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Sara LANDINI*1
Marco RIZZUTI*1
Ramon ROMANO*1
Chieko NAKABASAMI*2

PREFACE

In September 2016, a seminar between Toyo University and the University of Florence was held at the Department of Legal Sciences at the University of Florence. In this seminar, from Toyo University, 1 master's student and 7 undergraduate students of the Department of Regional Development Studies, and from the University of Florence, 2 doctoral students, in total 10 students participated with the faculty of both universities. There were 4 presentations in the seminar. First, Professor Landini overviewed cultural heritage protection. She explained about the ethics of cultural preservation, sustainability, and cultural heritage protection, types of cultural heritage, and sources of law regarding cultural heritage protection. Second, Dr. Rizzuti argued cultural heritage and inheritance law. He showed the difference between heritage and inheritance from a juristic point of view, followed by special inheritance law for cultural heritage, inheritance law vs. cultural heritage protection with rich examples. Third, again Professor Landini introduced Italian Intellectual Property Law. Last, Dr. Romano mentioned cultural heritage and copyright experiences from various perspectives: the mission of copyright in cultural heritage protection, cultural heritage in copyright partnerships and oppositions, the relationship between LDA (Legal Document Assistance) and CBC (Charlotte B. Collins), the copyright model for cultural heritage, and a new legal policy. The following 3 articles are the high points of the seminar.

As our last remarks in the preface, we would like to humbly express our best regards to Professor Paolo CAPPELLINI, Dean of the Law School, and Professor Patriza GIUNTI, Director of the Legal Sciences Department of the University of Florence. They also joined the seminar for appreciation.

Chieko NAKABASAMI, Tokyo, Autumn 2016

＊1 イタリア フィレンツェ大学法学部：Department of Legal Sciences, University of Florence
＊2 東洋大学国際地域学部：Faculty of Regional Development Studies, Toyo University

Cultural Heritage Protection.
An Overview

Sara LANDINI*

INTRODUCTION

The term Cultural Heritage commonly indicates the legacy of physical artifacts and intangible attributes of a group or of the society that are inherited from past generations, maintained in the present and preserved for the benefit of future generations. Cultural heritage includes tangible goods (such as buildings, monuments, books, works of art, and artifacts), intangible goods (such as folklore, traditions, language, and knowledge), and natural heritage (including culturally significant landscape, environment like particular kinds of trees…).

Cultural heritage is a part of the study of human history because it provides a concrete basis for ideas, and can validate them. Its preservation demonstrates a recognition of the necessity of the past and of the things that tell its story.

Social institutions, scientific knowledge and technological applications need to use a “heritage” as a “resource”. Ethics considers that what had been inherited should not be consumed, but should be handed over, possibly enriched, for the benefit of future generations.

The exploitation of resources and economic growth may negatively impact the conservation of cultural heritage . We can consider for example tourism.

Tourism can impact environmental sustainability. Natural tourist attractions might be destroyed by the multitudes of visitors. Governments must stimulate awareness that natural environments need protection from pollution caused by economic activity that then can ensure that the enjoyment of the environment is accessible to many people.

Sustainable tourism and ecotourism are two possible ways to address the many environmental and social problems associated with tourism. The UNEP (United Nations Environment Programme) and the UNWTO list 12 principles of sustainable tourism: economic viability, local prosperity, employment quality, social equity, visitor fulfillment, local control, community well-being, cultural richness, physical integrity, biological diversity, resource efficiency, and environmental purity.

UNEP has a long history of contributing toward the development and implementation of environmental law. DELC is the focal Division within UNEP which oversees the many facets of this global

＊フィレンツェ大学法学部 准教授（専門：私法）：Associated Professor of Private Law University of Florence-Italy

legal framework. Hence, the role of DELC within the framework of UNEP is primarily to ensure the progressive development of environmental law across different environmental sectors and levels of governance.

At a global level, DELC has been pivotal in the facilitation of intergovernmental platforms for the promotion and implementation of multilateral environmental agreements (MEAs) and defining international environmental norms.

As result of these considerations we can say that private tourism law is mainly composed by rules arising not from institutions, but from the instances of the changing society (customary law and contracts) according to the principles of hospitality and of environmental sustainability [1)].

Cultural heritage includes cultural property which includes the physical, or "tangible" cultural heritage, such as artworks. These are generally divided into two groups of movable and immovable heritage. Immovable heritage includes buildings (which themselves may include installed art such stained glass windows, and frescos), large industrial installations or other historic places and monuments. Moveable heritage includes books, documents, moveable artworks, machines, clothing, and other artifacts, that are considered worthy of preservation for the future. These include objects significant to the archaeology, architecture, science or technology of a specified culture.

Also "Intangible cultural heritage" is part of cultural heritage and consists of non-physical aspects of a particular culture, more often maintained by social customs during a specific period in history.

They include social values and tradition and customs and practices, language, arts, other aspects of human activity. The significance of physical artifacts can be interpreted against the backdrop of socioeconomic, political, ethnic, religious and philosophical values of a particular group of people.

Naturally, intangible cultural heritage is more difficult to preserve than physical objects because of their immateriality. Also their damage will be immaterial and not immediately perceptible

Aspects of the preservation and conservation of cultural intangibles include:

- folklore. It can be described as traditional art, literature, knowledge, and practices that are passed on in large part through oral communication and example
- oral history. It is the collection and study of historical information about individuals, families, important events, or everyday life using audiotapes, videotapes, or transcriptions of planned interviews.
- language preservation

"Natural heritage" is also an important part of a society's heritage, encompassing the countryside and natural environment, including flora and fauna, scientifically known as biodiversity, as well as geological elements (including mineralogical, geomorphological, paleontological, etc.), scientifically known as geodiversity. These kind of heritage sites often serve as an important component in a country's tourist industry, attracting many visitors from abroad as well as locally. Heritage can also include cultural landscapes (natural features that may have cultural attributes).

Regarding Cultural Heritage Protection Sources of Law it is significant the Convention Concerning

the Protection of World Cultural and Natural Heritage that was adopted by the General Conference of UNESCO in 1972. As of 2011, there are 936 World Heritage Sites: 725 cultural, 183 natural, and 28 mixed properties, in 153 countries. Each of these sites is considered important to the international community.

In Italy art. 9 Constitution says that "The Republic promotes the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the Nation".

Another important source is the Code of Cultural Heritage and Landscape (Decreto legislativo, 22/01/2004 n° 42)

According to art . 3 , paragraph 1 of the Code of Cultural Heritage and Landscape the protection of Cultural Heritage consists "in the discipline of direct activities , on the basis of an adequate cognitive activity , to identify the assets constituting the cultural heritage and to ensure their protection and conservation for purposes of public use ." As for the landscape (Art . 131 , paragraph 4) , its protection "is to recognize , protect and , where necessary , the recovery of cultural values it expresses ."

Another important source is the Environment Code dlgs 152/2006 affirming that (art. 2, 1) "This legislative decree has as its primary objective the promotion of quality of human life , to be achieved through the protection and improvement of environmental conditions and the prudent and rational utilization of natural resources "[2].

[Notes]

1) See particularly *Tourism and the environment: A sustainable relationship?* by C. HUNTER E H GREEN, Routledge: London, 1995.

The book explores the area of sustainability in tourism development. "The relationship between environmental quality and tourism success is discussed, focusing on ways to protect the world's tourism destinations for future generations."

See also *Tourism: Principle and practice*, by C. COOPER, Pearson Education: London, 2005; *Environmental issues of tourism and recreation*, by ZBIGNIEW MIECZKOWSKI University Press of America: New York City; Boulder, Colorado; Toronto; London, 1995.

