purpose made, of works belonging to the visual arts that become of public domain (unless they are original). In this way, therefore, the intention was to allow the free dissemination, sharing (including online) and reuse, even for lucrative purposes, of non-original copies of works of art that have fallen into the public domain.
In Italy, the objective pursued by the EU legislator to promote access to and dissemination of cultural heritage finds a limit in the current domestic regulation of cultural heritage and, in particular, in article 108 of the Code of Cultural and Landscape Heritage subjecting the reproduction for lucrative purposes of cultural heritage works to prior authorization from the cultural entities and to the payment of a fee, even though these works have now fallen into the public domain with regard to copyright. Therefore, the article will discuss whether, in the current context of open data, the 'protectionist' vocation that animates the above provisions of domestic Italian law still has an effective and valid reason to exist.

* Double-blind peer reviewed content.

1. *Introduction*

The development of new digital technologies has profoundly changed the methods of access and fruition of the cultural heritage. In particular, the digital medium represents a valuable tool available to the custodians of cultural heritage as it expands the possibilities and opportunities for access, thus helping to give new life to the past.

In this perspective, the diffusion of digital reproductions of artistic works in the public domain can also facilitate the access to cultural heritage in accordance with the aims of the WH Convention.

To this end, Article 14 of the EU Copyright Directive has expressly excluded from the protection of copyright and related rights all reproductions, for whatever purpose made, of works belonging to the visual arts that become of public domain. In this way, therefore, the intention was to allow the free dissemination, sharing (including online) and reuse, even for commercial purposes, of non-original copies of works of art that have fallen into the public domain.

In Italy, the objective to promote access to and dissemination of cultural heritage finds a limit in the current domestic regulation of cultural heritage and, in particular, in Article 108 of the *Codice dei bei culturali e del paesaggio* (Code of Cultural and Landscape Heritage). Article 108 subject the reproduction for commercial purposes of cultural heritage works to prior authorization from the cultural entities that have those works in their possession and to the payment of a fee, even though these works have now fallen into the public domain with regard to copyright.

Therefore, the paper discuss whether, in the current context of open data, the 'protectionist' vocation that animates the above provisions of domestic Italian law still has an effective and valid reason to exist.

2. *The presentation of the cultural heritage of humanity in the UNESCO Convention concerning the protection of the world cultural and natural heritage of 1972*

Fifty years have now passed since the adoption - in Paris, on 16 November 1972 - by the 17th session of the UNESCO General Conference of the text of the «Convention concerning the protection of the world cultural and natural heritage» (the 'WH Convention').

The WH Convention, which was established for protecting, preserving and presenting the world's cultural and natural heritage, has had a major impact on the protection of cultural heritage and natural beauty and landscapes. The WH Convention states in fact that these assets constitute an «outstanding universal value» that transcends national borders; the duty to protect and transmit them to future generations is therefore responsibility no longer merely of the individual States in which they are physically located, but also of the international community as a whole[1].

As is well known, the ratio outlined by the WH Convention for the conservation of cultural and natural heritage[2] is essentially based

[1] E. Baroncini, *I siti e la Convenzione Unesco del 1972 nelle controversie arbitrali internazionali sugli investimenti*, in *Tutela e valorizzazione del patrimonio culturale mondiale nel diritto internazionale*, edited by E. Baroncini, Bononia University Press, Bologna, 2021, pp. 431-432.

[2] The notions of «cultural heritage» and «natural heritage» are set out in Articles 1 and 2 of the WH Convention. In particular, according to Article 1, the following are included in the definition of «cultural heritage»: i) monuments (architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science); ii) groups of buildings (groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science); iii) sites (works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view). According to Article 2 the following are considered «natural heritage»: i) natural features consisting of physical and biological formations or groups of such formations, which

on the creation of lists: one is the World Heritage List, where assets of outstanding universal value are included; the second is the List of World Heritage in Danger, where assets threatened by serious and specific dangers are included. Both are administered by the World Heritage Committee. It is in any case considered that the obligations established by the WH Convention are applicable to all assets in the territory of a Contracting State: in fact Articles 1 and 2 state that they belong to the cultural or natural heritage and have «outstanding universal value», even if they are not included in the Lists[3]. The recognition of an asset as «part of the world heritage of mankind as a whole», by virtue of its «outstanding universal value»[4], and

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are of outstanding universal value from the aesthetic or scientific point of view; ii) geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; iii) natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Moreover, in the UNESCO international protection system, the notion of «world cultural heritage» adopted by the 1972 WH Convention, which, as has been observed, suffered from a Eurocentric and 'monumentalist' approach emphasising tangible (cultural and natural) assets having «outstanding universal value» (thus, A. Lupo, *La nozione positiva di patrimonio culturale alla prova del diritto globale,* in *Aedon*, 2019, 2, p. 109), must now be re-read in the light of the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by UNESCO on 17 October 2003 (ratified by Italy in 2007), which extended the perimeter to include «the practices, representations, expressions, knowledge, skills - as well as the instruments, objects, artefacts and cultural spaces associated therewith - that communities, groups and, in some cases, individuals recognize as part of their cultural heritage» (Article 2, paragraph 1), as well as the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005, which includes the most varied artistic and creative manifestations.

