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"APPROPRIATION ART AND COPYRIGHT: IS FAIR USE THE SOLUTION?"

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Al mio collega Giò

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INTRODUCTION

Between December 2012 and August 2013, the Office for Harmonization in the Internal Market, nowadays identified as the European Union Intellectual Property Office (EUIPO), produced the results of a large-scale survey in the member states of the Union on the perception of IP related rights (IPR) by EU citizens. In the quantitative phase of the research, almost 26,500 European citizens expressed their opinions through a questionnaire conducted by telephone. The results of the survey showed that the majority of European citizens consider IPR to be essential for the social and economic development of their country, but at least a tenth of them openly admitted to having committed IPR infringements in the last 12 months and to tolerating such behavior. However, the most relevant aspect of my thesis is the question: "who do you think benefits most from the protection provided by IP-related rights?" More than 40% of the respondents answered that they felt that European copyright law favored big companies and famous artists more than smaller businesses or citizens like them. The perception of most European citizens on this issue is that copyright law is not inclusive enough in protecting the rights of smaller artists and small businesses and that too much protection is given to more powerful players.

In analyzing this data, therefore, I realized that the original purpose of copyright law is not fulfilled by the current European legislative framework. Copyright was originally conceived as a tool to provide protection for authors, but also to encourage creativity and to make scientific and artistic discoveries available to the whole community. Gradually, this concept has been lost, as copyright is now seen as a mere investment tool to economically exploit scientific discoveries, artistic and literary creations. The problem therefore lies in the fact that, by failing to adapt to the current times, the discipline is deficient and lacks adequate protection for certain creators. Specifically, since I am passionate about art history and contemporary art, I will analyze how the current discipline fails to provide protection to certain contemporary artists who fall into the very broad movement of Appropriation art.

Copyright discipline is a complicated one to construct because it is based on a dedicated balance of interests at stake. The interests to be protected are both those of the creators or inventors to whom must be granted protection because of their creation, those of the community but also of other creators who see existing works as a source of inspiration to create new contents. The purpose of copyright law should be to protect existing creations and encourage new ones. The importance of this balance is also

underlined by Article 27[1] of the Universal Declaration of Human Rights, which enshrines both the right to culture and science, i.e. the right to enjoy creative and scientific works, and the right to moral and economic protection of those who create scientific and cultural works. The first right protected by this Article is the social interest conceived as the legislative motive behind copyright protection. This last aspect is very clearly stated in Article 1, Section 8, Clause 8 of the US Constitution of 1787, which states as follows: " *The Congress shall have Power [...] To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries*". It is no coincidence that the instrument which, in my opinion, could guarantee a fair balance between the various interests at stake is part of the U.S. legal system, that is fair use. This instrument allows to rethink copyright as an "access right" and not as an instrument of closure. In any case, as will be shown , even this tool , as it is codified nowadays does not turn out to be sufficient in covering some areas of the visual arts.. The Italian legal system also recognizes the right to culture and science in Article 9[2] of the Constitution, thus making it one of the fundamental principles of the Republic. However, the lack of adequate regulation at European level does not allow this protection to be fully realized.

This dissertation will be divided into three chapters. The first chapter consists of the historical analysis of the art movement identified as Appropriation art. It is necessary for the purposes of my thesis to make an historical analysis precisely so that the reader can understand the roots of an art movement that by reason of its principal tool, the appropriation of existing works in order to create new ones, faces the limitations imposed by copyright. Indeed , the Appropriation art movement highlights the fact that the legal tools provided by European and U.S. law are not sufficient to ensure adequate protection for the visual arts. This is evidenced by the fact that many artists who are part of this movement are often sued for copyright infringement. Some of the most emblematic jurisprudential cases, both from Europe and the United States, will be analyzed in the following chapters. In essence then, the purpose of copyright law, namely, to ensure adequate protection for all interests at stake, fails when it comes to visual arts and appropriation art. To fully understand this artistic movement, it is necessary to rediscover its roots by analyzing how appropriationism has changed over the centuries and its meaning has evolved.

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[1] Art. 27 UDHR: " Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and it benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

[2] Art 9 Italian Constitution: " The Republic promotes the development of culture and scientific and technical research."

The second chapter focuses first on an analysis of international and European copyright law, with a specific focus on exceptions and limitations to copyright. As will be shown , often the interpretation of exceptions and limitations is left to the courts. I will therefore analyze the approach of the Court of Justice of the European Union (CJEU) and the one of the European Court of Human Rights (ECHR), highlighting the differences of the two in dealing with exceptions and limitations when it comes to visual arts. In analyzing concrete cases, it will be evident how to date there is no instrument in the European regulatory framework that can provide adequate protection for certain types of artists such as appropriationists. The second section of the chapter will be devoted to the analysis of the Italian copyright legal framework, which does not differ much from the European one. An emblematic Italian case , *the Giacometti variations* case, will be examined, in which the national court to resolve the dispute refers to the U.S. fair use. This aspect is very important because it underlines the fact that there is no adequate regulation protecting creative reuses neither at the national nor at the European level.

The last chapter is devoted to answering the title question of the thesis: is fair use the solution? After conducting an analysis of the U.S. legal framework, the strengths and weaknesses of fair use will be examined by looking at case law. In essence, it will be demonstrated how fair use, as codified today, is inadequate to guarantee protections to artists who are part of the Appropriationist movement. In support of this argument, numerous proposals made by commentators and scholars to modify fair use will be presented, all different from each other, but all agreeing on the fact that fair use should be reformed in light of the visual arts.

CHAPTER 1

THE HISTORY OF APPROPRIATION ART FROM ROMAN ANTIQUITY TO NEO-CONCEPTUALIST ART.

1.1 An overview on Appropriation Art.

"Every book in literature science and art, borrows, and must necessarily borrow, and use much which was well known and used before." Justice Story.

Art in its broadest form has been the product of inspiration since ancient times. Every artist, writer, architect, whoever has produced something creative, has been inspired either intentionally or unintentionally by something they have seen, experienced or felt. The history of art is therefore a constant reference. The great artists of the past have been inspired by the masters of Greek antiquity and the Renaissance, but this does not make them "less artistic" or "less creative."

Artistic inspiration is such an important element of the creative process that in post-modernism it has become the real protagonist of an entire artistic movement, which we include in the broad category of Appropriation art. Appropriation means using elements from one work and inserting them into a new one. Nowadays, the images used are certainly those that are easily accessible from the internet and are very well-known. The concepts explored in the contemporary debate on Appropriation art are that of "author" and "paternity" of the work. Some believe that the concept of paternity has no place in this movement, such as Roland Barthes in his work "*The death of the author"*[3]. Others, however, argue that the concept of authorship can be strengthened in Appropriation art, such as Sherrie Irvin in her essay "*Appropriation and Authorship in Contemporary Art".* Another very important topic is certainly that of originality, the appropriationists question the concept of originality and wonder if art can ever be original. The technique of appropriation has been considered by anthropologists as part of cultural change.

[3] "The explanation of a work is always sought in the man or woman who created it… (but) it is language which speaks; not the author."8 With appropriated works, the viewer is less likely to consider the role of the author or artist in constructing interpretations and opinions of the work if they are aware of the work from which it was appropriated. Questions are more likely to concern the validity of the work in a more current context, and the issues raised by the resurrection and re-contextualizing of the original. Barthes finishes his essay by affirming, "The birth of the reader must be at the cost of the death of the author." Roland Bather, *The death of the author,* 1966.

There are three major appropriation practices. The first involves the artist appropriating an entire image. The second practice is identified with montage, which means bringing together images from different sources into one. The third practice identified with “simulationism”, deals with the appropriation not of a single work but of an entire genre.

Nowadays we hear more and more about Appropriation art. For example, the artwork that won the Golden Lion at the 58th Venice Biennale in 2019 is a work that is part of this movement. The prize was awarded to the opera entitled “*The White Album*” by Arthur Jafa, a video work that makes the public think about white supremacy and is made by combining various videos that Jafa has mainly downloaded from the internet.

The main legal problem related to this artistic movement lies in the protection offered by copyright and in the fact that often these artists are sued for violating the IP rights of the authors from whom they have taken inspiration. It is precisely in this area that we see how the current copyright discipline on the one hand does not protect enough these types of artistic works and on the other protects too much the so-called "underlying works" so as to prevent the free creativity of artists related to Appropriation Art. These artists are therefore treated as "second-class" artists, not recognizing their artistic dignity in the same way as "conventional artists". It is not only discrimination between artists, but it is above all the violation of the Freedom of Expression and Freedom of Creativity protected by Article 10 ECHR.

In the United States, the problem of copyright is being overcome through the instrument of fair use. Even through the use of this tool, however, the decisions of the various courts are not always in agreement with each other. In European legislation, instead, there are the so-called exceptions to copyright, but even in this case the decisions of the European courts are not always in agreement. In both cases, therefore, the artists of this movement find themselves in total uncertainty.

In this chapter we will analyze some of the most important trends of this movement such as the Readymade, , Pop art, Photography. We will start from Antiquity, analyzing the greats of the history of ancient art, until we will arrive at examples of great artists closer to us such as Eduard Manet, Marcel Duchamp, Richard Prince, and Sherrie Levine .

1.2 Emulation in the Classical Antiquity and the Greco-Roman sculptures.

As I have said the art of the emulation has its roots in the Greek and Roman antiquity. Roman art, especially as regards the sculpture has always looked at the canons of Hellenic art, sometimes "stealing" stylistic aspects and other times strictly reproducing the Greek works. In this context, emulation is not a criticism of the emulated work, but rather an admiration for it. Greek art therefore becomes the model to be inspired to, but we must not forget that the Greeks themselves have taken inspiration from the even more ancient oriental and Egyptian art. Moreover, just thanks to the Roman copies we have received numerous Greek sculptures gone lost. The copies have a great importance nowadays because they are evidence of the taste, of the artistic level and of the formal conception of the epoch in which they were performed, and they arouse interest just for the variations that they present in comparison to the originals themselves.

What Romans themselves thought about artistic imitation is still an open question. There are not many writings related to visual arts and creative imitation. However, we can refer to the writings of rhetoric that discuss this topic and often make analogies between rhetoric and visual arts. Vitruvius, Roman architect and writer of the second half of the first century B. C., points out that the criterion for judging the art of his time is the criterion of appropriateness and not of innovation. It is precisely the criterion of appropriateness that justifies the tendency to emulate the great Greek classics, considered consistent with the aesthetics of tradition[4]. Appropriateness therefore means being coherent with tradition, it means admiring the great classics of tradition and creating new works in accordance with it.

Of course, imitation is not enough. As a matter of fact, numerous writers and orators such as Cicero, Quintilian and Seneca the Young, however, condemn the “slavish” imitation of the model. Interesting are the two metaphors of Seneca about writers who imitate previous writers. The difference between a simple imitator and an imitator producing a mature creation is the same between the process of a bee obtaining nectar from various flowers and transforming it into honey and the purely "mechanical" digestive process of food being transformed into blood[5].

Roman art is often referred to as *eclectic*. The word *eclectic* comes from the greek *ekclegein*, which means "choose between several things". Eclecticism of Roman art lies precisely in taking inspiration from multiple models and not slavishly copy one. According to Quintilian, in fact, no model is perfect

[4] Vitr. *De Architectura*
[5] Sen.*Ep*.84

and universally accepted. Even if Cicero is considered the perfect orator, each student should not take him as an exclusive model, but only take the best from him and mix it with other models. The creative and mature imitation is therefore *eclectic*; is the result of many prototypes.

Dyonusius in fragment 6 of the "*De Imitatione*" refers to the myth of the painter Zeuxis, who was called by the citizens of Crotone to paint the most beautiful among women, to enrich the walls of the temple of Juno. The painter therefore selected the most beautiful women of the city by painting the most beautiful part of each of them to represent the perfection of Helena.

Fig.1 *Zeuxis Choosing his Models for the Image of Helen from among the Girls of Croton.* François-André Vincent. (via Wikipedia.org)

I would like now to deepen the concept of emulation in the Roman sculpture. Being the copy a proper category of the various categories in which it is divided the Roman sculpture. For a long time, this category has been considered lacking in originality, but today several studies have highlighted its importance by placing it in the Roman cultural context that I have partly described previously. During the Middle Ages and then during the Renaissance, both Greek and Roman artistic cultures were exalted and considered of equal dignity. In the second half of the eighteenth century some art historians such as J.J. Winckelmann began to support the thesis according to which Greek art represents the supreme model of aesthetics and artistic beauty, while considering Roman art inferior and a mere copy. This idea is increasingly strengthened during the period of Romanticism, which values the individual, originality and genius, especially in art. This approach began to change in the 1960s.