2) An Italian case on sustainability and cultural heritage protection is the recent case BASILICATA REGION V.S. AN OIL EXPLORATION COMPANY decided by Consiglio di Stato, sez. V, 15/07/2016, (ud. 14/07/2016, dep.15/07/2016), n. 3151

In the present case , as regards the protection of cultural heritage , the required permission to prospect for liquid and gaseous hydrocarbons, the subject of the present dispute , had been positively evaluated (prot act . n . 8054 of 26.5.2010) by the Superintendent for the Archaeological Heritage of Basilicata , after formal acceptance by the recurring commitment "to take charge of expenses relating to any preliminary archaeological investigations and / or extensive as may be deemed necessary" by the Superintendence.

With reference to the protection of land , particularly wine production (including those of DOC Aglianico del Vulture value), it should be noted that agricultural areas affected by the cultivation of vineyards had expressly excluded from research.

In relation to the protection of the environment and natural areas of great value , with prot acts . n. 4081 of 16.6.2011 and

prot . n . 7724 of 14.6.2011 the Superintendency of Heritage Landscape Heritage of Basilicata had expressed a favorable opinion , excluding only the areas subject to the constraints ex art . 142 , paragraph 1, lett . c) and h) , Legislative Decree . n . 42-2004 , that is, the rivers , the streams and the waterways and their banks or the feet of the banks for a 150 m range. each and the land encumbered by civic uses.

Nor can it be considered that the research for *liquid and gaseous hydrocarbons* in question can damage the historical centers and the tourist areas.

Basilicata Region acted against all those permissions but Consiglio di Stato, which is the supreme administrative court in Italy, affirmed that the activity of the Oil Company is sustanable.

Cultural Heritage and Inheritance Law

Marco RIZZUTI*

In the English language there is an evident resemblance between the word “Heritage” and the word “Inheritance”[1]: in fact they derive from the Medieval French synonyms “*eritage*” and “*enheritaunce*”, both coming from Latin “*hereditas*” and meaning inheritance. In its turn obviously “*hereditas*” comes from Latin “*heres*”, meaning heir, and it’s linked to the Greek “*χήρος*” and maybe to the Egyptian “*xart*”, both meaning orphan and widow or widower[2].

Naturally this resemblance is not a mere casualty, because the inherent meaning of Cultural Heritage reminds us something that we have inherited from our ancestors, and that we have to protect and preserve in order to pass it down to our descendants and heirs. That’s why we are interested in examining the relationships between Cultural Heritage Protection Law and Inheritance Law. In this enquiry we can find out at least two kinds of relationship that can be established between them.

I. A special Inheritance Law for Cultural Heritage

The first one deals with the specific legal regulations that make inheriting something encompassed in the legal definition of Cultural Heritage different from inheriting something else. In fact, cultural property is subject to rules that differ from the common rules governing ordinary property, because cultural goods do not belong only to their owners but involve also public and communitarian interests[3]. This concept is rooted in Roman law[4], but had been hindered in Nineteenth Century’s legal culture, whose paramount value was the right of Private Property[5], and re-emerged only when the latter’s absolute supremacy started being questioned at the beginnings of Twentieth Century[6]. In that context, one of the first Italian laws on Cultural Heritage Protection, the Law of 1902, endeavored to find a compromise between public interests and private interests also through the instrument of a legal preemptive right[7].

As is well known, Preemption means the right to be preferred in the event of a sale: the owner of a cultural good is not expropriated nor compelled to sell, but, if he freely chooses to sell, the State will have the right to be substituted to any private buyer, at the same price[8]. So the seller must notify to

＊イタリア フィレンツェ大学（博士研究員：民法）：Postdoctoral Researcher in Civil Law University of Florence-Italy

the State the private sale and, if he doesn't notify, the sale will be void[9]. We have to notice that this reformation has marked an important innovation in Italian legal history. In fact during the Middle Ages and the Early Modern Period, there were many legal preemptive rights designed to protect a variety of interests, but after the French Revolution they had been all abolished in order to ensure the highest level of protection to the above-mentioned paramount value of Private Property. In Nineteenth Century the only possible preemption could be a contractual preemption, arising not from the law but from a private agreement, subject to strict limitations and anyway, in the case of violation, unable to react on the sale's effects, but only giving right to a compensation for breach of contract. The first modern preemptive right in Italian Law has been the Cultural Heritage Preemption of the 1902's Law, and so it represented a turning point, because in the following decades many other Laws have introduced other preemptive rights regarding the most various matters, in order to protect many different public and communitarian interests against the proprietary interests.

Well, the regulations concerning the Preemption and the related notification are among the rules that make different inheriting a cultural good from inheriting something else, and so they give us an interesting example of this kind of relationship between Cultural Heritage and Inheritance Law. In fact, anyone who is called to be an heir has to notify this circumstance to the Tax Office, in order to pay the death duties, but, if the inheritance encompasses also a cultural property, he will have to notify the transfer to the Cultural Heritage Office too[10]. It's a quite surprising rule: there is no sale and no price, so the State cannot be substituted as an heir, but the notification remains, even if it stays without the Preemption, that in the ordinary cases represents its intended purpose. Therefore in this case another rationale of the notification becomes evident: it's not only meant to give the State a chance to exercise the preemptive right, indeed a quite rare event in our times of severe budget restrictions, but it's also intended to make possible a general and all-embracing control over every kind of transfer of cultural properties, considered as special properties always involving a public interest.

II. Inheritance Law vs. Cultural Heritage Protection

The second relationship may be a relationship of conflict between the interests underlying Cultural Heritage Protection and the competent rules of Inheritance Law.

In an ideal sense, Cultural Heritage is a sort of legacy of the great artists to everybody, and, so to speak, to the Mankind as a whole, but in legal terms the cultural properties are inherited and appropriated by specific persons, or possibly by the States, and they do not become commons. We can find only a very few examples in which a legal reference to Heritage Protection really means commonality, and so impossibility to appropriate the concerned good. At instance, the Outer Space Treaty defines the Moon and other Celestial Bodies as a "*Common Heritage of Mankind*" and forbids any appropriation[11], while some analogous provisions regard also the legal status of international waters and international seabed[12], as well as the status of the Antarctic Continent and of its natural resources[13]. They can

remind us the disputes arisen with regard to the unexplored New World at the beginning of Modern Era: when the Spanish Pope Alexander VI Borgia divided all the Lands and Oceans to be discovered between the King of Portugal and the Kings of Spain, establishing the famous meridian of Tordesillas, the King of France protested and ironically asked his Iberian colleagues to show him which article in the Will of Adam, the first man in the Biblical Tradition, could ever justify this partition[14]. Nowadays the mentioned International Treaties stand, so to speak, on the French side, because they consider their objects left as a "*Common Heritage*" to the whole Mankind, and so incapable of any appropriation at all.

On the other hand, the most part of what various Laws define as Cultural Heritage, and even as UNESCO World Heritage, are indeed owned by individuals, organizations or States. Therefore the Inheritance of cultural goods can hurt the Protection of Cultural Heritage. In fact, when the owner of an important collection of works of art, or of a complex of historical palaces, dies, the modern Inheritance Law system makes that those goods are divided and dispersed among many generations of different heirs, who may be totally uninterested in preserving, making available to the public and increasing the Cultural Heritage encompassed in the inheritance shares they have received.

It's not by a chance that many fundamental components of the Italian Cultural Heritage have come down to us thanks to the quite different Inheritance Law system typical of the Middle Ages and of the Early Modern Era, a system centered on the institutions of Primogeniture and above all *Fideicommissum*[15]. These institutions allowed the testator to concentrate all the inheritance in one person and to bind him to preserve what he had received, in order to pass it down again to the further generation and so on. Therefore in those times it was not unusual for a nobleman to be the owner of a wonderful castle but to live a life of hardships, because a *Fideicommissum* bound him to preserve the estate, forbidding to sell and monetize it without a judicial authorization, often difficult to obtain. At the same time, this situation created a perverse incentive to take debts without paying them, because *Fideicommissum* made impossible, or very difficult, also the forced sale of the concerned goods and therefore it resulted in a perfect instrument of fraud in detriment of bourgeois creditors. Of course, the main aim of that institution was not to protect Cultural Heritage, but to preserve through the centuries the political and economical power of the great feudal families[16]. However, especially in the Italian context, a relevant part of this power was deeply connected with the prestige related to arts patronage and antiquities collecting: so an important collateral effect of the diffusion of *Fideicommissa* has been the creation of an efficient and long-lasting mechanism of Cultural Heritage Protection.