[3] M. Gestri, *Teoria e prassi di un accordo pioneristico nella gestione dei beni d'interesse generale: la Convenzione del 1972 sul patrimonio mondiale*, in *Tutela e valorizzazione del patrimonio culturale. Realtà territoriale e contesto giuridico globale*, edited by M.C. Fregni, M. Gestri, M. Santini, Giappichelli Editore, Turin, 2021, p. 136,

[4] The concept of «outstanding universal value» is not directly defined by the WH Convention but is specified in the Committee's Operational Guidelines which state: «cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is

its inclusion by the Committee in the List, maintains unchanged the ownership right of the State on whose territory that asset is located. Therefore, firstly, as can be seen from Article 4 of the WH Convention, the State owes toward the international community the duty to ensure adequate protection, conservation and presentation of its heritage in order to pass it on to future generations[5]. Secondly, the international community intervenes (through assistance and cooperation mechanisms) only in the event that Contracting States do not have in place the necessary measures to protect their own heritage adequately.

The WH Convention does not state expressly the definition and the content of the obligation of protection imposed on Contracting States. In the absence of a general definition, the content of the obligation of protection that the WH Convention imposes on Contracting States - by the adoption of the triad 'protection-conservation-presentation', can be deduced from Article 5 where are stated the list of actions that States must undertake «in so far as possible, and as appropriate for each Country». These actions include, first of all, the adoption of a general policy aimed firstly at assigning cultural and natural heritage specific functions in collective life and secondly at including the protection of this heritage in general planning programmes (Art. 5(a)). The Contracting States must therefore recognise that heritage bears an intrinsic function and has to be determined the role carried forward in the lives of citizens. This

of the highest importance to the international community as a whole» (see point 49 of the Operational Guidelines for the Implementation of the World Heritage Convention of 31 July 2021).

[5] The French text of the WH Convention uses the wording «mise en valeur», rendered, instead, in English with the term «presentation», which is, however, much less incisive. However, that the sense of the rule in question is to value and not simply to illustrate the world heritage can be deduced from the reading of the WH Convention as a whole (in this regard, see F. Mucci, *Valorizzazione del patrimonio mondiale culturale e naturale: significato e strumento di una 'tutela sostenibile'*, in *La protezione del patrimonio mondiale culturale e naturale a venticinque anni dalla Convenzione dell'UNESCO*, edited by M.C. Ciciriello, Editoriale Scientifica, Napoli, 1997, p. 279.

is vital in order to ensure its proper protection and presentation[6]. In the light of this 'dynamic' vision of the protection of heritage (which has to achieve a key role in the development of the community), also the other obligations imposed on the Contracting States must be read in relation to the creation of services related to the protection of cultural and natural heritage with adequate staff and means (art. 5(b)), the carrying out of studies and scientific research (Art. 5(c)), the adoption of legal, scientific, technical, administrative and financial measures (Art. 5(d)), and the encouragement of national or regional training centres (Art. 5(e))[7].

In order to protect the cultural heritage of mankind, the WH Convention does not merely impose duties on the Contracting States to protect and preserve the existing cultural and natural heritage, but also requires them to present it in order to ensure maximum fruition by all mankind.

The presentation of the cultural and natural heritage of mankind therefore requires interventions aimed at giving value to the cultural heritage and promoting its potential, improving the conditions of its awareness and familiarity and increasing collective and individual fruition. Cultural and natural heritage assets are in fact assets of public interest not just on the basis that they belong to the State but because they are intrinsically considered for social community purposes. Therefore, the actions of the Contracting States should be oriented towards ensuring not only a merely static-conservative protection of the existing cultural and natural heritage but also its active role in the global community.

[6] F. Mucci, *op. cit.*, p. 280.

[7] On the actual normative scope of the obligations set forth in Articles 4 and 5 of the WH Convention, beyond the textual formulas used, see M. Gestri, *op. cit.*, p. 122, who in this sense refers to the decision of the Australia High Court, 1 July 1983, *Commonwealth of Australia and Another v. State of Tasmania and Others*, in *International Law reports*, 1985, p. 266 ss.

3. *The role of technology in the conservation and presentation of the cultural heritage of mankind*

The changes brought about by technological innovation that we are all witnessing (the development of the Internet, the emergence of digital platforms, the increasing digitisation of content, etc.) also affect cultural heritage. In particular, modern technologies, allowing new forms of 'consumption' of culture, have made cultural heritage accessible to a wider range of users. In fact, technology has increased the possibilities for the general public to access cultural heritage, also through the creation of new cultural products and new forms of interaction between cultural sites and users (e.g. digital libraries, museum websites for virtual visits, applications for smartphones, etc.)[8].