The roman copies of greek statues have never had a simple decorative function, but always an iconographic meaning. The Greek iconography has in fact been adapted to the requirements of the Roman culture. For example, there are numerous heroic nudes in the Roman art and borrowed from the Greek iconography. For instance, the statues of *Vespasian* and *Titus* (fig.2) from the Shrine of the Augustales in Misenum. In these cases, the heroic nude is used to convey the message of the strength of the empire, represented by the emperor and the divine appearance of the emperor seen as a semi-god.

Fig.2 *Vespasian and Titus* (via mapio.net)

Another example in support of this thesis is surely represented by the *Athlete* (fig.3) of Stephanos, roman sculptor and student of the master Pasiteles. Similarities with the famous Greek statue *The Kritios Boy* (fig.4) are clear, being Stephanos surely inspired by the canons of Greek aesthetics in representing his "*atlteta*". However, the spectator looking at the two statues cannot help but notice that the effect they create is completely different. There are, as a matter of fact, several differences. The *Athlete*'s head is more downward, and this contributes to the reflective aspect of the figure. The posture is also distinct. The *Athlete* places his weight on his left leg, and this is reflected in the position of his hips, making the figure more human and real. The simple facial expressions that Stephanos has

succeeded in recreating make sure that his statue has a totally different meaning and arouses different feelings in the spectator, in order to attribute equal dignity compared to the greek model.

Fig.3 *Athlete*, Stephanos (via pinterest.com)

Fig.4 The Kritios Boy (via theacropolismusem.gr)

The *Athlete* today is part of a new category called ideal sculpture (*Idealplastik*), a category that includes works that are undoubtedly inspired by others but that represent retrospective creations. These sculptures in my opinion represent true emulation intended in a mature creative and original sense. The term ideal sculpture is very important because it finally focuses attention on the subject matter of a work and not on formal aspects related to the work from which it is inspired.

All these records help us therefore to understand what emulation for the Romans was: reasoned imitation of the great models of the tradition, reinterpreted in the light of Roman culture and the social and political needs of the time.

1.3 Manet's *Olympia*, Giorgione's and Tiziano's *Venus*: reinterpretation of the female nude.

The attitude of 'quoting' the great works of the past, as happened for centuries with Michelangelo's *Pietà*, continued into the nineteenth century. Quoting a work of art means, in artistic language, taking inspiration from the point of view of the technique, the subjects, or a detail of the work. This is precisely why certain subjects become recurrent in art history, as is the case here with Venus.

The work I will consider is *Olympia* (fig.5) by Eduard Manet, a renowned French painter of the first half of the 19th century who is considered the precursor of impressionism. In this work we see a prostitute from the French bourgeoisie who was contemporary with the artist. The fact that the subject is a prostitute can also be deduced from the black cat at the foot of the bed, an erotic symbol. The bouquet of flowers that the black woman gives her also represents an offer from the client. manet decided to depict a very realistic female nude, without poetic flourishes. Even the name of the Olympia, brings us back to the figure of the prostitute, it was a name in fact that was often used by these women. We are no longer faced with an idealized female nude; the woman's expression is very cold. The figure of the woman is not linked to mythology and has no allegorical or symbolic meaning. The way the artist portrays his subject matter is undoubtedly linked to the trends of his time. He no longer shows subjects linked to Christianity or mythology. He shows every day, bourgeois people and scenes from daily life.

Fig.5 *Olympia*, Eduard Manet (via analisidellopera.it)

Therefore, while Manet undoubtedly represents a subject that is entirely relevant to the culture of his era, he does so by referring to and drawing inspiration from two great artists of the 16th century. I refer

to two famous paintings: Titian's *Venus of Urbino*(fig.6) and Giorgione's *Sleeping Venus(fig.7)*. The similarities between the artworks are obvious. In both Titian's Venus and Giorgione's, we find two female nudes lying on a mattress in the same position as Manet's prostitute. Manet thus takes up the subject of the female nude, transforming the image of the eternal Venus, full of allegories and symbolism, into an everyday woman, and moreover into a prostitute. If in Titian's Venus at the foot of the bed we find a dog, symbol of fidelity, at the foot of Manet's prostitute we find a black cat, an erotic symbol.

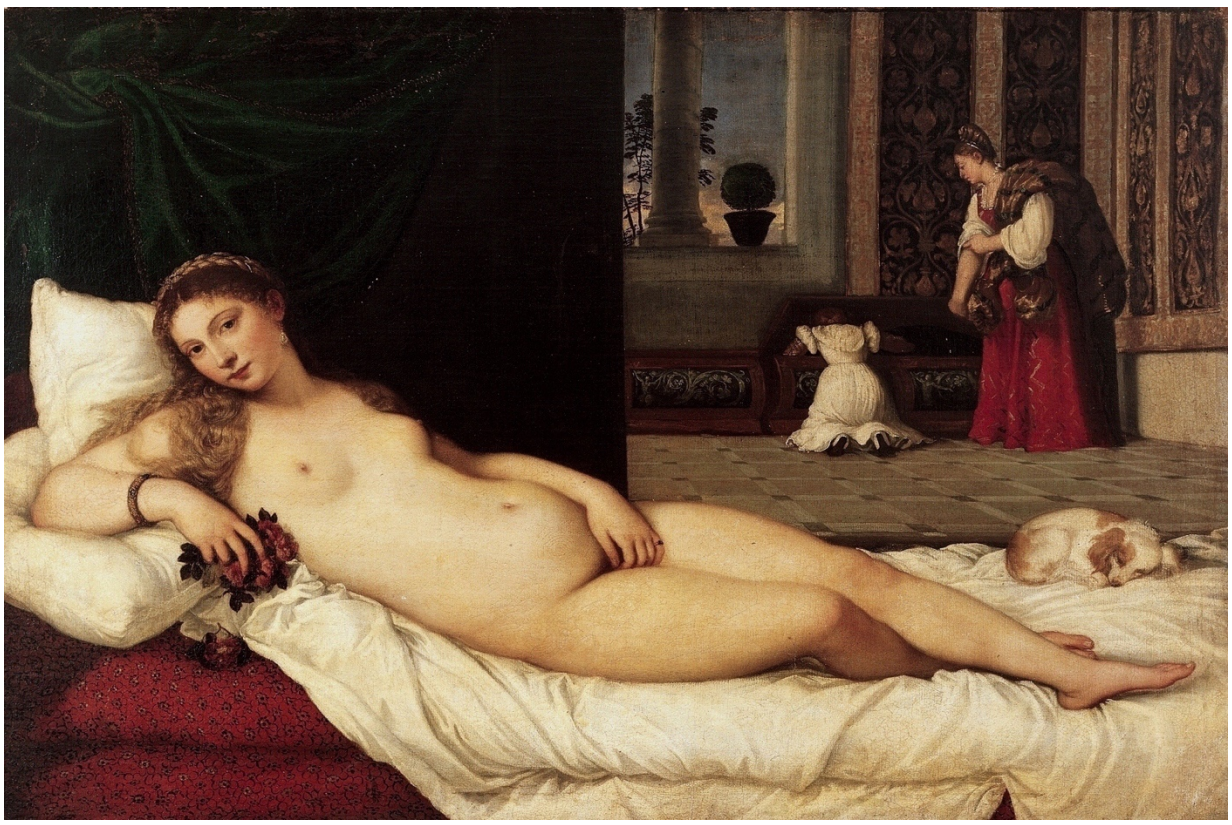


Fig.6 *Venus of Urbino*, Titian. (via analisidellopera.it)

Fig.7 *Sleeping Venus*, Giorgione.(via Wikipedia.org)

Titian and Giorgione in turn take their inspiration from the great ancient tradition, not only in the choice of *Venus*, which obviously goes back to the ancient mythology, but also in the choice of the female nude itself. In the history of art, in fact, certain subjects are crystallized, several images taken by various artists of different eras. A very frequent subject is precisely the female nude. In this case, however, the subject of the female nude is revisited by individual artists, not only from a technical point of view but also from the point of view of the meaning. Each artist uses this subject, placing it in the historical context of his own era. The same naked woman represented by Titian in the 16th century thus becomes the prostitute of Manet. In each of these works we therefore see a *fil rouge*, which links them together but at the same time differentiates them.

Once again, we see how appropriation in the history of art has always existed, helping to create pillars of tradition. The inspiration and admiration of artists of the caliber of Titian and Giorgione lies at the heart of the appropriation in this case. But it is precisely through the comparison with these works that Manet succeeds in better representing the situation of his era. It is through these comparisons that we can see how the social culture evolves, seeing the same subjects represented in different manners and with different meanings we understand how the culture of humanity changes from era to era.

1.4 Appropriationism in the Readymade of Duchamp.

Readymade certainly represents one of the first fundamental steps of Appropriation art in the 20th century avant-garde. Readymade, of which Duchamp is one of the greatest representatives, is part of the Dadaist avant-garde, where the artist's virtuosity is no longer the protagonist, but the concept. The concept relying under this artistic technique is about taking an everyday object and giving it value for the only fact that the artist conceives it as an artwork. By asking the viewer to consider an object as art, Duchamp makes it his own. . The characteristic of this technique is to change the common object's intended use by placing it in a completely unrelated context such as a museum.

The readymade technique is part of dada culture. Dadaism is a movement that developed in Zurich during the World War I. It brought together poets, artists and men of letters, all of whom shared a rejection of traditional rules and a rejection of war. The Dada artists were extravagant and disrespectful, the rejection of tradition is reflected in their artistic works. They claimed creative freedom by experimenting with various techniques and materials. Dada was the opposite of everything. It was anti-art. If art tries to convey a message through its works, Dadaism, on the contrary, does not want to convey any message. The interpretation of dada works depends on the individual. For this reason, the interpretation of the works of these artists are multiple. According to the Romanian poet Tristan Tzara, who wrote the "*Dada Manifesto 1918*" : "*God and my toothbrush are Dada, and new yorkers can be Dada too, if they are not already.*" The word Dada also means nothing at all. If you translate it literally from Russian it means "*yes, yes*" in German it means "*there, there*". It could also mean children's first words with which they mean everything or nothing.

Through the use of these objects, apparently devoid of artistic meaning, artists such as Duchamp express completely revolutionary concepts. Understanding the Readymade work of a Dadaist artist is not a simple task, however. As it is conceptual art, it has to be placed in the context and philosophy of the artist himself. Many of these works have been widely criticized as being very provocative. An example is Duchamp's famous sculpture *Fountain (*fig.8). The work was considered to be so provocative that when Duchamp proposed it to the Society of Independent Artists[6] it was rejected. The opera is, as a matter of fact, composed by an inverted urinal. There are many interpretations of this work. The American psychologist Tomkins declared that "*it does not require a great deal of imagination to see in the gently flowing forms of the overturned urinal the veiled head of a classical*

[6] Society of Independent Artists was a U.S. artistic association active in 1916.

Renaissance Madonna, or a seated Buddha, or one of the elegant and erotic forms of a work by Brâncuşi".

Fig.8 *Fountain*, Duchamp.

However, for the purposes of my analysis of Appropriation art, Duchamp's work entitled *L.H.O.O.Q.* (fig. 9) is certainly more significant. This time the artist does not use an everyday object to convey his message, but one of the world's most famous works of art, the *Mona Lisa*. The provocative message of the Dada artist is evident in this work. Duchamp once again refuses to produce art in a conventional way. The message is always the same: everything is art in the artist's philosophy. Everything, even the desecrating image of one of the icons of art history with a drawn moustache. Even the title of the work is provocative. The sound of the letters in the title read in French is: "*Elle u chad a cul*", which in English means "She has a hot ass". This work therefore encapsulates all the characteristics of Appropriation art: taking a piece of another work and redefining it in the light of a critique, a parody, a philosophical context. The Appropriationist artist, just like the Dadaist artist, is such because of the concept he expresses, not because of his artistic virtuosity.

