Kluwer Copyright Blog

Unrequited love at the times of French maisons: the Museum vs Le Musée

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When Sandro Botticelli depicted his beloved Simonetta Cattaneo de Vespucci as main character of "*the Birth of Venus"* back in the fifteenth century, he possibly thought she would eventually fall in love with him. She was the painter's very first love and was perhaps the most beautiful Italian lady of those times. Yet, she kept ignoring him. That was an unrequited love.

Likewise, when the Uffizi Museum sent a letter to the French *maison* Jean Paul Gauthier back in April 2022 asking to cease all uses of "*the Birth of Venus*" in their *Le Musée* collection, it possibly thought it would eventually receive – at the very least – some kind of reply. Yet, the recipient simply ignored the letter (more precisely, as of now, it just removed the contested items from its online marketplace.

Italian women can be tough, and so are French *maisons*. Indeed, while more than five centuries have passed, nothing has changed: this was just another unrequited love. Yet, the Italian museum is way more than a shy, neglected lover as it is now suing Jean Paul Gaultier, invoking the violation of the Italian Code of Cultural Heritage (CCH) and requesting the withdrawal of the 'illegitimate' clothes as well as an award for damages.

Lame comparisons apart, this story is interesting as it is an opportunity to discuss the protectability of artistic works under Italian laws. For this purpose and in order to provide a brief overview of the current legal framework, we distinguished below among four different categories of artworks and identified their (potential) legal treatment based on their location (in a cultural institution/in the public space) and legal status (covered by copyright/ in the public domain):

Scenario 1 – Reproduction of artworks located in a cultural institution/museum and in the public domain

This is exactly the case here. We have an artwork, displayed in a museum and which is in the public domain. In other words, more than 70 years have passed from the death of its author, Sandro Botticelli.

This is an hypothesis the resolution of which is relatively easy, because it is expressly disciplined by the Italian CCH. According to article 107 CCH *"The Ministry, the Regions and other territorial government bodies may permit the reproduction as well as the instrumental and temporary use of the cultural properties committed to their care, without prejudice to the provisions in paragraph 2 and those with regard to copyright"*. Thus, not only it is for the authority taking care of the artwork (e.g. museum institution, individual library and so on) to decide whether its reproduction shall be permitted but these very same authorities should also set out the specific concession fees associated with such reproduction. However, no fees shall be paid for certain specific uses, such as in the case of personal use, use for study purposes or public entities' use with the aim of enhancing the assets themselves.

On the other hand, given that these artworks have already fallen in the public domain, in such a scenario there is no room for copyright to apply. In other words, the Uffizi's claim could not be neutralized by relying on the Italian transposition of Article 14 of the DSM Directive, which provides that *"when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation."* This is for two reasons, as pointed out by E. Rosati. First, the Italian transposition of Article 14 is expressly without prejudice to the application of the CCH. Second, Art. 14 of the Directive is about the protectability of the reproduction of a public domain artwork, not a situation like that one at issue here, that is the actionability of the unauthorized reproduction of a public domain artwork.

Scenario 2 – Reproduction of artworks located in a cultural institution/museum and covered by copyright

Also in this second scenario an artwork exists that is displayed in a museum. However, in this case, the author of the work is still alive and/or less than 70 years have passed from their death.

Thus, copyright protection in the work subsists, with authors having the exclusive right to authorise or prohibit the economic exploitation, including the reproduction, of their works. In this respect, it should be noted thar there is a clear difference between works protected by copyright law and works protected under the CCH. Differently than original works protected under copyright, Article 2 CCH states that cultural property consists of *"immovable and movable things which, pursuant to articles 10 and 11, present artistic, historical, archaeological, ethnoanthropological, archival and bibliographical interest, and of any other thing identified by law or in accordance with the law as testifying to the values of civilisation"*.

This being said, also in this second scenario as in the first, third parties willing to use and/or reproduce artworks located in a cultural institution will still need to get in touch with the respective care-taker entity, so as to verify whether any license agreement is in place. This is because it is

possible – and even likely – that the rights of economic exploitation of the work at issue have meanwhile been transferred by the author to the institution itself. Under these circumstances, royalties shall be paid to such entity rather than to the author.