Instant reproductions of cultural heritage by visitors have reached an impressive quality and, in most cases, without the risk of prejudice to cultural heritage. The way in which these reproductions are disseminated nowadays has also changed: they are no longer exclusively set on physical supports (books, catalogues, etc.) but are shared mainly online, in particular through social networking platforms. There has also been a change in the way in which it is used, which is no longer limited to the physical visit of a museum, a monument, an archaeological site, etc., but it continues with the subsequent online sharing, where other people can enjoy it, albeit through a mediated experience[9].

Technological innovations applied to cultural heritage therefore offer new opportunities for the promotion and presentation of cul-

[8] M.F. Cataldo, *Preservare la memoria culturale: il ruolo della tecnologia*, in *Aedon*, 2020, 2, p. 89; M. Modolo, *Promozione del pubblico dominio e riuso dell'immagine del bene culturale*, in *Archeologia e calcolatori*, 2018, p. 73. Consider the case, for example, of 'Google Arts & Culture', which allows registered users to access the collections of numerous world museums.

[9] F.G. Albisinni, *Nuovi paradigmi e nuovi attori in tema di tutela e valorizzazione del patrimonio culturale, fra Costituzione e processi di liberalizzazione,* 2018, 4, at *www.aipda.it/paper-convegno-annuale-aipda-2018/*.

ture, in line with the objectives pursued by the WH Convention[10] because virtual fruition of cultural contents is shared on a global scale. With the advent of Internet, the culture environment (historically associated with an elite audience, and accessible to few people) has become easier to comprehend and therefore has been extended to a wider audience[11].

Modern technologies can also offer the opportunity in helping to keep alive the memory and the intangible value of cultural heritage destroyed in war or as a result of acts of terrorism or environmental disasters, opening the way to new forms of exploitation and fruition of cultural heritage[12].

Having said that, one of the most debated legal issues in relation to the new ways of using assets part of the cultural heritage is the

[10] The potentialities deriving from technological development are also relevant from the point of view of Article 9 of the Italian Constitution, a programmatic norm indicating two guidelines for public intervention, namely the promotion of the development of culture and research (Art. 9, paragraph 1), and the protection of the landscape and the historical and artistic heritage (Art. 9, paragraph 2). It is a widespread opinion in the doctrine that the two paragraphs of Article 9 must be read as a whole since the protection of the cultural heritage is a teleologically oriented means of achieving the aim of promoting culture, which makes it possible to extend the field of public intervention to the enhancement of the existing heritage beyond its mere conservation (cf. S. Franzoni, *Costituzione e patrimonio culturale*, in M.C. Fregni, M. Gestri, M. Santini, *op. cit.*, p. 76; A. Lupo, *op. cit.*, p. 115).

[11] M.F. Cataldo, *op. cit.*, p. 90.

[12] One example is the project 'The Million Image Database' for the protection and preservation of the world's cultural heritage, promoted by The Institute for Digital Archaeology in collaboration with UNESCO, Oxford University, Dubai's Museum of the Future and the government of the United Arab Emirates, which, thanks to the use of advanced technology, has reproduced the arch of Palmyra, a Syrian monument destroyed by ISIS in 2015, displaying its 3D copy in the cities of London, New York, Dubai and Florence. Confirming UNESCO's interest on the application of new technologies to safeguard cultural heritage, we can also consider its collaboration with the French start-up Iconem whose mission is the 3D reconstruction of destroyed monuments, as well as the fight against the illicit trafficking of works of art by ISIS. In 2017, UNESCO also launched the ReACH (Reproduction of Art and Cultural Heritage) initiative, led by the Victoria and Albert Museum in London with the aim of drawing attention to the growing importance of the role of technology in the context of cultural heritage protection and the necessary regulatory adaptation to the new reality.

digital reproduction of images (especially through photography). Technological innovation and the advent of the Internet have in fact revolutionised the processes of production and dissemination of photography, changing society's relationship with the image. In the era of social networks, citizens are no longer simply passive users of data and images but are instead increasingly becoming active participants in this process of information production[13]. At the same time, the reproduction of cultural heritage is an essential tool for promoting its popularisation[14].

With respect to images reproducing cultural heritage assets, as we will see in more details below, the competent Italian administration continues to adopt outdated approach that raises some concerns in light of the latest legislative trends - as witnessed by the adoption of Directive (EU) 2019/790 (the so-called Copyright Directive) - which instead intend to encourage, through re-use, the free dissemination of cultural heritage images, regardless of the purpose actually pursued (research purposes, personal use, profit, etc.).

4. *The reproduction of cultural heritage images in the light of Directive (EU) 2019/790*

In connection to the reproduction of images of cultural heritage (which, as mentioned above, represents one of the ways of using cultural heritage promoting access to and development of culture in line with the objectives of the WH Convention) there are different sectoral areas intersecting and overlapping, as a consequence of the multiple interests involved, especially for example in the fields of copyright law, or the rules on the ownership of public assets or of the re-use of public sector information, and the legislation on the protection of personal data.

[13] M. Modolo, *Promozione del pubblico dominio e riuso dell'immagine del bene culturale*, cit., p. 73.