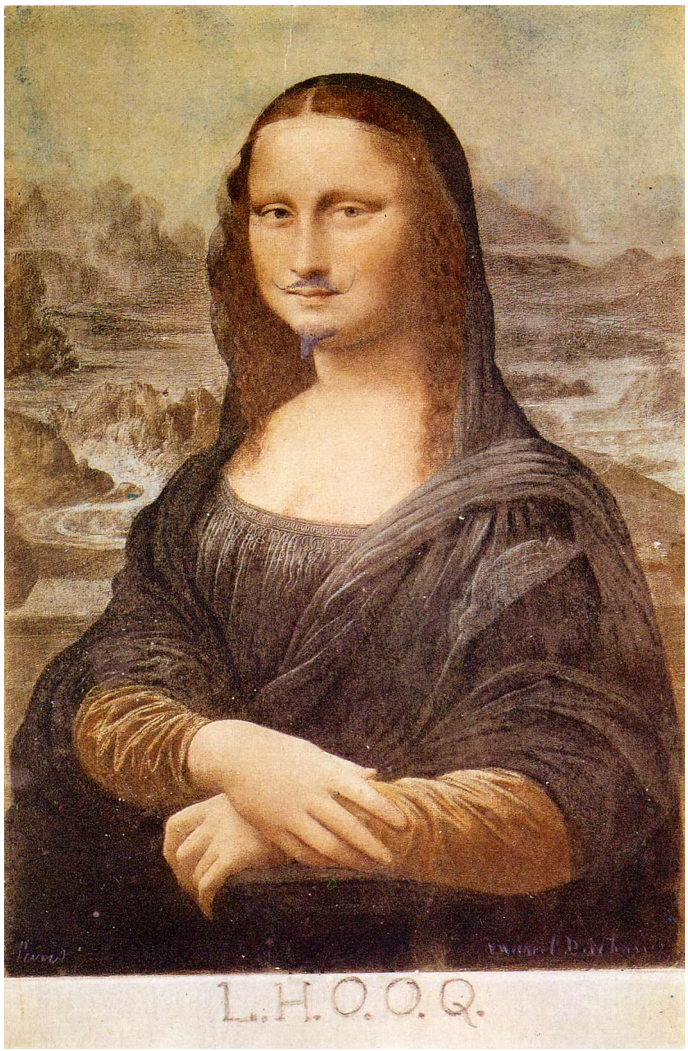


Fig.9 *L.H.O.O.Q.*, Marcel Duchamp

1.5 Pop art: everyday objects become art. A focus on Rauschenberg and Andy Warhol.

Pop art was born in the 1950s in the United States. The term pop art comes from the word "popular", which in this sense means anything that is mass-produced. The movement is therefore strongly linked to the American consumer society of those years. We don't know if the approach that these artists have towards contemporaneity is positive or negative. The dilemma is difficult to decipher because the artists themselves in their declarations have not been clear. The general characteristic of irony however leads to think that Pop art without being totally aware of it criticizes contemporary American society .The objects that become the protagonists of pop art, do not have an autonomous value of their own, but are certainly known by the whole society thanks to advertising. After the second post-war period, the use of certain objects such as televisions, refrigerators and cars became widespread and people could no longer live without them. Pop art aims to show the consumerist reality of the time. Is an art aimed at the masses and not at a narrow niche. The main theme is certainly the existential anguish of this society where man is no longer an individual, but a consumer. The artists stresses the superficiality

of the reality in which they live, where the mass media, advertising, everything seems to speak of joy, but in reality underneath lies anguish and depression. The main contexts depicted, are those of large cities full of contradictions. It represents the reality of the moment, it can be defined in fact as a new realism. New because it represents familiar images but modified to the point that they are no longer naturalistic. This movement evolves in various techniques, some artists experiment with performance others with the reworking of advertising images. In this context the pop artists think about the reproducibility of the works and therefore about their uniqueness. Pop art surely marks the passage from the modern era to the post-modern era.

Another representative of this artistic movement is certainly Robert Rauschenberg. He is an important figure, because he is considered the artist who brought Pop art to Europe. In 1964 he won the golden lion at the Venice Biennale with his work entitled, *Retroactive I*, the opera, realized with the silkscreen technique, represents frames taken from a recorded speech of President Kennedy. In 1976 Rauschenberg incorporated in the *Hoarfrost* series a print called *Pull*(fig.10) with a silkscreen of Morton Beebe photograph entitled *Mexico Diver*(fig.11). Beebe proved to be particularly annoyed by the work and sued Rauschenberg for a minimum of $10,000 damages and the profits of the sale from Rauschenberg's print. The pop artist in a letter of response[7] to Beebe says he is very surprised by his reaction since he *" never felt that he was infringing on anyone's rights as he have consistently transformed these images".* The case was solved one year later by Beebe's accepting $3,000.

[7] "Dear Mr. Beebe, I was surprised to read your reaction to the imagery I used in "Pull", 1974. Having used collage in my work since 1949, I have never felt that I was infringing on anyone's rights as I have consistently transformed these images sympathetically with the use of solvent transfer, collage and reversal as ingredients in the compositions which are dependent on reportage of current events and elements in our current environment hopefully to give
the work the possibility of being reconsidered and viewed in a totally new concept. I have received many letters from people expressing their happiness and pride in seeing their images incorporated and transformed in my work. In the past, mutual admiration has led to lasting friendships and, in some cases, have led directly to collaboration, as was the case with Cartier Bresson. I welcome the opportunity to meet you when you are next in New York City. I am traveling a great deal now and, if you would contact Charles Yoder, my curator, he will be able to tell you when a meeting
can be arranged. Wishing you continued success, sincerely Robert Rauschenberg". Rauschenberg's response letter, Jan 27, 1977.

Fig.10 *Pull*, Robert Rauschenberg

Fig.11 *Mexico Diver*, Morton Beebe

When we talk about pop art, the first thought certainly goes to the figure of Andy Warhol. He is an eclectic artist as well as an actor and screenwriter. Warhol immediately shows interest in the world of advertising, in fact he studied advertising art at the Carniege Institute of Technology. In 1949 he moved to New York, in the City he expresses his art in relation to the world of consumerism and frenetic city life. Warhol and Pop art are included in the theme of Appropriation art, because as in Dadaism, Warhol and the other artists of this movement bring into the scene everyday objects, such as the Campbell can of beans, or the faces of iconic film figures.

Warhol, in order to emphasize the culture of consumerism of contemporary society as well as depicting objects so called "popular" produces his works in series. He presents himself as a machine artist, he highlights what he thinks is the protagonist of the 20th century by becoming a machine himself. He emphasizes the lack of consciousness through a mere reproduction of images. In fact, his studio is called factory, a name that refers to the mass production of objects and not to the creation of works of art. The attempt to become a machine artist, however, fails. In the moment in which the artist edits an image or chooses one rather than another, he exits the concept of the machine. The machine

for Warhol is without conscience, it carries out his work in a mechanical manner, it cannot choose, edit or like something. The artist portrays twenty-five Marilyn Monroes (fig.12). Mechanically reproducing these images once again emphasizes the concept of machine and mass production and also suggests an idea of cheapness. Looking better at the prints, however, the spectator can see that each image has some small differences. We do not know if Warhol in doing so wants to highlight that even the mechanical process is wrong or if he wants to highlight his creative role in modifying an apparently perfect and impersonal image.

Fig.12 *MARYLIN MONRORE* , Andy Warhol (via deodato art)

A technique widely used by these artists and by Warhol in particular and the silkscreen. This technique is certainly one of the favorites of pop artists because it is obviously in harmony with the artist's purpose. It consists of printing in one or more colors on a silk frame, where some parts are made permeable to ink and other not depending on the figure that you want to get. It's a technique that is also used to obtain copies of high quality. Pop artists, such as Warhol that often us as the subject of his work a photography or other prints prefer this technique because it can produce an accurate copy.

It’s a mechanical reproduction that therefore refers to the reproduction of the machine, Warhol uses it both for purely technical purposes but also for the underlying meaning.

The silkscreen technique is also used for portraits serie. He production of portraits of Warhol is very important for our purposes. The artist in fact uses photos and therefore appropriates the image of iconic personalities. He does it not by manually painting the subjects' faces, but by reprinting photos and editing them. The portraits in addition question the concept of ownership, the subjects become a product of the machine and commercial property. It’s emblematic the portrait of Elizabeth Taylor(fig.13). The Hollywood diva is represented with a mass of black hair that perfectly frames the pale face, where the focus is made on the eyes colored with a very striking blue eyeshadow, the attention also falls on the bright red lips. What is represented however is not Liz Taylor as a person, but Liz taylor as a diva, what the public sees is a mask not a face, a commercial product.

Fig.13 *Liz*, Andy Warhol (via artsy.net)

Although Warhol's works were often commissioned by private individuals, he is undoubtedly to be considered an artist who made extensive use of appropriationism. This is demonstrated both by the series of portraits of Marilyn Monroe where he takes a photo taken by a photographer and prints it with the silkscreen technique without any kind of authorization, but above all by the series of Campbell cans where Warhol appropriates the logo. The Campbell can is used for two collections: *Campbell Soup Cans Serie I (*fig. 14) and *Campbell Soup Cans Serie II* (fig.15). The artist took inspiration from

his personal life, in explaining the origin of his work in fact Warhol said: " *I used to drink it. I used to have the same lunch every day, for 20 years, I guess, the same thing over and over again*." This statement inevitably recalls that sense of repetition proper to mass production and the concept of the machine. Warhol externalizes the sense of repetition not by reproducing just one can but by reproducing many. Each set contains ten prints of ten different soup cans depending on the flavor. The technique used is that of screen print on paper, which is reference of the technique used for billboards. Of course, the prints were widely criticized by those who considered them to be a reckless appropriation of a common object.

Fig.14 *Campbell Soup Can Serie I*,
Andy Warhol(via masterworksfineart.com)

Fig.15 *Campbell Soup Cans Serie II*,
Andy Warhol (via masterworksfineart.com)

Like every appropriationist artist, Warhol was sued at least three times by photographers from whom he had taken photos for his silkscreen prints. The claims of copyright infringement did not end even after his death, as the Andy Warhol Foundation was also sued. He was sued by Patricia Caufield for the hibiscus' photographs (fig.16) taken by her which were used by Warhol for his *Flowers serie*(fig.17). He was then sued by Charles Moore for some photographs (fig.18) he published on *Life* magazine, which have been used by the artist for the *Race Riot* (fig.19) painting. He was sued by Fred Ward too for the Jacqueline Kennedy's images used by Warhol in many prints.

Fig.16 Patricia Caufield (via minnimuse.com)

Fig.17 Flowers serie, Warhol (via moma.org)

Fig. 18 Charles Moore (via artsy.net)

Fig.19 *Race Riot*, Warhol (via artnet.com)

1.6 Richard Prince: the king of Appropriation Art.

"*I had limited technical skills. Actually, I had no skills. I played the camera. I used a cheap commercial lab to blow up the pictures. I never went into a darkroom*" Prince told *Artforum* in 2003. Richard Prince, American painter and photographer, was born in 1949 in Panama from American parents. He then moved to New York where he began his artistic career. He began his artistic production by re-photographing ads of furniture, watches and jewelry. By doing so Prince earns criticism from many in the art world but also numerous lawsuits. *"If you go out anywhere and you talk about Richard Prince, you'll find people will get incensed about his work or they'll rise and defend his works in a way I've never seen about other contemporary artists."* Brian Wallis, independent art curator. He was a very controversial artist, who was not always appreciated, especially in his early years, Larry Gagosian owner of the Gagosian Gallery said*: "His market struggled; his career struggled. He got used to trying different things. 'If they don't like this, what about this?'"*

As a matter of fact, in 1980 Prince produced a series of photographs, *Untitled (Cowboy)*(fig.20), which were basically a reproduction of the photographs taken by Sam Abell and other photographers for the Marlboro advertising campaign (fig.21). At that time Prince worked for a newspaper for which he cut out articles from the Times. It was at that time that he became fascinated by advertising campaigns. Prince's work is not a mere copy of the photos taken for the advertising campaign. In explaining his work, the artist emphasizes his reflection on contemporary culture. Prince believes that people at that time were experiencing a kind of crisis in their belief in a better future and then "*he starts to believe in advs"*. The concept of the advertising campaign was in fact: if you start smoking these cigarettes, you become this cowboy. It was based on the social culture of the moment, and Prince decided to extrapolate the cowboy from that system, unmasking the fictitious culture of the time, disconnected from real life. Prince's creativity lies in choosing which images to re-photograph, and it is in choosing them that he focuses attention and criticism and leads the public to reflect. The subject work is not the image, but the American culture it represents. Once again, the author challenges the concept of authorship: advertising photographers freely give up their authorship to produce images for a company. The copyright rights were as a matter of fact of Philipp Morris. The artist knew nothing about the law, he just wanted to give expression to his creativity, appropriation in this case is a symptom of creation not copyright infringement. The advertising campaign itself derived from an essay published on *Life* magazine in 1949 about cowboys. Commenting on prince's work, Clasen, one of Marlboro's photographers, said:

"It's basically stealing of one's images […] I don't' think any photographer I know feels that this is something should be allowed". Prince on the other hand replied: *"It wasn't about stealing […] It was more like claiming."*

Fig.20 *Untitled (Cowboy)*, Richard Prince. The Met museum, New York.