In that historical period, it was also possible to create the restrictions of a *Fideicommissum* through a contract between the testator and the envisaged heir, as demonstrated by the famous example of the Medici Heritage. In fact, the last scion of the Florentine Dynasty, Anna Maria Luisa, as a female could not inherit the feudal role of Grand Duke of Tuscany, but only the private property of the family, encompassing the collections accumulated during the centuries by that renowned House of great arts patrons, as well as the collections of the Duchy of Urbino, inherited through her grandmother, last sci-

on of the Montefeltro-Della Rovere House, in an analogous succession[17]. Therefore appointing an heir for the Grand Duchy had become an international affair since the last years of her father's reign, when, after the death of his elder and childless son, he was going to leave only Anna Maria and her lesser brother Gian Gastone, openly homosexual and so presumably unable to procreate further heirs[18]. In a first time, the European Powers, in order to compensate Spain for other territorial losses, designated the Infante Don Carlos, who had inherited also the Duchy of Parma from his mother Elisabetta Farnese, but when, during the Polish Succession War, he conquered the Kingdoms of Naples and Sicily, Don Carlos was compelled to renounce the possessions in Central Italy and retained only the private properties of Farnese House, including the arts collections and the library, which were moved to Naples, while the Powers decided to appoint Francis of Lorraine as Grand Duke of Tuscany[19].

When Anna Maria inherited from her brother the private property of Medici House, she was an old and childless widow, free to dispose of that huge patrimony through a Will, and so she was able to negotiate with the new Grand Duke the so-called "*Patto di Famiglia*", a term meaning family agreement that is lately resurfaced in a recent Italian Law[20]. It was a private law contract, signed on 31st October 1737, in force of which Anna Maria was bound to designate Francis as testamentary heir and he was bound to grant her an annuity and some degrees of honor for the rest of her life, but above all Francis and his descendants were bound not to move from Florence the inherited arts collections for ever[21]. Then, in order to fulfill the obligations deriving from the Pact, Anna Maria in her Will of 5th April 1739 designated Francis as universal heir, repeating the above-mentioned restrictions, and so she succeeded in protecting the Florentine arts collections from the fate of other Italian collections[22]. It's very important to notice how the text of the Pact highlighted among its pursued objectives the interests of the State and of the Public, so indicating an evolution towards a new conception of Cultural Heritage as a public good more than a mere property of the ruling family[23], but also mentioned the aim of attracting in Florence the curiosity of the foreigners engaged in the renowned Grand Tour, so consciously designing a process of touristic development that nowadays has become essential for the economy of the city[24].

The system of *Fideicommissum* was totally erased by the French Revolution in order to free the paramount right of Private Property from the ancient constraints, to strengthen the rights of creditors, and to destroy the power of the great families: as a prominent jurist was used to say, the new inheritance law rule of "*partage égal*" had made a better job than the guillotine[25]. At the same time, many important art collections and historical palaces, belonging to the Church or to the feudal Dynasties, were expropriated and transformed into Public Museums, making Cultural Heritage Protection a State's mission. However it's possible that *Fideicommissa* constituted under the ancient law still produce some effects also under the modern legal order. In fact, in particular contexts, such as the Roman one, the new legislators hesitated to wholly abolish *Fideicommissa*, in order to avoid the dispersion of the collections belonging to the noble families, such as Colonna, Borghese, Barberini, Albani or Doria Pamphili, and so they enacted special transitional rules, whose effects have lasted till our times[26].

In another case, an even more particular sequence of events made possible a strange survival of a *Fideicommissum*: we make reference to the complicated case of the Giorgio Vasari's Archive. In fact, when the father of Art History died in 1574, a Will containing a *Fideicommissum* regulated his inheritance, encompassing a fundamental part of the Italian Cultural Heritage. Therefore, in accordance to the *Fideicommissum*, when the masculine line of Vasari descendants lapsed in 1687, the Heritage passed to the Pia Fraternita dei Laici, a Foundation, but the executor, Count Spinelli, retained in his palace an important part of it: the Archive. The last heiress of Spinelli House married in 1819 Count Gabriello Rasponi, bringing to him the family's patrimony, and in 1908 the Archive was finally rediscovered in the palace of Count Luciano Rasponi Spinelli and was declared by the competent Officers as a Cultural Heritage of national relevance[27]. So the Fraternita claimed the property of the Archive, invoking Giorgio Vasari's Will, and some years later the litigation was arranged with an agreement sealed by notary Alfredo de Saint-Seigne on 30th July 1921: the Fraternita renounced to the Archive's property and Count Rasponi Spinelli accepted to give it "*in perpetual deposit*" to a Museum held by the Municipality of Arezzo, so trying to restore a sort of modern *Fideicommissum*[28]. The property of the deposited Archive remained to the Count and, when he died, it passed to his feeble-minded sister, Countess Flora Romano Rasponi, and then to her nephew, guardian and finally heir, Count Giovanni Festari.

Nowadays four sons of Count Festari own the Archive. In 1994 they summoned the Municipality, challenging the validity of the "*perpetual deposit*" and so the Cultural Heritage Office established an administrative law restriction on the Archive, designed to produce the same effects of the challenged private law contract. Then, Arezzo Tribunal in 1996 held the contract to be valid, but the Florence Court of Appeals in 2000 reversed this judgment and the Supreme Court in 2003 upheld the appeals decision, while the Florence Administrative Tribunal in 1998 held the validity of the administrative law restrictions. Such a complex situation has fostered new litigations. In 2009 the Festari brothers have unsuccessfully tried to sell the Archive to a Russian society, notifying to the Italian State an unaffordable price of 150 millions €, in order to avoid the exercise of the preemptive right[29]. Then they have summoned the Municipality and the Cultural Heritage Office, because of the lack of enhancement and the inaccurate custody of the Archive, losing the case in the first-degree judgment of Florence Tribunal in 2013, and they are still fighting in the appeals degree[30]. The Fraternita has taken into account the hypothesis of claiming again the property of the Archive, according to Vasari's Will and *Fideicommissum*, insofar as the invalidation of the "*perpetual deposit*" had deprived the 1921's agreement of its consideration, nullifying also the Foundation's renunciation. In its turn, the Cultural Heritage Office has summoned the Festari brothers, in order to claim the public property of the Archive, losing the case in the first-degree judgment of Arezzo Tribunal in 2016, and has also taken some steps in order to enhance the Archive itself, organizing the first exhibition of the files concerning the correspondence between Vasari and Michelangelo[31].

Anyway many modern European Codes and the Italian one among them, with its articles from 692

to 699, still contain the prohibition of Testamentary *Fideicommissum*[32]. So we might well ask if and how nowadays an Italian owner of cultural properties could bind his heirs to preserve them in the interest of the next generations. There are at least two ways to deal with this challenging question.

On one hand, we can ask if the prohibition of *Fideicommissum* is still an up-to-date provision or is an anachronistic one, and so if it could be overridden through a legislative intervention or a judicial interpretation. Naturally one could think that the war between Revolution and Feudalism is over, and so that introducing at least an exception to the ban on *Fideicommissum*, with specific regard to Cultural Heritage Protection, will be a useful intervention without serious disadvantages. In fact, in 1996 the well-known Italian Senator Franco Zeffirelli tried to present a Bill with this objective, but it has never been approved by the Parliament[33]. Then, in 2006 a strange legislative intervention introduced in the Civil Code a new article with regard to a general, and indeed not well defined, figure of binding act[34], but the Roman judges have held that it could not be inserted in a Will[35], so making very risky in terms of professional liability for a cautious notary to draft such a Will[36]. Finally, in 2016 the Italian Parliament has approved a new Legislation that seems intended to enlarge the scope of some previous exceptional provisions[37], in order to allow another kind of binding *Fideicommissum*: the Testamentary Trust in the interests of disabled persons[38]. Therefore we can suppose that this innovation will foster also a more benevolent interpretation, among both judges and notaries, towards the hypothesis of a Testamentary Cultural Heritage Protection Trust.