[14] L. Casini, *Riprodurre il patrimonio culturale? I "pieni" e i "vuoti" normativi*, in *Aedon*, 2018, 3, p. 1.

The present writing will be focused on to the limits of reproduction of cultural heritage images still in force in the Italian legal system. Those limits are intended to protect the ownership of public goods in a context that, also thanks to the latest interventions of the European legislator on copyright, seems to be going in the opposite direction through the promotion of a progressive 'culture of re-use' in the fields of cultural heritage reproductions.

In a nutshell, and in light of the pertinent legal frame that cannot be discussed in depth here, we would just like to highlight that the international and European copyright law grants moral and patrimonial rights to the author of the work, including the exclusive right of reproduction, which expire after the author's death[15]. After this period, the work falls into the public domain.

With regard to photographic reproductions of cultural heritage, copyright may cover not only the object portrayed in the photograph, but also the photograph itself if it has creative features that make it an original work according to the copyright law.

European copyright law has recently been amended by the Copyright Directive[16], which the European Union legislator adopted in order to promote the harmonisation of the European legal framework on the protection of intellectual works and other protected subject matter. The Copyright Directive has significantly renewed the system of exceptions and limitations to copyright and related

[15] In the Member States of the European Union, Directive 2006/116/EC on the duration of copyright protection and certain related rights recognises the protection of authors up to seventy years after their death (Art. 1). In the Italian legal system, this provision is contained in Article 25 of Law no. 633 of 22 April 1941. Outside the borders of the European Union, in the States adhering to the Berne Convention for the Protection of Literary and Artistic Works of 1896, the duration of protection may vary, but it is at least fifty years from the author's death.

[16] 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. The Copyright Directive was implemented by the Italian legislator with Legislative Decree no. 177 of 8 November 2021.

rights[17], but it also contains a significant effort to promote collective access to cultural content with a particular focus on the digital environment[18].

In particular, Article 14 of the Copyright Directive, entitled «Works of the visual arts in the public domain», introduced a new rule stating that the material resulting from a reproduction of a visual arts work[19] in the public domain[20] cannot be subject to copyright or related rights unless that material is itself an original work (in which case, being an intellectual creation, it may possibly benefit from copyright protection). In other words, material resulting from the reproduction of works - such as monuments, paintings,

[17] The Copyright Directive has been at the centre of a lively debate on the use of the Internet as an information medium, between freedom of expression and censorship. The most important provisions are those contained in Article 15, concerning online journalistic publications and introducing a related right for publishers (the so-called link tax), and Article 17, introducing a new liability regime for online content sharing platforms for content uploaded by their users. On the issue of publishers' rights, see C. Alvisi, *L'equità dei compensi per lo sfruttamento delle risorse di proprietà intellettuale*, in *AIDA*, 2021, pp. 1-15.

[18] M. Arisi, *Riproduzioni di opere d'arte visive in pubblico dominio: l'articolo 14 della Direttiva (EU) 2019/790 e la trasposizione in Italia*, in *Aedon*, 2021, 1, p. 3.

[19] The Copyright Directive does not define the notion of «works of visual art». To this end, some useful indications can be found in Directive 2012/28/EU on certain permitted uses of orphan works, whose Annex no. 3) contains a list, which is merely illustrative, of «works of visual art» including «art objects, photography, illustrations, design, architecture, drafts of such works and other material reproduced in books, magazines, newspapers or other works». In the domestic context, it should be noted that Article 32quater of Law no. 633 of 22 April 1941, a provision introduced by the legislator to implement the Copyright Directive (see *below*), refers «also» to the works of the visual arts referred to in Article 2, which include, *inter alia,* works of sculpture, painting, drawing, engraving and similar figurative arts, including set design, as well as architectural drawings and works. It can therefore be said that the reproduction of the image of a monument of «outstanding universal value» within the meaning of the WH Convention (for example, the Royal Palace of Caserta) also falls within the scope of Article 14 of the Copyright Directive. In this regard, it has been argued that it is indeed «intuitive to classify as a work of visual art the work which can be experienced visually», so M. Arisi, *op. cit.*, p. 4.

[20] As is clear from Recital 53, the term «public domain» used in Article 14 of the Copyright Directive refers to the condition of the work at the expiry of the term of protection under copyright law.

sculptures, etc. - that have fallen into the public domain is also in the public domain[21].

Under Article 14 of the Copyright Directive, therefore, materials in the public domain remain in the public domain once they have been digitised, so, the act of reproduction does not confer to the reproduction any copyright protection that no longer exists on the original. This means that the digital photographic reproduction[22] of a work of the visual arts which has fallen into the public domain will not be eligible for any copyright protection, not even according to the related rights, unless, as mentioned above, the reproduction has sufficient aspects of originality to make it an intellectual creation and therefore protectable by copyright[23]. The image reproduced for the sole purpose of documentation or online sharing (which is therefore not the creative expression of its author) of an asset of the cultural heritage has no longer copyright protection since, having come into the public domain, it will have the same regime as the original and, therefore, it will lack protection as well and will be freely reusable[24].