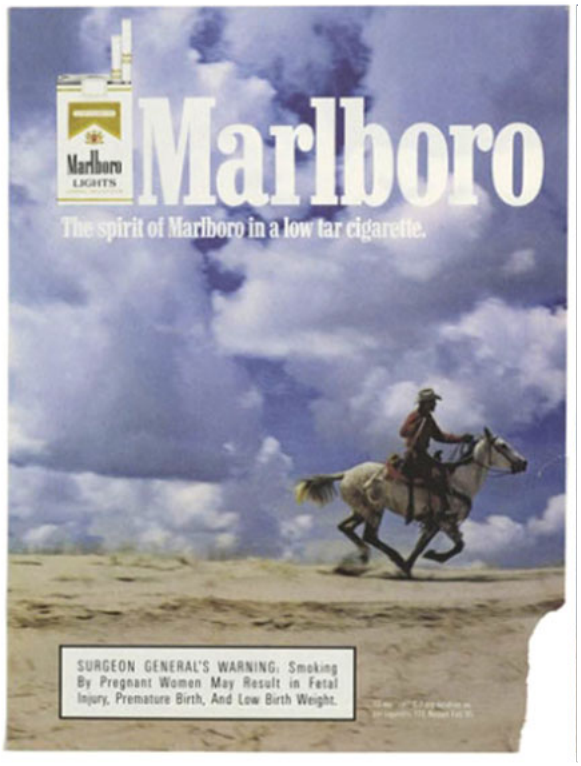


Fig.21 Marlboro campaign.

Prince has obviously adapted to new technologies over the years. In fact, he recently started using his iPhone instead of a camera. Prince then started to take screenshots of random photos taken from

Instagram. The screenshots contained the photo and the artist's comment, who reported all the others as spam in order to make his comment stand out, very often, silly and meaningless. He titled this work *New portraits* (fig.22), it consists mostly of seductive photos of young women, and was exhibited at the Gagosian gallery. The artist commented on his work as follows: "The *truth is, I don't care who they are; I care who I think they are. I'm not a very social person. I don't go out at night. So maybe I wish I looked like them or I could be them. In the end, it's fun. And a lot of the art I've made isn't that much fun. What was really strange was that I had a hit, meaning people wanted them right away. Which was a very strange experience.*" Prince once again emphasizes the current culture, a social-dependent society, which has probably lost ownership of itself, publishing everything about its life on social networks. As with all Prince's works, this one is also very divisive. Some of the women portrayed have criticized the artist and his work, such as the student Anna Collins, while others have said they are "honored", such as Karley Sciortino.

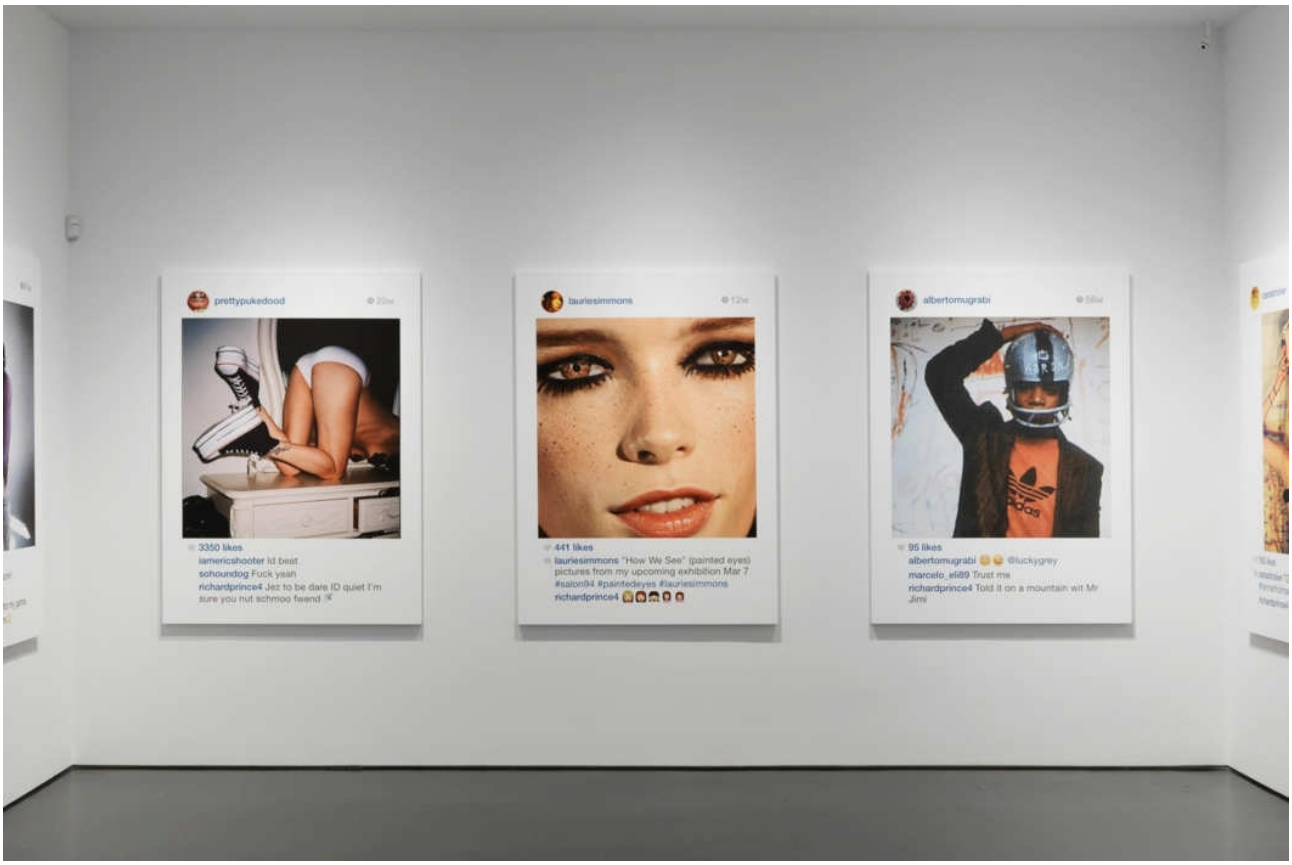


Fig.22 *New Portraits*, Richard Prince, Gagosian. nssmagazine

Looking at Prince's works you understand what it means to be an American of the late twentieth and early twenty-first centuries. Prince is today considered a great artist who is able to represent his

contemporary culture through an innovative artistic technique. His works began to be appreciated at the beginning of the 2000s, and it was during this period that his works were auctioned for millions of dollars.

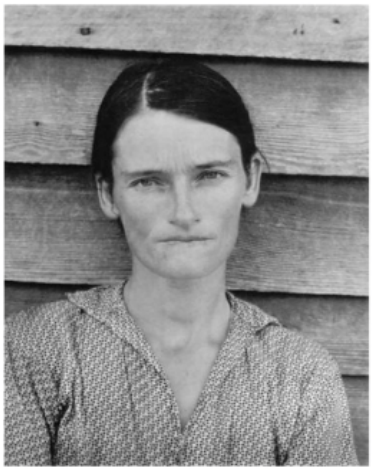
1.7 Photography: a visual art that often oversteps copyright boundaries. Focus on Sherrie Levine.

The discipline of photography is certainly one of the fields in which contemporary artists have found themselves fighting the limits of copyright. The techniques of photomontage and collage have certainly opened up a debate related to this topic.

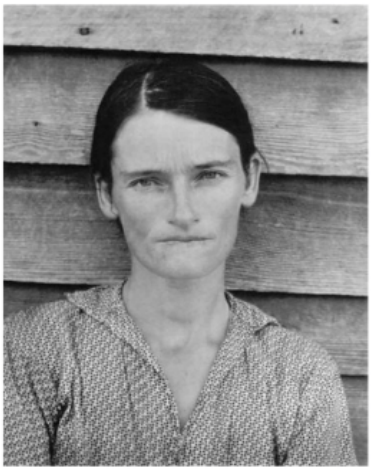
Since photography is an art in which it is not the "hand" of the artist that creates, but a series of mechanisms implemented by an instrument, the camera, there has been no lack of criticism regarding the subjection of photographic works to the discipline and protection offered by copyright. Today this aspect has been overcome by recognizing in the artist's choice of the right lights, poses and background the elements that justify the copyrightability of the works.

According to Melville Nimmer, professor of law, American lawyer and expert in freedom of speech, there are two cases in which a photograph does not meet the requirement of originality and therefore is not considered copyrightable: " *when a photograph of a photograph or other printed matter is made which amounts to nothing more than a slavish copying*" and " *when a photographer in choosing subject matter, camera angle, lighting etc., copies and attempts to duplicate all of such elements as contained in a prior photograph*".

The works of the simulationist photographers, artists who re-photograph photographs, fall in the first category formulated by Nimmer. One example is the *After Walker Evans* (fig.23) series by Sherrie Levine. The artist has produced a copy of the photographs taken by the photographer Evans, affixing her signature. Levine through this technique challenges the myth of the masterpieces and the notion of inventiveness and originality. Can this work be considered an autonomous, original work of art and therefore worthy of copyright protection? In my opinion, yes, based on the substantial meaning behind the formal aspect of the work. The artist invites the viewer to have a different interpretation of the work than the original. The work can be seen both as a criticism but also as a celebration of the artist who produced the original photo.



Walker Evans
Alabama Tenant Farmer Wife, 1936
Gelatin silver print



Sherrie Levine
After Walker Evans 1981

Fig.23

The categories proposed by Nimmer, in fact, limit the subjects that the photographer can use, thus preventing the photographer's creativity. As far as photography is concerned contemporary artists and photographers are increasingly having to face allegations of copyright infringements.

1.8 Conclusions.

This brief excursus from the art of ancient Rome to the very contemporary Levine shows how emulation first and then Appropriation never fails in any era, and how each artist understands and uses it as he or she chooses, depending on the message he or she wishes to convey. I have used this chapter both to give the reader a technical understanding of the history of Appropriationist art and to demonstrate how this movement has become an important part of the art world, despite being criticized by many. Furthermore, I have shown that if certain appropriationist works, which at first glance appear to be mere copies, are placed within the artist's entire artistic and philosophical panorama, they acquire a very interesting significance.

CHAPTER 2

THE COPYRIGHT LEGAL FRAMEWORK IN THE EUROPEAN COMMUNITY AND ITALY: CONTROVERSIAL CONCRETE CASES.

2.1 Introduction .

In this chapter I will analyze the European copyright discipline referring to different Directives and Regulations. Being a matter governed by 11 Directives 2 Regulations, numerous treaties and decisions of the CJEU, it would be impossible to analyze them all, I will focus on the Berne Convention which in 1886 established the mutual recognition of copyright among the adhering nations. I will focus therefore on the regime of exceptions and limitations to copyright in the Infosoc Directive. I will analyze some emblematic European cases, as we will see, since the exceptions and limitations to copyright, with the exclusion of one, are not mandatory for member states, the application of the discipline is fragmented throughout the territory of the Union. From this point of view, the CJEU is an important pillar, which attempts through its decisions to standardize the discipline.

Since I am an Italian student I will focus on the Italian situation. The second section of the chapter will concentrate, indeed, on the copyright legislation in vigor in Italy, regulated by Law 633 of 1941, obviously harmonized with European principles.

The purpose of this chapter is certainly to offer a clear legislative overview of the copyright discipline, but above all to highlight how the discipline as theorized today presents gaps and does not guarantee the same protection for all, when it comes to creative reuses and copyright limitations.

2.2 The Berne Convention : an overview on the international copyright legal framework.

The Berne Convention is an international agreement that was the first to provide the mutual recognition of copyright among its member nations. The idea behind this convention can be traced back to the French scholar Victor Ugo, actually the reasons coincide with the rise of the concept of copyright and authorship and the related economic and moral interests. The purpose of this Convention is to protect uniformly the rights of authors of literary and artistic works. Before the Convention came into force, in fact, the work of an Italian author was not protected in other countries such as France or England. The protection provided by the Convention is based on three fundamental principles:

1. the principle of “national treatment”

2. the principle of “automatic protection”
3. the principle of “independence of protection”

The process of drafting the text of the convention is quite long, beginning in fact on September 9th, 1886 in Berne and ending on May 4th, 1896 in Paris. The text was then the subject of numerous revisions: in 1928 in Rome, in 1948 in Bruxelles, in 1967 in Stockholm and finally 1971 in Paris.

What is the object of protection of the Convention? Literary and artistic works. The text opens with a definition of artistic literary work for the purposes of the Convention. Article 2(1)[8] makes it clear that: “*the expression ‘literary and artistic works includes all productions in the literary, scientific and artistic fields, whatever their mode or form of expression”*. Article 2, however, leaves the member countries free to provide that certain works not fixed by a material support are not covered by the aforementioned protection. The aforementioned article also provides protection for literary works such as encyclopedias without, however, affecting the protection of the individual works that are part of it. The protection of official legislative or administrative texts is always reserved to the internal legislation of member countries.

The subjects protected by the Convention are both the authors who are nationals to one of the countries of the Union, and the authors who have published their work in one of the above mentioned countries but who are not nationals of one of the member countries, and the authors who habitually reside in the countries of the Union. Published works are considered to be those edited with the consent of the authors and made available to the public.