On the other hand, we can ask if it could be possible to avail of any different legal instrument in order to achieve an analogous result, avoiding a direct challenge against the ban on *Fideicommissum*. In fact, a testator, instead of leaving his cultural properties to an individual, as heir or legatee, and binding him with a *Fideicommissum* or a Trust, can leave them to a Museum or to a Cultural Foundation: among the various possible examples, we would like to remember the legacy of the explorer and anthropologist Fosco Maraini, who left his important library, encompassing thousands of books and photos about Japan, to the Gabinetto Vieusseux, a renowned Florentine cultural institution[39]. Moreover, a testator can establish by Will a Testamentary Foundation with the inherent mission to preserve Cultural Heritage, and, in force of the same Will, he can leave his cultural properties directly to the Foundation itself.

In this case, the legal framework that we have to take into consideration is partially different. Indeed, in Eighteenth and Nineteenth Centuries, the same revolutionary legislators who prohibited *Fideicommissa* fought also against Testamentary Foundations, in order to avoid the removal of wealth from the ordinary mechanisms of circulation, to deter the return of Ecclesiastical Mortmain Property and to hinder the development of dangerous organizations interfering between the State and the Citizen. Therefore inheritances in benefit of Foundations were put under a strict governmental control, but at the end of Twentieth Century these mechanisms have been abolished[40], because of a radical change of mind. In fact, the present-day legislation and the forthcoming one[41] have a totally different approach, because their aim is to strengthen the non-profit organizations in order to pass them, in

accordance with the ideal of the so-called principle of subsidiarity, all the expensive public functions that States can no longer afford, in times of severe budget restrictions.

The positive consideration of Testamentary Foundations is also changing the judicial approach towards them, as demonstrated by an important decision taken by the Italian Supreme Court in 2008, with regard to the Wills of Count Guglielmo Coronini Cronberg from Gorizia, died in 1990, and of his sister Nicoletta, died a few years before. The Wills were essentially identical and they were meant to leave the huge patrimony of the family, including the Cultural Heritage accumulated since Tenth Century[42], to a Testamentary Foundation charged to preserve it for the benefit of the community as a whole[43]. Therefore some remote Austrian relatives of the Counts, their fifth-degree cousins, challenged the validity of the Wills, alleging the violation of the Italian Civil Code's articles 458 and 589, which prohibit agreements as to future successions and joint wills, as well as some procedural violations with regard to the above-mentioned mechanisms of governmental control on Testamentary Foundations' Inheritance. However, during the long judicial proceedings, as has been already said, the legislators abolished those controls and so this part of the litigation became irrelevant.

Finally the Supreme Court, with regard to the other disputed issue, ruled that, even if the identical Wills were evidently the fruit of an agreement between the testators, the cited prohibitions have to be interpreted as non absolute bans, also in the light of the new legislation about the "*patto di famiglia*", and so the judges stated that those Wills don't appear to fall within the prohibitions' scope, because they were not meant to produce reciprocal economical benefits for the testators, nor to pursue any other unworthy objective, but were only intended to pursue the morally positive objective of preserving Cultural Heritage through the creation of the Testamentary Foundation[44]. It's easy to observe how this creative interpretation, contrasting with the literal meaning of the Civil Code's provisions, has been influenced by the above-mentioned new approach to Testamentary Foundation's Inheritance in the domain of Cultural Heritage.

[**Notes**]

1) In the Italian language a connection between "*eredità*" (meaning inheritance) and "*patrimonio culturale*" (meaning cultural heritage) is less evident, but our recent legal literature has highlighted it: see L. CASINI, *Ereditare il futuro. Dilemmi sul patrimonio culturale*, Bologna 2016 (meaning "Inheriting the Future. Dilemmas about Cultural Heritage"). Moreover, the same wording has been used in order to give a title to the 18th Edition of the *Ancient History Festiva*l of Rimini, held since 10th to 12th June 2016.

2) See M. BERNAL, *Black Athena. The Afroasiatic Roots of Classical Civilization*, London, 1991, I, p. 62.

3) See G. MORBIDELLI, *La proprietà culturale*, in *Il contributo della prassi notarile alla evoluzione della disciplina delle situazioni reali*, edited by M. PALAZZO, Milan, 2015, pp. 15-32, also for further references.

4) At instance, the roots of our concept of Landscape Protection can be traced in the Emperor Justinian's *Novella LXIII* (see S. SETTIS, *Gli antichi Romani più bravi di noi nella tutela, in Il Giornale dell'Arte*, n° 313, October 2011).

5) The Piedmont's *Regio Brevetto* (meaning Royal Decree) of 24th November 1832 expressly stated that every kind of

Cultural Heritage Protection had to be realized without hurting Private Property's rights. In the 1848's Constitution granted by King Carlo Alberto, Property was proclaimed a "*sacred and inviolable right*", and so in 1883, during the long and harsh debates that preceded the approval of the 1902's Law on Cultural Heritage Protection, the Senator Luigi Ferraris remembered that, from a constitutional point of view, the property of a Raffaello's painting was as sacred as the property of a pair of oxen (see N.A. FALCONE, *Il codice delle belle arti e antichità*, Florence, 1913, pp. 111-114, and F. VENTURA, *Alle origini della tutela della《bellezze naturali》in Italia, in Storia Urbana*, 1987, p. 5, footnote 2).

6) This evolution of our legal thinking has led to the idea that Property Right is not always an absolute power but may have different contents with regard to different objects: see S. PUGLIATTI, *La proprietà e le proprietà (con riguardo particolare alla proprietà terriera*), in ID., *Le proprietà nel nuovo diritto*, Milan, 1954, p. 229 et seq., and P. GROSSI, *La proprietà e le proprietà nell'officina dello storico*, in *La proprietà e le proprietà (Pontignano, 30 settembre-3 ottobre 1985)*, edited by E. CORTESE, Milan, 1988, p. 205 et seq. Also article 42 of the 1948's Republican Constitution defines Property as a "*social function*", while article 9 places Cultural Heritage Protection among its "*fundamental principles*" (see S. SETTIS, *Il diritto alla cultura nella Costituzione italiana*, Udine, 2016).

7) We make reference to article 6 of Law n° 185 of 12th June 1902, whose provisions were recast in article 6 of Law n° 364 of 20th June 1909 (see R. BALZANI, *Per le antichità e le belle arti: la Legge n. 364 del 20 giugno 1909 e l'Italia giolittiana,* Bologna 2003), then in article 31 of Law n° 1089 of 1st June 1939 (the so-called "Bottai Law", from the name of its prominent Fascist supporter, Giuseppe Bottai, who was the Minister of National Education since 1939 to 1943), then again in article 59 of Legislative Decree n° 490 of 29th October 199, and finally in article 60 of Legislative Decree n° 42 of 2nd January 2004.

8) See G. FURGIUELE, *Contributo allo studio della struttura delle prelazioni legali*, Milan, 1984, also for further references.

9) This is a case of so-called "relative nullity", because only the State has the power to avail of it: see G. PASSAGNOLI, *Nullità speciali,* Milan, 1995, also for further references.

10) We make reference to article 59, paragraph 1, letter *c*, of Legislative Decree n° 42 of 2nd January 2004. See, also for further references, A.C. NAZZARO, *Gli atti di disposizione dei beni culturali tra diritti del proprietario ed esigenze di controllo pubblico*, in giustiziacivile.com, 26th February 2014.

11) The Treaty was opened for signature in the United States, the United Kingdom, and the Soviet Union on 27th January 1967, and entered into force on 10th October 1967.