Moreover, Article 14 of the Copyright Directive, by excluding the protection of copyright or related rights on the abovementioned materials, makes room for different uses of them, including those of a commercial nature. Consequently, following the intervention of the EU legislator, anyone can copy, use and share online photographs of cultural heritage assets in the public domain found on the

[21] G. Sciullo, *'Pubblico dominio' and 'Dominio pubblico' in tema di immagine dei beni culturali: note sul recepimento delle Direttive (UE) 2019/790 e 2019/1024*, in *Aedon*, 2021, 1, p. 17.

[22] It should be noted that Article 14 of the Copyright Directive does not exclusively concern photographic reproductions as the provision refers to «any material», an expression to which are attributable, for example, audiovisual works, 3D reproductions or more structured works such as collections or databases, the latter protected by Directive 96/9/EC as original, taking into account the selection of the contents and the efforts and investments for their creation.

[23] Article 14 of the Copyright Directive affects the regulation of non-original photographs as provided for by Articles 87 et seq. of Law no. 633 of 22 April 1941. See M. Arisi, *op. cit.*, p. 7.

[24] G. Sciullo, *op. cit.*, p. 18.

Internet (e.g., on the website of a museum) and reuse them, even for commercial purposes[25].

The goal promoted by Article 14 of the Copyright Directive is, to a certain extent, hindered by the rules on the protection of cultural assets still in force in the Italian legal system. In fact the Copyright Directive encourages (through the dissemination of reproductions of works in the public domain) both access to culture - and its promotion - and also to cultural heritage. The same goals can be found in the spirit of the WH Convention, where it requires the Contracting States to ensure the collective and individual fruition of the cultural heritage of mankind. In particular, the rule introduced by Article 14 overlaps with the Italian rules on the reproducibility of cultural assets contained in the Code of Cultural Heritage and Landscape - Legislative Decree no. 42 of 22 January 2004 (hereinafter the Code)[26], which will be discussed below.

5. *… and the rules of the Italian Code of Cultural Heritage and Landscape*

The cultural heritage preserved and exhibited within public entities largely falls within the public domain as the duration for the protection and exercise of copyright have expired[27]. In such cases, even in the absence of author's rights, the reproduction of the cul-

[25] See the European Commission's Communication of 4 June 2021 «Questions and Answers – New EU copyright rules» which states: «The new Directive ensures that no one can invoke copyright protection for works that have already entered the public domain in the visual arts. Thanks to this provision, any user can disseminate copies of works of art in the public domain online with full legal certainty. For example, anyone is entitled to copy, use and share online photographs of paintings, sculptures and works of art in the public domain found on the internet and to reuse them, including for commercial purposes or to upload them to Wikipedia» (available at *https://ec.europa.eu/commission/presscorner/detail/it/QANDA_21_2821*).

[26] So-called 'Codice Urbani', named after the Italian Minister for Cultural Heritage and Activities, at that time, Giuliano Urbani.

[27] Which, as stated above, expire seventy years after the author's death.

tural heritage in the hands of public administrations continues to be limited by some specific rules of the Code and, in particular, by Article 108.

In this regard, it is worth summarizing the regulatory steps occurred in this field in order to highlight how the Italian legal system has sought to adapt to the changes introduced by technological innovations, especially in relation to the digital reproduction of cultural heritage. Leaving aside here the analysis of the rules dealing with reproductions of cultural heritage through casts[28], and taking into consideration the other forms of reproduction (in particular, photography), it can be stated that in the last decade the Italian legislator has started a progressive but partial liberalisation of the relevant discipline.

At the beginning, the public administration had a strong power of control on the reproduction of cultural assets, in line with the Italian law on cultural assets, historically following a proprietary model of exclusive fruition[29] and focused on the protection and preservation of the material part of the cultural asset to the detriment of its presentation and use[30]. The earliest rules were contained in Royal Decree no. 798 of 29 March 1923 concerning «rules on the reproduction by photography of movable and immovable objects of historical, palaeontological, archaeological and artistic interest», which allowed the photographing of cultural assets, regardless of any lucrative purpose, only after authorisation by the public administration and upon payment of a fee[31].

[28] In particular, Article 177, paragraph 2 of the Code prohibits, save in exceptional cases and in accordance with the procedures established by the Ministerial Decree of 20 April 2005, «the reproduction of cultural assets consisting in making contact casts of the originals of sculptures and works in relief in general».

[29] R. De Meo, *La riproduzione digitale delle opere museali fra valorizzazione culturale ed economica*, in *Il Diritto dell'informazione e dell'informatica*, 2019, 3, p. 674.

[30] M.F. Cataldo, *op. cit.*, p. 91; F.G. Albisinni, *op. cit.*, p. 2.

[31] Article 1 of Royal Decree no. 798/1923 laid down that «Anyone wishing to reproduce by means of photographs immovable or movable objects of historical, archaeological, palaeontological or artistic interest belonging to the State, or

Subsequently, with Law no. 340 of 30 March 1965, a distinction was introduced regarding the purpose of the authorisation to take photographs, a fee exemption vis à vis public entities was introduced for activities having «artistic or cultural» purpose[32]. A further extension of this exemption came into force in 2004 with the first edition of the Code: it is therein stated that private persons can make reproductions for personal use or for study purposes, but always with the prior authorisation of the competent public administration.