Article 5 is undoubtedly one of the most important, as it deals with the rules of application of the protection provided by the Convention. Authors of works in countries other than their country of origin and which are part of the union, in fact, will enjoy the same protection and rights provided both by

[8] Art 2(1) Berne Convention : “The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.”

their country of origin[9] and by the Convention itself. The exercise of rights and the fruition is regulated by the national legislation of the country of origin. If the author is not national of the country of origin of the work, it will be protected as if he is.

As far as the author's rights are concerned, even after the transfer of the same, the right to claim the authorship of the work is not compromised. In fact, the author can oppose to any deformation, mutilation or operation that causes damage to the work itself. The term of protection provided for the work includes the life of the author and 50 years after his death. However, the countries of the union will be free to provide for a term of protection longer than that provided for by the convention. Paragraphs 2[10] and 3[11] of Article 7 provide different terms for specific works such as cinematographic works. With regard to collective works, the term is counted from the death of the last author.

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[9] Art 5(4) Berne Convention: The country of origin shall be considered to be:
(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;
(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:
(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and
(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

[10] Paragraph 2 Art. 7 Berne Conv: " However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

[11] Paragraph 3 art 7 Berne Conv: "In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

The Convention introduces one of the most important rights reserved to authors of works, namely the reproduction right. The right of reproduction consists in the exclusive right for the author to authorize the reproduction of the work in any way or form. If a work has already been made accessible to the public, quotations from it will be allowed, these quotations must mention the source and the name of the author. With regard to the use of works for illustrative purposes in teaching, the discipline is delegated to the legislation of the countries of the Union. In no circumstances can the author's right to fair compensation be infringed upon, nor the right to a fair hearing. The authorization of the author is required also in case of adaptations, variations or other transformations of the work. With regard to the cinematographic adaptation of an original work, the author of the aforementioned cinematographic work will enjoy the same rights as the author of the original work. The owner of the copyright on the cinematographic work is established by the legislation of the country in which protection is requested. In some countries of the Union the legislation includes among the rights holders the authors of the contributions made to the cinematographic work. Those who have contributed to the work cannot oppose the reproduction or circulation of the same, unless otherwise agreed.[12]

The author of an artwork will enjoy economic rights on every sale subsequent to the first transfer. This protection is guaranteed if the author's national law permits it and may therefore be invoked in another country of the Union to the extent that it is permitted. The amount shall be a matter of legislation of the country.

The protections offered by the Convention are such when the author signs his work, even with a pseudonym. The protection is therefore guaranteed without any formality. When it comes to anonymous or pseudonymous works, the publisher whose name appears on the work is considered the author's representative. As a representative, the publisher enforces the rights of the author and protects him from external interference. the moment the author reveals his name, the publisher's role expires. In the case of unpublished works of which the identity of the author is unknown, if it can be presumed that the author belongs to a country of the Union, it is reserved to the competent authority of that

[12] Art. 14-bis (2) lett. C Berne Conv.: " However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union."

country to designate a representative to safeguard his or her rights.[13]If a work is counterfeited, whether it comes from a country of the Union or from another country where the work is not protected, it will be confiscated in accordance with the legislation of each country.

The provisions of the Convention do not prevent individual governments from applying more extensive measures. The governments of the countries of the Union will be able to conclude agreements among themselves, provided that the agreements do not conflict with the provisions of the convention and guarantee more extensive rights than those granted by the convention itself.

Articles 22 et seq. of the Convention deal with structuring the organization of the Convention. An Assembly[14] of the countries of the union is established, in which the government of each country is represented by a delegate. Each member country has only one vote. Resolutions are voted by a two-

[13] Art. 15(4) lett. b Berne Conv.:" Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union."

[14] The functions of the Assembly are established by art.22(2) lett.a Berne Conv.: " The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Union and the implementation of this Convention;

(ii) give directions concerning the preparation for conferences of revision to the International Bureau of Intellectual Property (hereinafter designated as "the International Bureau") referred to in the Convention establishing the World Intellectual Property Organization' (hereinafter designated as "the Organization"), due account being taken of any comments made by those countries of the Union which are not bound by Articles 22 to 26;

(iii)review and approve the reports and activities of the Director General of the Organization concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union;

(iv) elect the members of the Executive Committee of the Assembly;

(v) review and approve the reports and activities of its Executive Committee, and give instructions to such Committee;

(vi) determine the program and adopt the triennial budget of the Union, and approve its final accounts;

(vii) adopt the financial regulations of the Union;

(viii)establish such committees of experts and working groups as may be necessary for the work of the Union;

(ix) determine which countries not members of the Union and which intergovernmental and international non-governmental organizations shall be admitted to its meetings as observers;

(x) adopt amendments to Articles 22 to 26;

(xi) take any other appropriate action designed to further the objectives of the Union;

(xii)exercise such other functions as are appropriate under this Convention;

(xiii)subject to its acceptance, exercise such rights as are given to it in the Convention establishing the Organization.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

thirds majority provided there is a quorum of half the participants. Each delegate may vote only on behalf of the country he or she represents. Countries that are not members of the assembly are also admitted to meetings but only as observers. The assembly meets every three years in ordinary session and is convened by the Director General. In special cases it may be convened in extraordinary session by the Director General at the request of the Executive Committee, or at the request of at least one-fourth of the participating countries. The Executive Committee shall consist of the delegates of the member countries elected at the Assembly. The Committee shall correspond to one-fourth of the number of member countries. In electing the Committee, however, the General Assembly shall take into account an equitable geographical distribution of seats. The members of the Executive Committee carry out their functions from the moment when the session of the Assembly that elected them is declared closed until the following one. The Assembly decides on the date of election of the members, who may be re-elected up to a maximum of two thirds of them. The Committee meets once a year in ordinary session. At the request of the Director General, at the initiative of the Committee itself, at the request of a quarter of its members or of its chairman, it may be convened in extraordinary session. The functions of the Executive Committee are regulated by article 23(6) of the Convention.[15]

The administrative functions are carried out by the International Bureau. The main task of this institute is to collect all information relating to copyright. Whenever a member state issues a legislative text relating to copyright, it communicates it to the International Bureau. The international office publishes a monthly updated magazine, every time that a country of the Union asks for it, it provides the relative information. Among the various functions there is also that of study and research.

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[15] Art. 23(6) Berne Conv.: "The Executive Committee shall:

(i) prepare the draft agenda of the Assembly;

(ii) submit proposals to the Assembly respecting the draft program and triennial budget of the Union, prepared by the Director General;

(iii) approve, within the limits of the program and the triennial budget, the specific yearly budgets and programs prepared by the Director General;

(iv) submit, with appropriate comments, to the Assembly the periodical reports of the Director General and the yearly audit reports on the accounts;

(v) in accordance with the decisions of the Assembly and having regard to circumstances arising between two ordinary sessions of the Assembly, take all necessary measures to ensure the execution of the program of the Union by the Director General;

(vi) perform such other functions as are allocated to it under this Convention.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Executive Committee shall make its decisions after having heard the advice of the Coordination Committee of the Organization."

2.3 Exceptions and limitations in the EU acquis.

2.3.1 Under the Berne Convention.

"*Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses*", Numa Droz, Chairman of the Berne Conference. In fact, an excessive protection of works without any kind of limitation or exception would harm the various interests at stake. Various interests are at stake when we talk about copyright, certainly important are the interests of authors, which as we have seen are well protected (in theory), the second type of interests are those of end- users, which can be protected only if a system of exceptions and limitations is established.
The Berne Convention already introduced the possibility of unauthorized use a work that was, however, legal.[16]The so-called three step test is based on three different conditions:

1. it has to be a special case
2. it doesn't have to conflict with a normal exploitation of the work
3. it doesn't have to unreasonably prejudice the legitimate interests of the author

The "three step- test" was originally applied only to the right of reproduction, in a second time it was extended to all exclusive rights.

We can divide copyright exceptions and limitations regarding the Convention into three categories:

1. "Limitations" on protection: copyright should not exist in some kind of works based on public policy grounds, art. 2(4). [17]
2. Exception to protection of a work for s "permitted uses" based on reason of public interests, art. 2*bis*(2). [18]

[16] Art. 9(2) Berne Conv.: " It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

[17] Art 2(4) Berne Conv.: " It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts."

[18] Art 2*bis*(2) Berne Conv.: "It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11bis (1) of this Convention, when such use is justified by the informatory purpose."

3. Compulsory licenses: allows the use of a copyrighted material under the payment of a compensation to the copyright owner, Article 11*bis* (2)[19]

However, these exceptions and limitations are optional, only one is mandatory and it is the one related to the quotation. Article 13 of the TRIPS agreement confirmed the validity of the three-step test but extended its application to all economic rights.[20]

2.3.2 Under the InfoSoc Directive.

The system adopted in Europe regarding exceptions and limitations is a closed system, in fact it is based on an exhaustive list of cases introduced by the InfoSoc Directive. Of all the directives governing this matter, the InfoSoc Directive is certainly one of the most important because it aims to harmonize exceptions to copyright for all types of works. It entered in force on 22 June 2021. One of the objectives of the directive is to ensure a high level of certainty and protection in the market of intellectual property. In the preamble[21], however, the Directive emphasizes the fact that the desire to ensure a system of exceptions to copyright does not mean completely dismantling the system of copyright protection. The ultimate goal is the harmonization of the discipline at European level; in fact, the Directive highlights how the various national systems relating to exceptions to copyright only contribute to an excessive fragmentation which has negative effects on the Internal Market.

The regime of exceptions and limitations is contained in Article 5 of the Directive.[22] However, only one of the exceptions is made mandatory to be adopted by member states. This exception applies to

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[19] Art 11*bis*(2) Berne Conv.: " It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

[20] Art 13 TRIPS Agreement: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

[21] Recital 22 of the InfoSoc Directive.

[22] Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable: a transmission in a network between

third parties by an intermediary, or a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation; in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or nonapplication of technological measures referred to in Article 6 to the work or subject-matter concerned; in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 of the European Parliament and of the Council(1); in respect of ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted; in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790;

uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability, without prejudice to the obligations of Member States under Directive (EU) 2017/1564 of the European Parliament and of the Council(2); reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible; quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose; use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings; use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible; use during religious celebrations or official celebrations organized by a public authority; use of works, such as works of architecture or sculpture, made to be located permanently in public places; incidental inclusion of a work or other subject-matter in other material;

use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use; use for the purpose of caricature, parody or pastiche; use in connection with

acts of reproduction considered technical copy of service providers, telecommunications operators and certain others under special circumstances. It is a guaranteed exception for temporary reproduction. Although it is compulsory and therefore technically implemented by all states, even in this case there have been some implementation problems that lead to an application that is not exactly uniform throughout the Union. As a matter of fact, the temporary reproduction is not considered an exception in Netherlands, since the Dutch Copyright Act doesn't consider temporary reproductions as part of the reproduction right.

All the other exceptions provided for in the list of Article 5 concerning the right to reproduce and the right to communicate are optional. This is certainly one of the critical aspects regarding the regime of exceptions. If, in fact, the purpose of the Directive is to harmonize the discipline, leaving so much discretion to national legislation means maintaining an internal fragmentation. Each member state is therefore free to incorporate the discipline as it prefers into its own legislation. In addition, the list is exhaustive, so no new exceptions can be introduced. Some exceptions (photocopying) are guaranteed in presence of fair compensation to rightsholders, so even in this case there is no total freedom of exercise of the relative right. The fair compensation is also defined by each member state, once again excessive discretion is given to member states, which means fragmentation.

We can categorize exceptions and limitations based on underlying foundations:

1. in favor of the public interest
2. in favor of fundamental freedoms (freedom of expression etc.)
3. for the benefit of private use

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the demonstration or repair of equipment; use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building; use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections; use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorized act of reproduction. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

The first category of exceptions has been made on the grounds that society could benefit from certain content only if it is made freely accessible. The exception of the benefit of libraries for example, has been introduced to ensure preservation of and access to culture. Article 5(2), however, makes no specific reference to what types of reproductions are permitted. Once again, too much discretion is given to the interpretation of each member state.

The second category includes the exception relating to the freedom of expression that is certainly the most important exception for the purposes of my thesis, because it is linked to the activity of the artist in the case of creative reuses. This exception was also introduced to permit the free movement of information. However, this exception has also been made optional for the member states. in my opinion, however, to make optional an exception that guarantees such an important freedom, which is among the fundamental rights, is a big mistake. As a matter of fact, freedom of expression is protected under Art 10 of the ECHR[23] and under Art 11 of the Nice Charter[24]. The respect of this principle is fundamental in a democratic society. This exception provides quotation for the purposes of criticism, the application of this exception has often been restricted only to texts rather than artistic works, for which is mostly not allowed. Basically, this type of exception therefore does not protect creative reuses. The second type of exception provided is that of parody, which, however, has been interpreted in a very restrictive manner; once again, this exception does not guarantee the protection of artistic works that are the outcome of creative reuses.