12) We make reference to the Law of the Sea Treaty, the international agreement that resulted from the Third United Nations Conference on the Law of the Sea (so-called UNCLOS III), which took place since 1973 until 1982.

13) We make reference to the Antarctic Treaty, opened for signature on 1st December 1959 and officially entered into force on 23rd June 1961.

14) The Treaty was signed in Tordesillas on 7th June 1494 between Ferdinand of Aragon, Isabel of Castile and John of Portugal. Francis I of France challenged the validity of the Pact and funded the explorations of Giovanni da Verrazzano, in order to claim his part of the New World.

15) We prefer to maintain the original Latin name of this peculiar institution: however it is possible to compare it with the Common Law institution of Remainder.

16) See, also for further references: L. GAMBINO, *Il substrato socio-culturale del fedecommesso familiare, in La Nuova Critica*, 1971, pp. 143-176; P. UNGARI, *Storia del diritto di famiglia in Italia (1796-1942)*, Bologna, 1974; A. ROMANO, *Famiglia, successioni e patrimonio nell'Italia medievale e moderna*, Turin, 1994; M. PICCIALUTI CAPRIOLI, *L'immortalità dei beni. Fedecommessi e primogeniture a Roma nei secoli XVII e XVIII*, Rome, 1999; F. TREGGIARI, *Minister*

ultimae voluntatis, Naples, 2002; S. CALONACI, *Dietro lo scudo incantato. I fedecommessi di famiglia e il trionfo della borghesia fiorentina (1400-1750)*, Florence, 2005. With particular regard to Cultural Heritage see D. RAINES, *Sotto tutela. Biblioteche vincolate o oggetto di fedecommesso a Venezia, XV-XVIII secoli, in Mélanges de l'École fraçaise de Rome - Italie et Méditerranée modernes et contemporaines*, 2012, pp. 533-550.

17) Vittoria Della Rovere, as a female, could not inherit the feudal role of Duke of Urbino, so in 1631 the Duchy was seized by its feudal suzerain, Pope Urban VIII (reign: 1623-1644), and she inherited only the private properties, including the arts collections, that were moved to Florence and passed to the Medici House, because of her marriage with Ferdinand II (reign: 1621-1670), Anna Maria's grandfather. That's why the wonderful portraits of Duke Federico da Montefeltro and her wife by Piero della Francesca, or the Urbino's Venus by Titian nowadays are in Florence's Uffizi instead of Urbino's Ducal Palace.

18) Cosimo III (reign: 1670-1723), Anna Maria's father, proposed also the restoration of the Florentine Republic or an amendment to the Feudal Law in order to make his beloved daughter able to succeed in the Grand Duchy, but the European Powers boldly ignored all his requests. From the internal point of view, the last years of the Medici Dynasty were marked by a strong contrast between the clerical party leaded by Cosimo III and then by Anna Maria and Cardinal Neri Corsini, on one side, and the freethinkers' party leaded by Gian Gastone (reign: 1723-1737), on the other side. See E. ROBJONY, *Gli ultimi dei Medici e la successione al Granducato di Toscana*, Florence 1905; H. ACTON, *The Last Medici*, London, 1932; U. CHITI, *Nero Cardinale*, Florence, 2002.

19) The Polish Succession War (1733-1735) was part of a series of dynastic succession wars between the Austrian House of Habsburg and the French House of Bourbon. In this case, the Austrian candidate, Frederick August von Sachsen, nephew-in-law of Emperor Karl VI (reign: 1711-1740), won the throne of Poland, while the French one, Stanislaw Leszczyński, father-in-law of King Louis XV (reign: 1715-1774), was compensated with the Duchy of Lorraine, seized to the above-mentioned Francis, son-in-law of the Emperor. In its turn Austria left Naples and Sicily to Don Carlos, cousin of the French King, and was compensated with Parma, directly annexed to the Empire, and Tuscany, assigned to Francis of Lorraine.

20) We make reference to Law n° 55 of 14th February 2006, that introduced in our Civil Code the articles from 768 *bis* to 768 *octies*, in order to regulate an exceptionally admitted case of agreement as to future successions, with particular regard to entrepreneurs' successions. Indeed we haven't notice of a wide diffusion of these new contracts, but maybe they have been useful in order to settle the family and succession's issues of a prominent Italian tycoon and politician.

21) It was not an easy negotiation: as Anna Maria wrote to her representative in Vienna "*c'éda sperar poche cortesie e attenzioni da questa gente affamata*" (we cannot expect courtesy nor attention from so hungry people), but at that time the Austrians didn't yet understand the value of the Florentine works of art and were mostly interested in the Medici's estates, moneys, silvers and precious stones, so they accepted as a reasonable price the restrictions regarding the arts collections, because in the opinion of General Wachtendonk, commander of the troops who had occupied Tuscany, "*l'intrinsique du pays nous est assûré, et quelques bijoux ou meubles de plus ou de moins n'est pas notre grand affair*" (we gained the essential of the Country, and it doesn't matter to obtain more or less jewels or furniture). During the negotiations Anna Maria was helped also by Cardinal Neri Corsini, nephew of the Florentine Pope Clemens XII (reign: 1730-1740), who in 1734 opened to the public the Roman Musei Capitolini, and brother of Bartolomeo Corsini, viceroy of Sicily, who, on behalf of Don Carlos, was the author of the Order of 21st August 1745, the first legislative attempt to preserve the antiquities of Taormina.

22) Anna Maria was fully aware of the threats on arts collections posed by inheritance issues. When her husband, Prince Elector Johann Wilhelm von Pfalz-Neuburg (reign: 1690-1716), died and she came back from Düsseldorf to Florence, her representatives and those of the Elector's brother and heir Karl Philipp were engaged in a difficult negotiation with regard to her valuable personal art collections (see H. KÜHN-STEINHAUSEN, *Die letzte Medicäerin, eine deutsche Kurfürstin*.

Anna Maria Luisa von der Pfalz 1667-1743, Düsseldorf, 1939), that finally she succeeded to bring in her new Florentine abode of Villa La Quiete, nowadays a Museum belonging to the University of Florence (see www.villalaquiete.unifi.it/storia/storia-della-villa). Then she had witnessed the fate of the Farnese Collection, moved from Parma to Naples by the same Don Carlos who at that time was also the appointed heir of Tuscany. Moreover she knew what had happened to the Montefeltro-Della Rovere Collection because of her grandmother's succession and was determined to avoid to the Medici Collection what she called the Urbino's opprobrium. Even worse had been the fate of the Gonzaga Collection of Mantua, sold out to various European buyers during the last decades of Seventeenth Century because of the financial difficulties of the Duchy (see A. EMILIANI, R. MORSELLI, *Gonzaga. La Celeste Galleria*, Milan, 2002).

23) In the Pact's wording: "*per ornamento dello Stato, e per utilità del Pubblico*". It's interesting to observe how some years later the same concepts were adopted even by Don Carlos, when he became King of Spain and decided not to move again the Farnese Collection or the archaeological findings of Pompeii, discovered under his reign, leaving them to his son Ferdinand as property of the King of Naples (see P. D'ALCONZO, *L'anello del re. Tutela del patrimonio storico-artistico nel Regno di Napoli (1734-1824)*, Florence, 1999).

24) In the Pact's wording: "*per attirare la curiosità dei Forestieri*". An analogous wording had been used in the Edict of 1733, in force of which Cardinal Annibale Albani, on behalf of the above-mentioned Pope Clemens XII Corsini, prohibited the export of Roman antiquities, making reference to the "*incitamento a' forestieri di portarsi alla medesima città per vederle ed ammirarle*". Today's Florentine historians and politicians are aware that they owe to Anna Maria if the Medici Collections are not in the Kunsthistorisches Museum of Vienna, and therefore their city is a global touristic attraction, and not a provincial town like Parma or Urbino. That's why she had become a most celebrated figure: see C. ACIDINI, M. VERGA, S. CASCIU, G. CONTICELLI, M. BRANCA, A. BRUSCHI, R. MOROZZI, *La principessa saggia. L'eredità di Anna Maria Luisa de' Medici Elettrice Palatina*, Leghorn, 2006, and A. VALENTINI, with preface by E. GIANI, *Il testamento di Anna Maria Luisa de' Medic*i, Florence, 2006.