Decree-Law no. 83 of 31 May 2014, converted into Law no. 106 of 29 July 2014 (the so-called 'Art Bonus') opened further to the liberalisation process of the free reproduction of images of cultural assets: the need to obtain authorisation from the administration ceased to exist for «study, research, free expression of thought or creative expression, promotion of knowledge of the cultural heritage»[33]. Law no. 124 of 4 August 2017 then extended free repro-

held in governmental artistic institutes, must apply to the Superintendent of Monuments, or to the Superintendent of Galleries, or to the Superintendent of Museums, depending on their duties, or to the directors of those institutes». Consequently, visitors to a public museum who, at the beginning of the 1950s, wished to take a photograph of a work of art present there, had to apply to the director of the museum beforehand, waiting to be authorised, and subsequently paying a sum of money as a fee for the reproduction made.

[32] Article 5 of Law no. 340/1965 stipulates that «Anyone wishing to take photographs in Istituti statali di antichità e d'arte [State Institutes of Antiquities and Art] must apply for permission to the competent superintendent or head of the Institute. No fee is due for photography for artistic or cultural purposes. For photographs taken for profit, the permit is issued against payment of a fee, the amount of which is established in advance and in general terms by the Ministry of Finance, in agreement with the Ministry of Education, for the entire national territory. […]». In this regard, see M. Modolo, *op. cit.*, p. 76, who reports how the legislator, with Article 5, intended to limit, by maintaining the obligation of authorisation by the public administration, «the proliferation of amateur photographs which could have had negative repercussions on tourism in the main Italian cultural sites».

[33] Law no. 106/2014 had the merit of conceptually separating the physical use of the cultural asset from its reproduction, clearly distinguishing the two activities. Until 2014, in fact, the Code, by continuing to subject any reproduction to the authorisation of the public administration (regardless of the purpose pursued), in fact assimilated photography to a concession of use of the cultural asset.

ducibility to bibliographic and archival assets «provided that the latter are freely consultable and not subject to limits on display, for reasons of confidentiality»[34].

Following the aforesaid regulatory changes, the Code currently provides that «no royalties shall be due for reproductions requested or made by private individuals for personal use or for study purposes, or by public or private entities for the purpose of presentation, provided that they are carried out on a non-profit basis» (Article 108, paragraph 3)[35].

In addition, the following activities, «carried out on a non-profit basis for the purposes of study, research, free expression of thought or creative expression, and promotion of the knowledge of cultural heritage» are in any case free of charge: «1) the reproduction of cultural asset (excluded bibliographic and archival assets subject to restrictions on accessibility) […], carried out in compliance with the provisions protecting copyright and in a manner that does not involve any physical contact with the asset, nor the exposure of the same to light sources, nor involving in cultural institutions, the use of stands or tripods; 2) the dissemination by any means of images of cultural assets, legitimately acquired, so that they cannot be further reproduced for profit» (Article 108, paragraph 3bis).

Following the 2014 reform, reproduction for the purposes listed above is therefore free of charge and no prior authorisation is required. In the case of photographic reproductions, the (partial) liberalisation made by the legislator concerns not only the taking of photographs but also the dissemination of reproductions of cultural assets for non-profit purposes and by any means (therefore also online, on social networks, blogs, etc.).

Article 108, paragraphs 3 and 3bis of the Code states the free reproduction of images of all cultural assets as long as they are used for non-profit purposes. Therefore, only the public administration

[34] On the troubled adoption of this legislative measure, see L. Casini, *op. cit.*, p. 3.

[35] Applicants are in any case obliged to reimburse the costs incurred by the granting authority.

that holds these assets is entitled to carry out for profit activities or, in any case, at its own discretion and upon payment of a fee, to grant authorisation to third parties. The current legal framework of the Code reserves to the entity in charge of the property prerogatives similar to those of the owner, making it possible to take extra-contractual injunctive and compensatory protection in the case of unauthorised reproductions for profit[36].

The Italian legislator, in implementing the Copyright Directive, expressly has maintained in force the application of the above-mentioned codified provisions[37], disregarding the recommendation of those operating in the culture system who had stressed the opportunity to intervene, instead, and in line with the spirit of Article 14 of the Copyright Directive, to achieve complete liberalisation in the reproduction of images of cultural heritage.