The last group of exception concerns the benefit of private use, which actually consist in the private copying exception. With regard to this exception, the type of medium used for copying is irrelevant, the copy must be made by a natural person, any type of commercial use is excluded and the rightholder is entitled to fair compensation. Fair compensation is provided for any prejudice to the rightholder, in

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[23] Art. 10 ECHR: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[24] Art 11 Nice Charter: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media shall be respected."

any case if the rightholder has already obtained a payment for example because he used a license, fair compensation is not due. Also, in this case it comes left much flexibility to the member states, therefore, also if this exception has been transposed from nearly all the states, the discipline turns out much various and fragmented above all as far as the regime of the compensations is concerned.

2.4 Case law.

2.4.1 The Court of Justice of the European Union.

The Court of Justice of the European Union has contributed a great deal to clarifying the more obscure points of the legislation, issuing judgments that have contributed to the construction of the copyright discipline. However, the case law, over time, has not always been consistent with each other. Therefore, if on the one hand the Court of Justice has contributed to harmonizing the discipline and clarifying it, on the other hand, in some cases it has created further confusion. I will analyze some of the Court's judgments in order to underline once again how the lack of a well codified instrument makes it difficult for authors to find a definitive framework of the legislation.

2.4.2 C-161/17 Land Nordrhein-Westfalen v. Dirk Renckhoff: notion of 'communication to the public'.

The question referred to the CJEU by the German Federal Court of Justice concerns a dispute relating to the need to request a new and additional authorization from the author in order to publish on an internet site his work, which is already freely accessible because it has been published on another site with the consent of the author. I decided to take into consideration, among many others, this judgment because I consider it important for the purposes of my thesis for two reasons: *in primis*, in this case, the European Court is in contrast with the case law previously issued on this subject, *in secundis* because I will make a comparison with an American decision that will highlight the differences between copyright legislation among Europe and United States. The very fact that this judgment is in discontinuity with the previous ones, supports my theory: the lack of clarity of the discipline does not allow the courts to have the same orientation. Moreover, I consider this judgment very interesting because it highlights a further issue, namely the difficulties of copyright law in keeping up with ongoing technological developments.

As regards the legal framework of this case, I think it is fair to make a brief mention, albeit having analyzed extensively the copyright regulation in the preceding paragraphs. As to the concept of "communication to the public", in fact, Recital 23 of the InfoSoc Directive understands it very broadly, stating that : " *This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting*." This notion is also recalled in Article 3 of the Directive[25]. Article 5[26] of the Directive relating to exceptions and limitations to copyright also plays a very important role in this case. In addition, reference should certainly be made to the German national copyright law (*Urheberrechtsgesetz*). German law in fact refers both to the protection of photographic works and to communication to the public in § 52.

The case concerns the illustrative but unauthorized use of a photograph of the city of Córdoba taken by the photographer Renckhoff by a pupil of the Gesamtschule of Waltrop: the pupil, while carrying out a school project for a language laboratory, had first downloaded and then published on her school's website the photograph that is the subject of the proceedings, which was already available on a travel

[25] Art. 3 InfoSoc Directive: " Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. Member States shall provide for the exclusive right to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
(a) for performers, of fixations of their performances;
(b) for phonogram producers, of their phonograms;
(c) for the producers of the first fixations of films, of the original and copies of their films;
(d) for broadcasting organizations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article."

[26] Art. 5(3)a InfoSoc Directive : " Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790;"

website, where it had initially been published with the consent of its author. The photographer then sued the local government running the school for copyright infringement. The court of first instance partially upheld the photographer's appeal and ordered the removal of the image from the school's website and in addition to the payment of the compensation for damages. The decision was then appealed to the Superior Court of Land (*Oberlandesgericht Hamburg*), which considered irrelevant the fact that the author had authorized the online publication of the photo and had not placed any restrictions to prevent its use, and ruled that the download and publication on the website of the school was a copyright infringement. The German Federal Court of Justice therefore decided to refer a question to the CJEU for a preliminary ruling : " *Does the inclusion of a work – which is freely accessible to all internet users on a third-party website with the consent of the copyright holder – on a person's own publicly accessible website constitute a making available of that work to the public within the meaning of Article 3(1) of [Directive 2001/29] if the work is first copied onto a server and is uploaded from there to that person's own website?".* Essentially, the questions were twofold: whether the uploading to a website of a photo taken from an authorized website could fall within the notion of 'communication to the public', and whether the online upload should be considered as communication to a 'new public'.

It is also interesting to analyze the Court's response in the light of the Advocate General's opinion on the case, which takes a more liberal stance. The criticisms relating to copyright exceptions are also highlighted by the fact that on the same case the Advocate General takes a certain stance while the Court's judges take another. As a matter of fact, in April 2018, the Advocate General of the CJEU in its conclusions underlined the fact that the absence of the name of the author of the photograph on the travel website and the lack of restrictions on the free use of the image "*would have encouraged the pupil and her teacher to assume, once again legitimately, and without any need for further enquiries, that the photograph was freely available to the public*.[27]" However, this approach is not shared by the Luxembourg judges, who emphasize that the exercise of copyright should not be subject to any formality. Also, on the concept of 'new public' the opinions of the Advocate General and the CJEU are discordant. While on the one hand the Advocate General highlights the fact that since the photo was published without any kind of restrictions it was already legally accessible by all Internet users, on the other hand the judges of the Court consider that there was a distinction between the public of the travel website and the public of the school website, which would constitute the so-called 'new

[27] Opinion of Advocate General Campos Sánchez-Bordona, 25 April 2018, C-161/17, Land Nordrhein-Westfalen v. Dirk Renckhoff (2018), § 75.

public'. The third point on which the Advocate General and the Court do not agree is the issue concerning the didactic exception in Article 5(3) of Directive 29/2001. According to the Advocate General, the Court should have given a more expansive interpretation to this exception, but once again the Court has taken a more restrictive position. The final answer to the preliminary ruling was therefore : "*the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that it covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website*".

As I have argued before, the essence of a tool such as fair use would, in my view, be very useful for the resolution of disputes of this kind. Starting from the assumption that I embrace a more expansive solution than the one given by the CJEU and therefore closer to the Advocate General's opinion, it seemed to me appropriate to highlight how the application of fair use in a similar case has led to a diametrically opposed solution in the United States. The case I refer to is *Russel Brammer v. Violent Hues Productions*, *LLC No. 1-17-cv-01009*. The facts relate to a time lapse of Washington D.C. taken by photographer Russel Brammer and posted on his personal website. Violent Hues, a film festival organizer, posted a cropped version of the photo on its website with information on what to do in Washington D.C. The photographer was therefore convinced that his copyright had been infringed and sued Violent Hues. The Federal Court of the State of Virginia held that the use made by Violent Hues fell under the scope of fair use. The reasons given by the Court are several. The Court pointed out that the defendant's use was quite transformative and not commercial. It also stressed that the purpose of Violent Hues was informative and not expressive and that the use was made in good faith.
Furthermore, the Court acknowledged the fact that Violent Hues' use had no negative market effects whatsoever for the photographer.

2.4.3 C-466/12 Svensson.

I decided to consider the *Svensson case* in relation to the *Renckhoff case* in order to highlight how the CJEU in 2014 came to one solution and in 2018 to another completely opposite one in regard to the

interpretation of Article 3(1) of Directive 2001/29/EC. The *Svensson case* concerns the making available of copyright-protected content that has already been published on a second website without any measures to restrict access. The applicants in the proceeding are journalists who wrote articles published on the *Göteborgs-Posten* website and have sued Retriver Sverige, which operates a website on which there are links that redirects users to articles published on other websites. The court of first instance dismissed the plaintiffs' application and they therefore appealed the judgment to the court of second instance, which decided to stay the proceedings and refer certain preliminary questions to the CJEU. Specifically, the questions were as follows:
"(1) If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive [2001/29]?

(2) Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?

(3) When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?

(4) Is it possible for a Member State to give wider protection to authors' exclusive right by enabling communication to the public to cover a greater range of acts than provided for in Article 3(1) of Directive 2001/29?"

The CJEU stressed that communication to the public consists of two fundamental elements: an 'act of communication' in the broad sense and that the act is addressed to a 'public'. Both elements are present in the concrete case. However, the Court rightly pointed out that in order to fall within the notion of Article 3(1) it is necessary that the act of communication is addressed to a 'new public'. The Court therefore did not consider the public of the defendant's site as 'new': " *In the circumstances of this case, it must be observed that making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a new public.*" As a matter of fact, the public which could have accessed the content by means of the clickable link should be qualified as indeterminate because it is potentially composed of all the users of the

Internet. Consequently, the authorization of the copyright holder is not required. The Court's final answer is as follows: *"Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public', as referred to in that provision. Article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision."*

In conclusion, having analyzed these three judgments, I wanted to highlight how the Court of Justice gives different interpretations to the same provision in relation to similar cases. In addition, I wanted to point out how completely identical cases are judged differently in different parts of the world, due to the fact that the decision-making criteria used are different and the instruments are also different.

2.4.4 Toward a more liberal interpretation by the CJEU: Funke Medien, Pelham and Spiegel Online decisions.

As will be analyzed in the next section , often the CJEU and ECHR have found themselves to have different positions regarding the issue of exceptions and limitations to copyright . In fact, the former has i taken a more restrictive approach, while the latter has been more liberal by appealing to freedom of expression. However, in more recent years, the CJEU has also shown itself to be more open to a more liberal interpretation. Indeed , in 2019, three very important decisions were issued that demonstrate the CJEU's greater flexibility: *Funke Medien*, *Pelham* and *Spiegel Online*. If, however, the CJEU proves to be more flexible in ruling that exceptions and limitations to copyright must be interpreted in light of foundational rights, specifically in light of freedom of expression, it remains adamant on the fact that an external exception cannot be introduced and that therefore existing exceptions remain categorical and peremptory. In this section the three decisions will first be analyzed in fact and in law, then a final commentary on their importance will be made.

Before analyzing the legal issues in the Funke Medien case, it is necessary to refer to the factual issue. Funke Medien is an online portal that runs a German newspaper *Westdeutsche Allgemeine Zeitung*. Funke Medien requested from the Federal Republic of Germany access to *Unterrichtung des*

Parlaments i.e., parliamentary briefings of weekly military reports regarding army operations on foreign soil. In German law there are four levels of confidentiality , the *Unterrichtung des Parlaments* are classified at the lowest level. Authorities, however, refused to provide such information, which was retrieved through anonymous means by Funke Medien and posted on the online portal. The Federal Republic of Germany sought an injunction action against Funke Medien on the grounds that its copyrights had been infringed. The matter went all the way to the German Supreme Court, which decided to stay the proceeding and refer the question for a preliminary ruling to the CJEU. The question was as follows :

"(1) Do the provisions of Union law on the exclusive right of authors to reproduce (Article 2(a) of Directive 2001/29) and publicly communicate their works, including the right to make works available to the public (Article 3(1) of Directive 2001/29), and the exceptions or limitations to these rights (Article 5(2) and (3) of Directive 2001/29) allow any latitude in terms of implementation in national law?

(2) In which way are the fundamental rights of the [Charter] to be taken into account when ascertaining the scope of the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29 to the exclusive right of authors to reproduce (Article 2(a) of Directive 2001/29) and publicly communicate their works, including the right to make works available to the public (Article 3(1) of Directive 2001/29)?

(3) Can the fundamental rights of freedom of information (second sentence of Article 11(1) of the Charter) or freedom of the media (Article 11(2) of the Charter) justify exceptions or limitations to the exclusive rights of authors to reproduce (Article 2(a) of Directive 2001/29) and publicly communicate their works, including the right to make works available to the public (Article 3(1) Directive 2001/29), beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29?"

With regard to the *Pelham* case, the facts concerned a music group *Kraftwerk* who had produced a song called "*Metall auf Metall"*. The band members claimed that the composers Pelham and Haas had copied a two-second sample in their song "*Nur min"* and repeated it several times in the song. The band members alleged the infringement of their intellectual property rights and asked the territorial court to stop the infringement and award damages. This case also goes all the way to the Constitutional Court of Germany, which in analyzing the facts decides to request a preliminary ruling from the CJEU with these questions:

"(1) Is there an infringement of the phonogram producer's exclusive right under Article 2(c) of Directive 2001/29 to reproduce its phonogram if very short audio snatches are taken from its phonogram and transferred to another phonogram?