25) See F. GALGANO, *Il rovescio del diritto*, Milan, 1991, p. 10.

26) During the Revolutions of 1848, Pope Pius IX was compelled to grant a Constitution and the new Parliament debated about the possible abolition of *Fideicommissum*, but in the session of 25th August 1848 the opponents remembered how many works of art had been sold abroad, especially to English collectors, with irreparable prejudice for Rome, during the previous short periods of abolition of the institution, caused by the French invasions of 1798 and 1809 (see L. PARPAGLIOLO, *Codice delle antichità e degli oggetti d'arte*, Rome, 1932, pp. 69-72). After the annexation of Rome to Italy in 1870, the abolition of *Fideicommissum*, enacted by the Civil Code of 1865, was extended to the new Province, but article 4 of Law 28th June 1871 kept temporarily in operation the *Fideicommissa* regarding the art and antiquities collections of the great Roman families, until the entry into force of a new Italian Uniform Law on Cultural Heritage Protection (see E. FUSAR POLI, "*La causa della conservazione del bello". Modelli teorici e statuti giuridici per il patrimonio storico-artistico italiano nel secondo Ottocento*, Milan, 2006, p. 322-328). As usual in Italy, this "transitional" period lasted some decades, because of the fierce resistance opposed by the supporters of Private Property against such a law. Even when, as has been said, that Law was finally approved in 1902, the above-mentioned 1871's provisions remained in force, and indeed they are considered still in force, according to article 129, paragraph 2, of the above-mentioned Legislative Decree n° 42 of 2nd January 2004.

27) The author of that sensational discovery was the Florence Cultural Heritage Officer Giovanni Poggi, a prominent art historian and one of the inspirers of the above-mentioned Cultural Heritage Law of 1902.

28) However some files of the Archive were declared lost and reappeared later in an American collection… so probably each one had his part of profit in the arrangement.

29) The Cultural Heritage Office held the notification to be invalid, because of the lack of the required information. Then the Archive was sequestered by the Carabinieri, on behalf of the Rome Public Prosecutor, who was investigating on the hypothesis of a fraud against the Italian State, perpetrated through a sham contract. However the Russians never claimed the Archive. See also A. GUALDANI, *La prelazione artistica e il caso dell'archivio Vasari di Arezzo*, in www.aedon.mulino.it, 2010, n° 3.

30) In the meanwhile, various creditors of the Festari brothers, and among them even the Tax Office, have tried to seize the Archive.

31) The exhibition has taken place in Florence, at Medici Riccardi Palace since 12th May to 24th July 2016 (see the exhibition's website: www.michelangelovasari.it).

32) With the same aim, article 698 of the Civil Code forbids successive usufructs, while article 462 limits bequests to *concepturi* (meaning: children to be conceived after the death of the testator) and article 699 limits perpetual testamentary annuities. Judges and legal scholars still debate about the validity of some peculiar testamentary devices, such as the "*si sine liberis decesserit*" clause or the "*Fideicommissum de residuo*" clause, but also about the relationships between *Fideicommissum* and Usufruct (see, also for further references: S. PIRAS, *La sostituzione fedecommissaria nel diritto civile italiano*, Milan, 1952; F. AMATO, G. MARINARO, *La nuova sostituzione fedecommissaria*, Naples, 1979; A. DE CUPIS, *Il fedecommesso assistenziale, in Giurisprudenza italiana*, 1983, p. 129; V. DURANTE, *Fedecommesso*, in *Enciclopedia Giuridica Treccani,* Rome, 1989, XIV, p. 3 et seq.; G. IUDICA, *Fondazioni, fedecommesserie, trusts e trasmissione della ricchezza familiare, in Studi in onore di R. Sacco*, Milan, 1994, II, pp. 639-656; G. PASSAGNOLI, *Raffronto tra l'amministrazione di sostegno, il fedecommesso assistenziale e il trust,* in *Trust: opinioni a confronto*, edited by E. BARLA DE GUGLIELMI, Milan, 2006, p. 616 et seq.; R. PACIA DEPINGUENTE, *Sostituzione fedecommissaria fra tradizione e modernità, in Rivista del Notariato*, 2008, 3, pp. 555-587).

33) A Bill with this objective has been presented on 17th October 1996 by the prominent operas and films director Franco Zeffirelli, who has been a Senator for the center-right party Forza Italia since 1994 to 2001.

34) We make reference to article 2645 *ter* of the Civil Code, that has been introduced by Law n° 51 of 23rd February 2006.

35) We make reference to the Rome Tribunal decision of 18th May 2013, in *Famiglia e Diritto*, 2013, p. 783 et seq., with comment by R. CALVO, *Vincolo testamentario di destinazione, il primo preceedente dei Tribunali italiani*. On the other hand, it could be possible to argue the admissibility of such an act having regard to article 647 of the Civil Code, which regulates the testamentary *onu*s (see G. RISPOLI, *Atto di destinazione e pretese successorie, in Successioni per causa di morte*, edited by V. CUFFARO, Turin, 2015, pp. 646-677). Nowadays another argument can be derived from the new Law n° 112 of 22nd June 2016, that will be mentioned hereafter.

36) According to the feared article 28 of Law n° 89 of 16th February 1913, the Italian notaries are punished if they accept to draft a void act.

37) The above-mentioned articles 692-699 of the Civil Code have always admitted an exceptional hypothesis of *Fideicommissum*, with regard to the particular cases in which the heir is an interdicted child, grandchild or spouse of the testator.

38) We make reference to article 6 of Law n° 112 of 22nd June 2016, the so-called "After Us Law", that regulates the instruments available to the parents of disabled persons in order to ensure the wellbeing of the children after their death. Those new provisions expressly deal only with tax breaks intended to facilitate the concerned juridical institutions, but they also take into consideration, implicitly allowing it, a legal mechanism that resembles to a *Fideicommissum* made available with regard to any severely disabled heir, even if not interdicted (maybe considering that, after Law n° 6 of 9th January 2004, Interdiction is almost disappeared in the Italian legal praxis).

39) In order to celebrate the 150th Year since the establishment of diplomatic relations between Italy and Japan, the Gabinetto

Vieusseux, with the support of Ente Cassa di Risparmio di Firenze, a Banking Foundation, has taken part in the organization of the exhibition "*Il Giappone di Fosco Maraini. Immagini, appunti, progetti*", hosted by the Cominelli Testamentary Foundation in its Palace near the Garda Lake, since 30th July to 2nd October 2016 (see the exhibition's website: http://www.vieusseux.it/news/94/345/IL-GIAPPONE-DI-FOSCO-MARAINI-Immagini-appunti-progetti.html).

40) We make reference to article 13 of Law n° 127 of 15th May 1997 (one of the so-called "Bassanini Laws", from the name of Franco Bassanini, the prominent Italian Administrative Law Professor who inspired them), that expressly abolished article 17 of the Civil Code, as well as Law n° 218 of 21st June 1896 and any other provision intended to control the acquisitions of goods by non-profit organizations.

41) A whole reform of Italian Non-profit Organization Law has been promoted with the Delegation Law n° 106 of 6th June 2016.

42) Above all by the last Count, a passionate art collector who in the Thirties had lived in Florence in order to graduate in Law, and so had established important relationships with the artistic milieu of the city.

43) This was the wording of the Count's Will: "*Il patrimonio storico artistico riunito nei secoli dalla mia Famiglia, completato e ricostituito a mia cura, non deve essere disperso ma servire al pubblico godimento ed all'educazione culturale della collettività*" (in the Foundation's website: www.coronini.it/chi-siamo/statuto).