Scenario 3 – Reproduction of artworks displayed in a public space and in the public domain

This scenario shares some similarities with the case at issue. Indeed, there is an artwork and more than 70 years have passed from the death of its author. Yet, this work of art is not located in a museum but *en plein air*. This would be the case, for example, if Sandro Botticelli had been a street artist and his painting had been reproduced on the walls of some buildings in Florence rather than exposed in a museum. This is also the case for most of the architectural works, such as the Colosseum, built by our Roman ancestors and placed in *Via dei Fori Imperiali* in Rome.

Absent any legal provision on this point,[1] the mentioned works should be regarded as "*commons*" or common goods and their use should be permitted in all the possible forms, by anyone. Indeed, this conclusion is in line with the Italian Constitution and, more in general, with the need for the interests of the community to always prevail over those of individual owners, regardless of their public or private nature. At the basis of this solution there is the inevitable understanding that historical goods are first and foremost assets of the community, as they belong to the Nation rather than to public entities (Article 9 of Italian Constitution).

However, this solution does not seem to be accepted by many municipalities, which have recently asserted their rights on these works, even if displayed in public spaces. For example, according to the the regulation of the municipality of Lucca a prior authorisation is required, as well as the payment of a certain fee, for the case of photographs or filming taking place on municipal land and not having a purely private purpose.

Scenario 4 – Reproduction of artworks displayed in a public space and protected by copyright

This last scenario is very similar to the previous one: also in this case, there is an artwork and it is placed in the public space. Yet, its author is still alive and/or less than 70 years have passed from its death.

Absent any legal provision, in the authors' view, a legal exception should apply, allowing the free reproduction of works which are permanently placed in public spaces. In particular, such exception should not distinguish between the reproduction of works protected by copyright (Scenario 4) and works in the public domain (Scenario 3), provided that these works are "permanent" and they are not intended for temporary collective enjoyment. Likewise, in the wake of other European models expressly recognising a "*freedom of panorama*" as per Article 5(2)(h) of the InfoSoc Directive, only two-dimensional reproductions (drawings, paintings, photos and videos) should be covered by the exception, as well as those uses which do not have the protected work as their central element. In other words, while a photograph including the *Ara Pacis* Museum in the background should always be allowed, . this would not be the case for a photograph the sole object of which is the museum itself.

Final remarks

Our analysis shows that the question of protectability of artworks in Italy is far from clear. This is all the more so when for works of art displayed in a public space, absent a specific rule on this topic.

Coming back to our Birth of Venus saga, the main difficulty here is that, when it comes to cultural goods, in line with the Italian CCH, each institution has to define the list of goods and the corresponding concession fees. Such a scenario inevitably involves high transaction costs, since every decision is left to the discretionary power of the institutions, and it is not possible for third parties willing to use the artwork to obtain a quote in advance. At the same time, such legal uncertainty affects all the parties involved.

In this respect, a potential solution *de iure condendo* would be the implementation of a legal system where not only the list of cultural goods but also the fees to be paid for their exploitation are established (and made publicly available) in advance by the relevant institution (and notably the Ministry of Culture). Fees should be different depending on the specific artwork at stake as well as the type of use and licensee. Indeed, such a system would be beneficial for all parties involved, given that it would achieve the underlying purpose of the Italian CCH: promoting and enhancing the Italian cultural heritage, while preserving the memory of the national community and its territory (Article 1 CCH).

[1] In Italy, there are three principal cases to look to for guidance. First, in 2017 the Court of Florence ordered the travel agency and tour operator Visit Today, which had reproduced the image of Michelangelo's David statue in its advertising to remove all images of Michelangelo's statue of David from its digital and print promotional material and publish the decision in three national newspapers and on Visit Today's website. In the same year, the Court of Palermo found that an Italian bank had breached the CCH when including an image of the city's Teatro Massimo in their adverts. Most recently, the Court of Florence issued an injunction against Studi d'Arte Cave Michelangelo S.r.l. for using an image of Michelangelo's David, see https://www.legalcheek.com/2022/11/the-uffizi-follows-up-pornhub-success-by-suing-jean-paul-gaultier/

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