(2) Is a phonogram which contains very short audio snatches transferred from another phonogram a copy of the other phonogram within the meaning of Article 9(1)(b) of Directive 2006/115?

(3) Can the Member States enact a provision which — in the manner of Paragraph 24(1) of [the UrhG] — inherently limits the scope of protection of the phonogram producer's exclusive right to reproduce (Article 2(c) of Directive 2001/29) and to distribute (Article 9(1)(b) of Directive 2006/115) its phonogram in such a way that an independent work created in free use of its phonogram may be exploited without the phonogram producer's consent?

(4) Can it be said that a work or other subject matter is being used for quotation purposes within the meaning of Article 5(3)(d) of Directive 2001/29 if it is not evident that another person's work or another person's subject matter is being used?

(5) Do the provisions of EU law on the reproduction right and the distribution right of the phonogram producer (Article 2(c) of Directive 2001/29 and Article 9(1)(b) of Directive 2006/115) and the exceptions or limitations to those rights (Article 5(2) and (3) of Directive 2001/29 and the first paragraph of Article 10(2) of Directive 2006/115) allow any latitude in terms of implementation in national law?

(6) In what way are the fundamental rights set out in [the Charter] to be taken into account when ascertaining the scope of protection of the exclusive right of the phonogram producer to reproduce (Article 2(c) of Directive 2001/29) and to distribute (Article 9(1)(b) of Directive 2006/115) its phonogram and the scope of the exceptions or limitations to those rights (Article 5(2) and (3) of Directive 2001/29 and the first paragraph of Article 10(2) of Directive 2006/115)?"

The third decision the *Spiegel online* case concerns a literary work. The facts concerned Mr. Beck, who was a member of the German parliament at the time. Mr. Beck had written an article on sexual offences against minors, which was then published in a journal, in which a sentence from the original manuscript had been shortened by the publisher. In later years, Mr. Beck received criticism regarding

the content of his article, he repeatedly tried to defend himself on the grounds that his words had been modified. Around 2013, Mr. Beck published the manuscript on his personal website, explaining that he distanced himself from the words published in the journal. However, Spiegel online, an information website, published an article claiming that Mr. Beck had misled his audience because the central meaning of the manuscript had not been altered by the publisher. Mr. Beck therefore sued Spiegel online on the basis that it had infringed his copyright by publishing the text of his article on the website. The Land Court accepted Mr. Beck's arguments and Spiegel online appealed to the Constitutional Court of Germany. The Court decided to stay the proceeding and to refer a preliminary ruling to the CJEU :

" (1) Do the provisions of EU law on the exceptions or limitations [to copyright] laid down in Article 5(3) of Directive 2001/29 allow any discretion in terms of implementation in national law?

(2) In what manner are the fundamental rights of the Charter of Fundamental Rights of the European Union to be taken into account when determining the scope of the exceptions or limitations provided for in Article 5(3) of Directive 2001/29 to the exclusive right of authors to reproduce (Article 2(a) of Directive 2001/29) and to communicate to the public their works, including the right to make their works available to the public (Article 3(1) of Directive 2001/29)?

(3) Can the fundamental rights of freedom of information (second sentence of Article 11(1) of the Charter) or freedom of the press (Article 11(2) of the Charter) justify exceptions or limitations to the exclusive rights of authors to reproduce (Article 2(a) of Directive 2001/29) and communicate to the public their works, including the right to make their works available to the public (Article 3(1) of Directive 2001/29), beyond the exceptions or limitations provided for in Article 5(3) of Directive 2001/29?

(4) Is the making available to the public of copyright-protected works on the web portal of a media organization to be excluded from consideration as the reporting of current events not requiring permission as provided for in Article 5(3)(c), second case, of Directive 2001/29, because it was possible and reasonable for the media organization to obtain the author's consent before making his works available to the public?

(5) Is there no publication for quotation purposes under Article 5(3)(d) of Directive 2001/29 if quoted textual works or parts thereof are not inextricably integrated into the new text — for example,

by way of insertions or footnotes — but are made available to the public on the Internet by means of a link in [Portable Document Format (PDF)] files which can be downloaded independently of the new text?

(6) In determining when a work has already been lawfully made available to the public within the meaning of Article 5(3)(d) of Directive 2001/29, should the focus be on whether that work in its specific form was published previously with the author's consent?"

Basically, the questions asked by the German Court in the three different cases to the CJEU are the same: is it possible to justify an external exception to copyright based on freedom of expression? The CJEU decided to follow the interpretation given by Advocate General Spuznar who issued an opinion for all three cases. in fact, The Advocate General argued that certainly the freedom of expression is fundamental in the interpretation of the exceptions and limitations provided by Article 5 of the InfoSoc Directive, but that creating an external exception based on the FoE in addition to those already existing would not be possible. The CJEU therefore emphasizes in all three judgments that the exceptions should not be seen as derogations to copyright, but as real rights of third parties[28]. The Luxembourg Court therefore went a long way in making this statement. Basically, although it took a much more liberal approach than its predecessors, it decided to keep the list of exceptions a closed list. The Court recognized the importance of fundamental rights in the interpretation of Article 5 InfoSoc Directive, giving more flexibility to national courts. The CJEU in fact considers that there are already safeguards for users of copyrighted works within the existing legislation, exceptions and limitations are "*specifically intended [...] to ensure a fair balance between, on the one hand, the rights and interests of rightholders [...] and, on the other, the rights and interests of users of works or other subject matter.*"[29] The Luxembourg Court considers that the already existing exceptions and limitations when interpreted in the light of fundamental rights are safe-harbor for users' rights.

2.4.5 The European Court of Human Rights: balancing freedom of expression and copyright.

[28] CJEU, Judgments in Funke Medien, at para. 70 :" although Article 5 of Directive 2001/29 is expressly entitled 'Exceptions and limitations', it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter"

[29] CJEU, Judgments in Funke Medien, at para. 70, and Spiegel Online, at para. 54.

After the entry into force of the European Charter of Fundamental Rights in 2012, the CJEU has been more diligent in balancing its decisions by taking into account and referring to the fundamental rights expressed in the charter. The European Court of Human Rights has certainly played a fundamental role. The *Ashby Donald v. France* judgment is emblematic, in which photographers invited to a fashion show were sued by various fashion houses for taking photos of the show and publishing them on a specialized website. The photographers therefore appealed to the ECtHR for violation of their right of expression under Article 10 of the ECHR[30]. The Court's response is very important, as it stressed that intellectual property rights must be understood as exceptions to freedom of expression and not vice versa. It also emphasized that national courts must take freedom of expression into account and strike a fair balance when applying restrictions, especially when it comes to political and artistic freedom of speech. I consider appropriate to quote some passages from the judgment in question relating to paragraph 38. As a matter of fact the judges stated that : " *freedom of expression constitutes one of the essential bases of a democratic society, one of the basic conditions for its progress and the development of each individual*" and that : " *it involves exceptions that in any event require a narrow interpretation, and the need to restrict it must be established convincingly*."

2.4.6 National Courts and Article 10 ECHR.

Some national courts have also followed the ECtHR's lead, while others continue to adopt contrasting approaches. An emblematic decision in the footsteps of the ECtHR is that of the French Supreme Court of Cassation in the *Klasen v. Malka case*. The facts concerned the appropriation by the French artist Peter Klasen of photographs (fig. 26) taken from an Italian fashion magazine and then inserted into one of his paintings (fig.27) for the purpose of criticism. The photographer of the original photos discovered this and sued him for infringement of his author's rights.

[30] Art. 10 ECHR: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"

Fig.26 photograph of the magazine “Flair”,
Alix Malka (via alixmalka.com)

Fig. 27 *Painting*, Peter Klasen
(via ipkitten.blogspot.com)

The Paris District Court held that Malka's photograph lacked the requirement of originality and were therefore not covered by copyright, thus rejecting the applicant's claims. Instead, the Court of Appeal recognized the originality of the photos and therefore stressed that the photos were copyrighted, rejecting the possibility of applying the exceptions of quotation and parody, and dismissed Klasen's claims based on freedom of expression as not sufficient to limit the author's rights to the original photos. The Court of Cassation therefore annulled the decision of the Court of Appeal based on article 10 ECHR. Specifically, it annulled the judgement, pointing out that the court of appeal had not explained in concrete terms how it had established the right balance between the various interests at stake by failing to take into account the right of freedom of expression.

If on the one hand, in the decision on the previous case, we can see the Court's awareness of the problem of the violation of freedom of expression when it comes to creative reuse and copyright, on the other hand, always in France we can see a completely opposite decision on a similar case.
I am referring to the case of *Koons v. Bauret* in which the French photographer Bauret sued the American artist for producing a porcelain sculpture (fig.28) called *“Naked”,* taking inspiration from Bauret’s photography *“Enfants*” (fig.29). The photo essentially depicted two naked children, those subjects were taken by Koons and adapted to his work.

Fig. 29 *Enfants*, Bauret
(via connaisencedesart.com)

Fig.28 *Naked,* Jeff Koons.
(via artforum.com)

The French High Court recognized the importance of balancing copyright with freedom of expression but denied that Koons' work was sufficiently transformative and therefore ordered him to pay damages to Bauret's heirs. The Court also reversed the burden of proof by placing on Koons the burden of proving why he used Bauret's photograph as inspiration without asking his authorization. An artist was thus asked to justify his artistic inspiration, which goes completely against the *ratio* of Article 10 ECHR. I felt I had to analyze this case for several reasons. First and foremost, I wanted to demonstrate once again how different courts have different yardsticks of judgement. Secondly, I wanted to emphasize that this particular judgement, instead of defending an artist, left him completely exposed: it required an artistic justification, which goes against the artists' own freedom to create, and it did not take into account the characteristics of the artistic movement to which Koons belongs.

2.5 The legal framework of Italian copyright law.

The protection of copyright in Italy is deferred to law 633 of 1941, over the years, obviously, the Italian discipline has gone along with the European discipline, conforming to the principles dictated by the InfoSoc Directive and taking into consideration the Berne Convention. In this section, therefore, I will

analyze the regulations dictated by the aforementioned law and the innovations made by Legislative Decree 181/2021 implementing the 2019 European Copyright Directive. The last part will be devoted to a famous judgment of an Italian court.

2.5.1 Law 633/1941 : the regulatory framework.

Copyright, as provided in Article 131, protects all creative works of a literary, musical, artistic, architectural, theatrical or cinematographic nature. It also protects works that can be attributed to any other form of expression, including programs necessary to elaborate literary creations and even databases, which by choice or arrangement of material, can be considered as the author's ideas. Collective works are considered original and as such are protected by copyright, regardless of, and without prejudice to, the protection accorded to the creations that compose them.32 There are also works that are not protected by copyright. As pointed out in point 9 of art 2, for example "*the protection of databases does not extend to their content and does not affect existing rights in that content*". The protection of databases is guaranteed at European level by Directive 96/9/EC. In the light of the considerations above, therefore, a work is creative, not necessarily when it gives rise to something absolutely new, but also when it is original, innovative and "creative" and is the author's personal elaboration of something that already exists. Copyright protects both the externalized form of the work, such as a sculpture, and the more intimate and inner expression, which can be the elaboration of the plot of a film or literary creation.

The author has the exclusive right to publish the work, to use it economically in any form and manner, whether original or derivative, within the limits set by law. For example, Article 12bis[33] states that the

[31] Art 1 L.633/41: " Intellectual works of a creative nature belonging to literature, music, the figurative arts, architecture, theatre and cinematography shall be protected under this Law, whatever their mode or form of expression. Computer programs are also protected as literary works within the meaning of the Berne Convention on the Protection of Literary and Artistic Works ratified and implemented by Law No. 399 of 20 June 1978, as well as databases which, by the choice or arrangement of the material, constitute an intellectual creation of the author."

[32] Art 3 L.633/41: " Collective works, consisting of a combination of works or parts of works, which have the character of an autonomous creation, as a result of the selection and coordination for a specific literary, scientific, educational, religious, political or artistic purpose, such as encyclopedias, dictionaries, anthologies, magazines and newspapers, shall be protected as original works, independently of and without prejudice to copyright in the works or parts of works of which they are composed."