44) We make reference to the Supreme Court decision n° 24813 of 8th October 2008, in *Rassegna di Diritto Civile*, 2010, I, p. 316 et seq., with comment by M. D'AURIA, *Natura patrimoniale ed interesse morale dell'intesa che istituisce erede una fondazione disposta per testamento*. The previous steps of the legal proceeding have been the decisions of the Gorizia Tribunal, 4th April 2000, in *Familia*, 2001, II, p. 514 et seq., and of the Trieste Court of Appeals, 26th February 2003, in *Familia*, 2003, II, p. 1156 et seq. The Foundation's lawyers have been the prominent Civil Law Professors Fabio Padovini and Mario Nuzzo.

Cultural Heritage and Copyrights' Experiences in Italy

Ramon ROMANO*1

The link between Cultural Heritage and Intellectual Property is ancient and always actual. In the centuries these two dimensions, personal and economic, have improved the our perception of Arts.

We can say that the Copyright has three missions. First of all a “cheering mission” in the cultural heritage's development; they have had also a “protective mission” for its preservation and, finally, the copyrights can serve the cultural heritage's “educational mission”.

Respect to the ***cheering mission***, since the XV century, in Italy has began the protection of artworks and of artistical techniques; therefore through this defence were created many appreciable works now present in our cities.

Historically, for instance, in the Venetian Republic there was a statute that granted a s.c. *privilege*, i.e. a patent (and its related economic benefits), that lasted 10 years, to the *guild of glaziers* rather than to the single glazier.

These masters were the same people who created glass artworks in Murano and, at that time, the craft secret's infringement was punished with the death. The related artworks are not protected directly by copyrights, even if the first copyright's laws have been in Venice at the last of 1400.

During the Reinassance, through a better cultural image, a city could demonstrate a greater **political power**. In the Municipal Age-when Italy was fragmented into many small states - the art was a political tool, and this is the reason whereby the Italy has, now, the most important cultural heritage in the world[1)].

In a *utilitarian* view (Mill, Bentham) these were the instruments that have promoted, at that time, an **economic growth** and today allow us, visiting noble palaces, as Palazzo Pitti here in Florence, to enjoy of amazing chandeliers (without a legal protection against the plagiarism, in fact, these creations-that would become part of our's cultural heritage-there would be no because economically disadvantageous)[2)].

As we said, over the cheering mission, the intellectual property law, especially the copyright law, has a ***protective mission*** of the cultural heritage.

This protection in Italy has developed a “**double track**”[3)], i.e. two profiles: public and private. They

＊1 イタリア フィレンツェ大学（博士後期課程在学）Phd Student-University of Florence-Italy

are two parallel tracks, but sometimes they meet up.

The **public profile** is represented, first of all, by the **art. 9 of Constitution** that litteraly protects and enhances the historical and artistic heritage of the nation. There are also european rules, as the **art. 3 TUE** and **art. 167 TFUE**, that express general principles of conservation and safeguarding of cultural heritage. We have, also, adhered to **international conventions** (from the first convention on the protection of cultural heritage during the wars, signed at Aja in 1954, to the Convention of Paris in 1997 on protection of immaterial cultural heritage).

However, in the national legal system (after some Bourbon's provisions of 1775 on the Pompei's protection and the "Croce's Law" in 1920 on the landscape's protection) the first-comprehensive - law on the cultural heritage's protection has been the "**Bottai's law**" in 1939 (l. n. 1089/1939); after many decades we have now a single text so called "Codice dei beni culturali e del paesaggio": "Code of the cultural objects and the landscape" (D. lgs 22 January 2004, n. 42: **CBC**), that is now the our main reference.

The artwork's protection has an other constitutional matrix in the **art. 35 Cost**. that defends the job in all its expressions (v. art. 2060 c.c.).

The **Civil law** helps the Public law through the Copyright Law (L. 22 April 1941, n. 633, s.c. **LDA**) and the Civil Code (artt. 2575-2583) defending the economic interest (art. 25 LDA, until 70 years after the author's death) and the author's moral rights (artt. 20-23 LDA and art. 2577 c.c., forever).

On one hand the moral rights-right to reveal and to claim the authorship, right of unreleased, rights to retire from commerce artwork's copies, to integrity of the work opposing to any distortion of it-are, first of all, attributed to author (artt. 20-21 LDA); when he is died these faculties are attributed, from generation to generation (perpetually), to his descendants (not to his heirs) *iure proprio*, i.e. as a personal right (art. 23 LDA) to defend the author's memory and his cultural message[4].

Before the Constitution and CBC, at the same time of s.c. "Bottai's law" that states the *public enjoyment* of the cultural heritage (art. 7), one of the first provisions on the cultural objects' protection was been just the **art. 23, sub. 2, LDA**.

The provision express a sort of *partnership* between public administrations and citizens in the cultural heritage's protection; it in fact stated and states that when a family interest to protect an artwork became a public interest to protect a cultural object, the same faculties provided by the art. 23 LDA are attributed to the Government (originally to the Prime Minister, now to Cultural Heritage's Minister, which was established in 1975).

Consequently there is a **concurrent protection** on the cultural heritage (for example today against the commercial use of Botticelli's Venere-often printed on aprons-could claim both Botticelli's descendants both the Government). In this situation an artwork, altough copyrighted or patented (es. Venere's apron), is bended in favor of moral, family and cultural interests.

In the **European Directives** we can observe yet this trend to prefer personal or public interests. In this direction moves, in fact, the Dir. 28/2012/EU on the use and protection of **orphan works** (that

could be too part of a cultural heritage)[5].

These works express well the link between the purpose of dissemination promoted by Cultural Heritage's rules and the Copyright's limits because these are books, newspapers, films that are still protected by copyright but whose authors or other rightholders are not known or cannot be located or contacted to obtain copyright permissions.

In front of this contractual lock and vacuum protection the orphan works have become part of collections held by European libraries that, with new rules, could legally digitize them, group them in a free and open database[6] and put them online, overcoming the copyright's limitations.

This balancing is identified, also, in **international conventions** (as "UNIDROIT Convention on stolen or illegally exported cultural objects", signed in Rome in 1995, that regulates the civil liability in the movement of cultural objects; for example the art. 4 states-between the lines - that the compensation to the purchaser of a work stolen also depends on the existence and his knowability of rights, moral and economic, on the cultural object; for this reason-i believe - could be important a return, in the copyright laws, to the *formalities* abrogated by Berna Convention in 1908).

Given the above, condition whereby a cultural object can, also, receive the copyright protection is that it has **creativeness** (art. 1 LDA). On the contrary the work, then the check of the existence of it's **cultural value** for the society (art. 12 CBC), can receive defense by CBC.

The most important work that has both the references is the ***artwork*** (art. 2 LDA; sculpture, painting, industrial design, etc...)[7].

Nevertheless the law (**art. 10, co. 5, CBC**) states that an artwork, as a sculpture, made by a living author or, however, within 50 years since its creation cannot be regulated by the cultural heritage's rules. Even the artistic buildings have the higher limit of 70 years.

For example the sculpture made in 1970 by an artist dead in 2010 will get the "cultural protection" in 2020 (if this statue belongs to the building's facade the "cultural protection" will began only in 2040). Until the 2080 it will keep the economic protection, while the moral protection will be forever[8].

In this moment, therefore, the italian law shows a dangerous **conflict of interests** between author's economic aims and public interest, because is very difficult to say which interest prevails during the last 20 years of economic privilege.

This opposition is, too, the opposition between two values' orders: the fast and free things' movement and the protection of personal or public rights[9].

Speaking with regard to *movable things*, probably could be better stretch this privilege to 70 years; in fact the general prevalence of the public interest on the private interests allows us to observe a weakening of the exclusive rights on the artwork.

Although the art. 107 CBC, at co. 1, states that the P.A. could allow to make **copies of "cultural objects"** respecting each copyrights on the artwork, there is in fact a trend to overcoming the typical exclusivity of the private property (i.e., here, of the copyright). For instance, according to co. 2, in the conflict between the economic interest to make a mold of the statue and the public interest to forbid it

prevails the last one.