The recent amendments to the Italian legislation are in line with the rule introduced by Article 14 of the Copyright Directive. It has nevertheless been observed that the limits to a full liberalization of the re-use of reproductions of cultural heritage assets, still provided for by the Code (Article 108) for profit activities, are instead likely to frustrate the objective pursued by the EU legislator to foster ac-

[36] In this regard, reference is made to the decision of the Court of Palermo which, applying Articles 107 and 108 of the Code, condemned a credit institution for having used the photograph of the Teatro Massimo as part of an advertising campaign without having been previously authorised by the Fondazione Teatro Massimo to reproduce the image for private and commercial use and in the absence of payment of the relevant fee (Trib. Palermo, judgment of 21 September 2017, no. 4901). Similarly, a judge in Florence prevented, as a precautionary measure, a travel agency from using the image of Michelangelo's David for advertising purposes in the absence of a concession by the Galleria dell'Accademia in Florence (Court of Florence, order of 26 October 2017, in *DeJure*).

[37] The Copyright Directive was implemented in Italy by Legislative Decree no. 177/2021 of 8 November 2021 which introduced into the Italian Copyright Law (Law no. 633/1941) the new Article 32quater pursuant to which «Upon expiry of the term of protection of a work of the visual arts, as per Article 2, the material resulting from an act of reproduction of such work shall not be subject to copyright or related rights, unless it constitutes an original work. The provisions on the reproduction of cultural assets laid down in Legislative Decree no. 42 of 22 January 2004 shall remain unaffected».

cess to culture and its promotion as well as access to cultural heritage[38]. As mentioned above, Article 14 of the Copyright Directive, in fact, does not create a distinction between the purposes of reproduction, including both non-profit and also profit activities[39].

In the following lines we will try to summarise the orientations aiming from one side to maintain a differentiated regime in relation to the purposes of reproduction and, on the other side, those aiming at a full liberalisation.

Firstly, there is the concern that, if full liberalisation of reproductions of cultural heritage for profit purposes were to be achieved, the economic entrance currently guaranteed by fees granted by Article 108 of the Code would disappear. This is countered by the observation that the management and reporting of reproduction fees produces a volume of costs that is not proportional to the revenues[40]. At the same time, some experiences (such as the Egyptian Museum in Turin and the Rijksmuseum in Amsterdam) would show that the adoption of a fully free system for reproductions is able to bring greater advantages and benefits in terms of publicity, dissemination and popularisation of culture compared to the meagre revenues from royalty payments[41].

The prior approval for profit purposes is also considered a resource to guarantee the protection of the decorum of the cultural heritage so to avoid disrespectful uses of the images[42]. In this re-

[38] See Recital 53 of the Copyright Directive.

[39] M. Arisi, *op. cit.*, p. 8.

[40] D. Manacorda, *L'immagine del bene culturale pubblico tra lucro e decoro: una questione di libertà*, in *Aedon*, 2021, 1, pp. 24-25; M. Modolo, *La riproduzione del bene culturale pubblico tra norme di tutela, diritto d'autore e diritto al patrimonio*, in *Aedon*, 2021, 1, p. 31.

[41] L. Casini, *op. cit.*, p. 4 and M. Modolo, *Promozione del pubblico dominio e riuso dell'immagine del bene culturale*, cit., p. 81, who refer to how the Egyptian Museum of Turin since 2014 allows the free use of images also for commercial purposes, as long as the reference to the Museum is given, similarly to what was decided by the Rijksmuseum in Amsterdam and the Statens Museum for Kunst in Copenhagen.

[42] The case of the image of Michelangelo's David used in 2014 for advertising purposes by a US arms company is emblematic in this respect.

gard, it should be noted that, in addition to the fact that decorum is a vague legal concept, and therefore potentially insidious, it seems that the main concern of the public administration is rather to prevent the private individual from making any economic profit through a cultural content[43]. It is in fact legitimate to rise the doubt that the digital copy of a physical cultural asset has the capacity to dilute its artistic and cultural value. In essence, the need for the public administration to systematically filter the uses of the image, through the instrument of the authorisation of the lucrative use of the reproduction of the cultural heritage, would be the result of a traditional, but no longer current, 'sacral' and 'sacralising' vision of the cultural heritage that assigns an absolute rather than a relational value to the cultural good[44]. In this regard, it has also been observed that the provisions of the Code that aim to limit degrading uses of cultural heritage – especially Article 20[45] – actually refer to the use of movable tangible assets and architectural buildings and spaces, but not to the use of their intangible component. The extension of prohibitions and limitations also to images of cultural heritage would therefore be illogical[46], therefore ignoring the potential of digital cultural heritage as means of developing and stimulating culture, creativity and the economy.

In support of full liberalisation, it has also been observed that the new modalities of use and access to the digital heritage made possible by digital copying would challenge the traditional concept of 'rivalry of consumption' set in the Code[47]. The use of the material, physical asset, is in fact considered as 'rival' because it excludes possible simultaneous uses by several different subjects. This form

[43] D. Manacorda, *op. cit.*, p. 25; M. Modolo, *Promozione del pubblico dominio e riuso dell'immagine del bene culturale*, cit., p. 81.

[44] M. Modolo, *La riproduzione del bene culturale pubblico tra norme di tutela, diritto d'autore e diritto al patrimonio*, cit., p. 32.

[45] Article 20 of the Code states that «Cultural assets may not be destroyed, deteriorated, damaged or put to uses that are not compatible with their historical or artistic character or that are detrimental to their conservation».