This conclusion is rooted in the 3D printing reproduction, in which instead the egoistic interest to not license an artwork's copy is, often, won by the cultural and creative collettive interests. From an artwork's photography, in fact, now we can "copy" or "create" - when the creation is "a distinguishable variation" from the original work - a new model of the artwork[10].

Another case in which we can view the "favor rei publicae", i.e. the preference to a public interest, is respect to the **will to retire** (*ius poenitendi*) **or to destroy** (*ius abutendi*) the artwork that is, also, a cultural object; in this case the collective interest to the dissemination of a cultural message prevails on the author's moral faculties.

This trend is, also, proved by the "new" art. 15 LDA that, establishing a *fair use*, allows to play in museums or public libraries works of others, so that they are known and enhanced.

There are cases that show that the **cultural object's reproduction** is governed as such as the artwork's reproduction. In these cases the italian public law-CBC - mimics the copyright law-LDA-foreseeing "licenses" and "fair uses".

Significant, by the way, is the s.c. "**David armed's case**"[11].

The Michelangelo's David is guarded in Galleria dell'Accademia in Florence since 1873 and its **material reproduction** is subject to a sort of "***license***", i.e. to a public authorization that check the compability between stated purpose and cultural destination (artt. 106-107 CBC); in front of this license is provided the payment of a "***fee***" (art. 108 CBC).

In 2014 the US company USA ARMALITE, to promote the sale of its weapons, has infringed both rules making an outrageous photomontage depicting the David armed with a machine gun.

Against the US company reacted immediatly the italian government and the case was solved peacefully with the withdrawal of the image from the advertising campaign.

This case appears trivial, but starting from it the scholars have established a **strict interpretation** of the prohibition of cultural objects' free reproducibility (art. 107 CBC), considering it also operates with respect to **digital reproduction** (we expect now the expressed modification of the CBC).

At the same time, in 2014, was reformed the art. 108, co. 3, CBC specifying **a sort of new "fair use"**, i.e. that you can't photograph monuments for *commercial purposes* but you can reproduce freely a monument (for example the same Michelangelo's David, as well as i did for this lecture) when you have a personal purpose, a study's aim or if you want to express your creativity.

Nevertheless, sometimes, the copyrights form a "***dam***" that prevents this fair use; for this reason we must check that the cultural object is free from copyrights (art. 107, co. 1, CBC), included "new copyrights" like a play of lights (es. Ponte Vecchio by night).

In Italy in fact-unlike many european countries that have transposed the article 5(3(h) of s.c. "InfoSoc Directive" (Dir. 2001/29/CE on the copyright laws' harmonisation)-there isn't the s.c. "**freedom of panorama**" (i.e. a special copyright fair use that allow to photograph monuments or others buildings without licenses)[12].

Sometimes, to invoke this “cultural fair use” (not the freedom of panorama), we must prove the photo shoot's *unprofessional's nature*.

I believe that a shoot with a reflex on a tripod could be sanctioneted, instead a shoot with a compact camera should be free (both ex art. 108, co. 3., CBC, both for the public land's abusive occupation ex art. 20 D. Lgs n. 285/1992, artt. 38-39 D. Lgs n. 507/1993 and art. 633 c.p.)

In summary, in Italy the *digital reproduction of a cultural object* (es. Ponte Vecchio by night) might need, first of all, a copyright's authorization (by the play lights' author), then a public authorization (by the Municipality of Florence), providing - in this last case - that there isn't the “fair use” stated by art. 108, co. 3, CBC. Instead can never be invoked a “freedom of panorama”.

The technological development, through a smart use of IPRs (patents but overall copyrights on softwares and other contents), has allowed to open a **new legal policy** in the cultural heritage's protection and enhancement. We passed, in fact, from a logic of controls to a **logic of agreements**.

This is now proved by the agreement between Google Cultural Institute and the most important world's museums on the creation of an *open access database* of artworks digitized in H.D., that is, moreover, a copyrighted work (es. Uffizi's agreement)[13].

This one, that it's part of s.c. ***Google Art Project***, represents a new address: collaborative and selfless rather than prescriptive and selfish. Over the historical cheering mission and the general protective mission we can see, in fact, that the digital copyright rules can take an ***educational mission***, spreading the artwork's cultural message in the world, with the main aim to “democratize” the access to the culture and promote its preservation for the future generations.

There is, so, a **new political strategy**: choosing the most important world's content provider, in fact, we can transform it from the main co-responsible for the digital infringements to the best ally of copyrights and cultural heritage's protection.

Finally, we should remember that the our Supreme Court (Cass. Civ., S. U., 14 Febraury 2011, n. 3665)[14] in 2011-speaking about enviromental goods-said in general that a cultural object, regardless of the holder's private or public nature, is a “**common good**” because it is inherently allocated to a community to fulfill its fundamental rights, even if its holder can deserve an award (es. royalties) for his efforts to protect and promote it (artt. 106-110 CBC).

Unfortunately this judgment was overturned in 2014 by HUDOC that stated the preeminence of the private property right on the public interest; but i believe that the question is still open and we hope in a new overturning that states the *cultural identity* can not be confined in an *enclosure*, being - instead - essential in the social progress[15].

[Notes]

1) For an historical overview v. P. O. Long, *Openess, secrecy, autorship. Technical arts and the culture of knowledge from antiquity to the reinassance*, Baltimora, 2001, pp. 88-101. In this period every town wanted to appear more beautiful than the others to assert its political power.

2) W. Fisher, *Theories of Intellectual Property in New essays in the legal and political theory of property* (edited by R. Munzer), Cambridge (Usa), 2001, pp. 168, 194, 198.

3) This expression is used by A. Pojaghi, *Beni culturali e diritto d'autore, in Dir. Aut*., Milano, 2014, p. 151.

4) By the way P. Greco, P. Vercellone, *I diritti sulle opere dell'ingegno, in Trattato Vassalli*, XI, 3, Torino, 1974, p. 345 ss. . Contra A. Zaccaria, *Diritti extrapatrimoniali e successione*, Padova, 1988, p. 180, according to which it would be a *mortis causa right*.

5) M. L. Montagnani, *Le utilizzazioni delle opere orfane*, in *AIDA*, 2013, p. 162. V. http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm#maincontentSec1 .

6) See https://euipo.europa.eu/ohimportal/it/web/observatory/orphan-works-database .

7) A. Pojaghi, *Beni culturali e diritto d'autore, op. cit*., pp. 149-150.

8) A. Pojaghi, *ult. op. cit*., p. 152.

9) R. Barberio, *Il regime e le forme di circolazione e di controllo dell'opera d'arte tra diritto d'autore e tutela del bene culturale, in L'arbitrato ed il mercato delle opere d'arte*, Reggio Calabria, 2011, p. 91 e ss. .

10) In the U.S.A. see Bridgeman Art Library Ltd. v. Corel Corp., 36 F. Supp 2d 191, 196 (S.D.N.Y. 1999).

11) L. Casini, "Noli me tangere": *i beni culturali tra materialità e immaterialità*, in Aedon, 1, 2014.

12) A. Spedicato, *Piccola guida alla tutela della fotografia e dell'opera fotografica*, Padova, 2012, p. 48.

13) See https://www.google.com/culturalinstitute/beta/partner/uffizi-gallery?hl=it

14) In *Giur*. It., 2011, p. 12, with note of C. M. Cascione, *Le Sezioni unite oltre il codice civile. Per un ripensamento della categoria dei beni pubblici*, p. 2506 ss. .

15) Considering the cultural heritage as an intellectual property we can say that its function is to engender a "cultural self-determination". By the way: W. J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse, in Va. L. Rev*., 78, 1992, pp. 149-157. R. J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue, in Tex. L. Rev., 69, 1990-1991*, p. 1866.