[46] D. Manacorda, *op. cit.*, 25.

[47] D. Manacorda, *op. cit.*, 27.

of use would then legitimize the request for authorization to the administration in charge of the asset, necessary to ensure the physical protection of the asset and the payment of a fee would be then justified by the need to compensate the community for the exclusive and excluding use (e.g. the occupation of a historic building to shoot a television commercial). On the other hand, the use of the digitised cultural asset would be typically 'non-rivalrous', as it would guarantee the simultaneous use of the same digital image to a potentially infinite number of users. In the latter case, authorisation procedures and rights of use would instead be likely to produce exclusionary effects, as they would inevitably limit the possibilities of re-use granted by digital images[48].

6. *Conclusions*

This contribution starts from the widely shared observation that technological innovation - and in particular the digital reproduction and online dissemination of images of monuments, paintings, sculptures, etc. - can contribute to the presentation of the world's cultural heritage by ensuring access to it on a global scale, in line with the spirit of the WH Convention.

Accordingly should be read the latest European measures - in particular the recent Copyright Directive[49] - promoting the culture of free re-use (also for profit purposes) of cultural heritage images in

[48] M. Modolo, *La riproduzione del bene culturale pubblico tra norme di tutela, diritto d'autore e diritto al patrimonio*, cit., pp. 30-31.

[49] In the same direction is the adoption of Directive (EU) 2019/1024 on open data and the re-use of public sector information, which considers the free and also commercial re-use of public administration data as a wealth multiplier for the economies of the Member States, as well as the European Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, which recommends «promoting the widest possible access to digitised public domain material and the greatest possible re-use of it for commercial and non-commercial purposes» (cf. point 5(b)). Reference is also made to the Council of Europe Framework Convention on the Value of Cul-

the public domain so to facilitate access to culture and its promotion, as well as access to cultural heritage.

However, the Italian rules contained in the Code seem to go in the opposite direction to these objectives. The use of the reproduction of cultural heritage assets, pursuant to Article 108 of the Code, has been made free, in fact, only for non-profit purposes and we have summarised the main points underlying the positions against and favourable to full liberalisation.

In this respect, it is our opinion that the 'non-rivalrous' profit use - for example to advertise goods or services - of cultural heritage images, rather than being a source of danger or concern, could represent a further resource for its presentation and dissemination as it can bring the general public closer to art and cultural heritage, increasing their visibility and access. It cannot be ignored that digital cultural assets are an extraordinary tool for development, improvement and stimulation of culture, creativity and the economy. It should also be borne in mind that advertising initiatives generally concern works already known to the public, and therefore already normally the subject of cultural presentation initiatives which, as pointed out, are also the best antidotes to counter the possible risks of diluting the symbolic value of the asset[50].

The profit taboo, which is the last obstacle to the liberalisation of reproductions of cultural heritage, is the focus of a debate that seems primary cultural (and precisely on how to conceive the cultural asset) and only in second place legal or economic. If one follows the assumption that these are common assets, to which everyone should have free access, we can share the opinion of those who affirm that «everyone should have the same opportunity to re-elaborate in the freest and most creative way their own personal image of the past», even for commercial purposes, whereas «offering

tural Heritage for Society of 27 October 2005 (the so-called 'Faro Convention'), which recognises the right of everyone «to benefit from cultural heritage».

[50] M. Modolo, *Promozione del pubblico dominio e riuso dell'immagine del bene culturale*, cit., p. 82, who gives the example of the advertising use of the image of Michelangelo's David by an American weapons company.

everyone the same possibilities of re-use would serve, if anything, to prevent the possible emergence of exclusive concessions in favour of the wealthiest clientele in a […] genuinely democratic perspective»[51].

The unstoppable speed of technological innovation seems to impose a further reflection *de iure condendo* on the possibility of fully liberalising reproductions of cultural heritage regardless of the profit purpose, possibly pursued with a view to ensuring the widest access and use. After all, technology has reached such a high level of development and changes so quickly that it is difficult to prevent the full liberalisation of the reproduction of cultural heritage, where there is also the risk of waging anachronistic battles with no margin for success.

[51] *Ibidem*.

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This open access publication gathers young and senior scholars of the Una Europa Universities to celebrate the first fifty years of the UNESCO 1972 World Heritage Convention (WHC). Financed as a Seed Funding Grant of the Una Europa Alliance, the WHC@50 project offers an interdisciplinary analysis of the WHC, the jewel of the UNESCO Conventions. By introducing the (r)evolutionary concept of World Heritage and involving the International Community as a whole in the preservation, valorization and transmission to future generations of cultural and natural sites and landscapes of outstanding universal value, the WHC is indeed one of the major treaty instruments of our age. We therefore hope, through the final results of the WHC@50 research cooperation activity, to contribute to the dissemination of the WHC knowledge, attracting the attention of academics, politicians, experts, officials and civil society, and contributing to the debate for strengthening the 1972 UNESCO Convention, suggesting solutions to overcome the problematic aspects of its implementation and activities.

Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín, Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

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