[33] Art 12bis L.633/41: " Unless otherwise agreed, the employer shall have the exclusive right to the economic exploitation of the computer program or database created by the employee in the performance of his duties or following instructions given by the employer."

employer has the right to use the work created by his employees in the performance of their duties. The same principle is laid down by Art. 88[34] with regard to photographic works. Where the photographic work is obtained during and in performance of a contract of employment, the economic exploitation of the photographs belongs to the employer and the principal, subject to an equitable remuneration for the photographer. Copyright protection arises at the moment the work is created. It is not necessary to go through excessive formalities to have your creation protected by law, but only to prove its authorship, originality and the fact that no one has conceived it before. To this end, it is advisable to deposit your work with the SIAE[35], which certifies the date. Apart from issuing a certificate of deposit, the SIAE does not check the work, so accepting the deposit does not guarantee copyright protection if the work is not among those worthy of protection. Article 20 protects the moral right of the work, i.e. "*the right to claim the authorship of the work and to oppose any distortion, mutilation or other modification, and any act to the detriment of the work itself, which may be detrimental to its honor or reputation*". This is irrespective of the rights of economic use of the work, which may be recognized, as specified, also to persons other than the author. The right to paternity of the work is inalienable, even though once the author accepts the changes, he cannot prevent it from being performed in that way or ask for it to be suppressed. The death of the author does not invalidate the right to claim the paternity of the work, which the law recognizes as belonging to the spouse, children, parents, direct ascendants and descendants, brothers, sisters and their descendants, and to the competent Minister, after consulting the Trade Union Association, if there are public reasons.

The rights of economic use of the work include the following faculties:

- publication and use;
- reproduction by any means;
- dissemination, including at a distance by appropriate means;

[34] Art 88 L.633/41: " The photographer is entitled to the exclusive right of reproduction, diffusion and distribution of the photograph, subject to the provisions of Section II of Chapter VI of this title, as far as portraits are concerned and without prejudice, with regard to photographs reproducing works of figurative art, to the copyright on the work reproduced. However, if the work has been obtained in the course and in the performance of a contract of employment or work, within the limits of the object and purpose of the contract, the exclusive right shall belong to the employer. The same rule shall apply, unless otherwise agreed in favor of the principal when it concerns photography of things in the possession of the principal and unless the person who uses the reproduction commercially pays the photographer an equitable consideration. The Minister for Cultural Assets and Activities, with the rules established in the regulation, may establish specific tariffs to determine the remuneration due by the user of the photograph."

[35] The Italian Society of Authors and Publishers is a public economic body with a membership base, responsible for the protection and intermediation of copyright in Italy

- distribution, including commercial distribution;
- translation, transformation and processing;
- rental and temporary assignment.

All these operations require the consent of the author of the work and, in most cases, the payment of a fee in his favor. These rights last for the author's lifetime and until the end of the 70th year after his death, except in special cases provided for by the Law. After this long period of time, the works become of public domain. They can therefore be published freely on condition that the author's honor and reputation are respected, and actions to defend them are provided for without time limits and can be exercised by the heirs.

The utilization rights recognized to authors of intellectual works and the connected rights of a patrimonial nature may be purchased, sold or transmitted in all the ways and forms permitted by law, subject to compliance with the rules laid down by the Law. As specified by Art. 109[36], the transfer of one or more copies of the work does not also entail, unless otherwise agreed, the transfer of the utilization rights as provided for and regulated by the L.A. In fact, there is a distinction between the transfer of the work and the copyright on the same. For this reason, it is necessary that the will to transfer all or a part of the patrimonial rights on the work results from a written deed. The transfer of the patrimonial rights of a work may also take place by entering into a license agreement, whereby the author grants the right to exploit the work for a limited period or for a specific purpose, while retaining ownership. Once the contract has expired, the author can grant the rights to the work to another person. The license may be exclusive or non-exclusive and may cover all or only part of the rights.

Chapter V of the Law is entitled "exceptions and limitations" and is obviously the chapter on which I dwell most, because it is the section that potentially concerns the concept of creative re-use.

Article 65 Law was amended by Legislative Decree no. 68 of 9 April 2003, implementing Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society. The text currently in force provides that news articles of an economic, political or religious nature published in magazines or newspapers, or broadcast or made available to the public, and other material of the same nature may be freely reproduced or communicated to the public in other magazines or newspapers, including radio and television, if the reproduction or use has not been expressly reserved, provided that the source from which they are taken, the date and the author's name,

[36] Art. 109 Law.633/41: " The transfer of one or more copies of the work does not imply, unless otherwise agreed, the transfer of the rights of use governed by this law. However, the transfer of a print, engraved copper or other similar means used to reproduce a work of art shall, unless otherwise agreed, include the faculty to reproduce the work itself, provided that such faculty belongs to the transferor."

if given, are indicated. In order for the exception to be validly applied, the following requirements must be met;

- they must be news articles of an economic, political or religious character, or other material of the same character;
- published in magazines or newspapers;
- the reproduction or use has not been expressly reserved;
- republication or communication to the public may only take place in other magazines or newspapers (including radio or television);

Article 66 provides for one of the so-called "public interest exceptions" and concerns the free reproducibility of speeches of public interest. Article 68[37] regulates the possibility of making photocopies for personal use of purely literary works. Article 68*bis* provides that, without prejudice to the liability of intermediary service providers under the rules on electronic commerce (Legislative Decree 70/2003), acts of temporary reproduction which are transient or incidental and an integral and essential part of a technological process, and which are performed for the sole purpose of enabling the

[37] Art. 68 L. 633/41 : " Reproduction of individual works or extracts of works for the personal use of readers by hand or by means of reproduction not suitable for distribution or dissemination to the public is free. The photocopying of works existing in publicly accessible libraries or in school libraries, public museums or public archives, carried out by these bodies for their own services, without any direct or indirect economic or commercial advantage, is free. Without prejudice to the prohibition of the reproduction of musical scores and scores, the reproduction for personal use of original works by photocopying, xerocopying or similar means shall be permitted within a limit of fifteen per cent of each volume or issue of a periodical, excluding advertising pages. The persons in charge of reproduction outlets or centers which use photocopying, xerocopying or similar reproduction equipment on their own premises or make it available to third parties, even free of charge, must pay compensation to the authors and publishers of the original works published for the printed matter reproduced by means of such equipment for the uses set out in paragraph 3. The amount of this remuneration and the methods of collection and distribution are determined according to the criteria laid down in article 181-ter of this law. Unless otherwise agreed between SIAE and the associations of the categories concerned, this fee may not be lower for each page reproduced than the average price per page for books as recorded annually by ISTAT. Reproductions for personal use of works existing in public libraries, made within those libraries by the means referred to in paragraph 3, may be made freely within the limits established by the same paragraph 3 with payment of a flat-rate fee to those entitled under paragraph 2 of article 181-ter, determined in accordance with the second sentence of paragraph 1 of article 181-ter. This fee shall be paid directly each year by the libraries, within the limits of the revenue collected for the service, without additional charges to the State budget or to the bodies on which the libraries depend. The limits referred to in paragraph 3 shall not apply to works not included in the editorial catalogues and rare because they are difficult to find on the market. The distribution to the public of the copies referred to in the previous paragraphs and, in general, any use in competition with the rights of economic use due to the author is prohibited."

transmission over a network between third parties with the intervention of an intermediary, or a lawful use of a work or other subject matter, are exempted from the reproduction right.

Article 70[38] is very important because it reproduces the exception of quotation of Article 5 of the InfoSoc Directive. Subject to the application of the three steps test and its positive outcome, Art. 70 establishes that the quotation or partial reproduction of the work and its communication to the public is free:

- if made for the purpose of criticism and discussion, within the limits of such purposes and provided that they do not constitute competition for the economic use of the work;
- if carried out for teaching or scientific research purposes, the use must also be for illustrative and non-commercial purposes.

Doctrine and jurisprudence interpret this article strictly, restrictively and not analogically, like the other cases of free use. This Article is also applicable in cases of making the work available online.

In order to protect authors, producers of phonograms, original producers of audiovisual works and producers of video grams from the phenomenon of audio-video reproduction for private use, the Italian legislature chose a mechanism which provides on the one hand for a right to remuneration in favor of the right holders and on the other hand for the lawfulness of reproduction for private use.

In the Italian legislative text there is basically no reference to the possibility of creative reuse, which in the event must be included in any of the exceptions provided for. Actually, with regard to a derivative work, which is an intellectual work derived from one or more pre-existing works, in that it constitutes a translation, graphic reproduction, musical, theatrical or cinematographic adaptation of the original work, it's established that the only person entitled to create derivative works is the author. So, once again, I believe that the inclusion of a specific instrument such as American fair use, which I will discuss in the following chapters, is fundamental to protect the creativity of all those authors who make

[38] Art 70 L.633/41 : " The summary, quotation or reproduction of excerpts or parts of a work and their communication to the public shall be free of charge if carried out for purposes of criticism or discussion, to the extent justified by such purposes and provided that they do not constitute competition for the economic exploitation of the work; if carried out for purposes of teaching or scientific research, the use must also be for illustrative and non-commercial purposes. It is allowed the free publication through the internet, free of charge, of low-resolution or degraded images and music, for educational or scientific use and only if such use is not for profit. By decree of the Minister for Cultural Assets and Activities, after consultation with the Minister for Education and the Minister for Universities and Research, and subject to the opinion of the competent parliamentary committees, the limits to the educational or scientific use referred to in this paragraph shall be defined. In anthologies for scholastic use, reproduction may not exceed the amount determined by the regulation, which shall establish the method for determining fair compensation. The summary, quotation or reproduction shall always be accompanied by a reference to the title of the work, the names of the author, the publisher and, in the case of a translation, the translator, where these particulars appear on the work reproduced."

of Appropriation art their main creative medium. Through this law, in fact, these authors are not only not protected, but are exposed to the possibility of being suited by other authors without the possibility of enforcing their rights.

In Italy, in addition to law 633/1941, which at Art. 185 establishes its applicability also "*to the works of foreign authors, domiciled in Italy, which have been published for the first time in Italy"*, when it is necessary to regulate the protection that domestic law grants also to foreign authors, reference must be made to international conventions. The second paragraph of art. 186 of the L.A. also states that "*If the conventions contain a generic reciprocity or equal treatment pact, this pact shall be interpreted according to the rules of equivalence in fact of the two protections established in the following articles".*

2.5.2 Novelties introduced by Legislative Decree 181/2021.

In 2019, the EU, albeit with Italy voting against, approved the Copyright Reform Directive, which Member States are now required to implement. With it, among other things, print publishers will be able to enter into agreements whereby online platforms will have to pay to use their content, while short links and snippets will remain free. In addition, large platforms (e.g. YouTube) will be sanctioned for the dissemination of copyrighted content by users. For medium-sized platforms, however, the control obligations are mitigated and disappear for small ones. Finally, it is worth noting the exclusion of the obligation to comply with the new copyright rules with reference to the uploading of content to online encyclopedias (such as Wikipedia) and for memes, such as parodies or quotations.

Among the innovations, some of which appear to be of historic importance, are the recognition of the figures of dubbing directors, dubbers, dialogue adapters and translators, the appreciation of the role of collective management bodies and the introduction of transparent mechanisms in line with the digital era. New obligations regarding transparency, contractual adaptation and, finally, termination of the exclusive license agreement in case of non-exploitation of the work have been introduced to protect the weaker party in the contractual relationship (copyright owner or artist). These measures, which are bound to have a significant impact on the existing copyright law (Law 633 of 22 April 1941), also provide new opportunities for the creative industry. On the one hand, the value of authors and performers takes center stage and, on the other hand, greater transparency in the use of works by digital platforms is ensured.

The principle of adequate remuneration proportionate to the potential or actual value of the licensed or transferred rights to be paid to authors, performers or artists of the work is affirmed. In certain limited cases, the remuneration of authors and artists may be realized as a lump sum instead of being commensurate with the revenue derived from the exploitation of their works. If there is no agreement between the parties, the amount of the remuneration due is defined by AGCOM.[39]

The possibility of using copyright-protected material also in digital form is strengthened. The exceptions allowing such uses have been updated and adapted to technological changes to allow for online and cross-border uses. A specific regime is introduced for the exploitation of out-of-commerce works with a view to encouraging greater cross-border and online access for European citizens.

The assisted negotiation mechanism provided for in cases where the parties encounter difficulties in reaching an agreement for the granting of a license for the exploitation of audiovisual works on video on demand services has been strengthened. Each party may request the assistance of AGCOM, which provides guidance on appropriate negotiation solutions, including on the determination of the remuneration due.

Important innovations have thus been introduced, but even here there is no reference to exceptions concerning creative reuses.

2.6. Italian Case Law.

2.6.1 "The Giacometti Variations" case: a look toward the U.S. fair use.

As for the facts of this case, we have to go back to 2009. In October of that year, the director of the Fondazione Prada, a major Italian cultural institution located in Milan, asked the Giacometti Foundation, an institution that looks after the interests of the artist Alberto Giacometti , for permission to use some of Giacometti's sculptures, in particular *Grande Femme III* (fig.30) and *Grande Femme IV*, for the project entitled *The Giacometti Variations* (fig.31) by John Baldessari. The Giacometti Foundation, however, refused to grant permission, but Fondazione Prada nevertheless brought

[39] Authority for Guarantees in Communications is an independent Italian administrative regulatory and guarantee authority.

Baldessari's project to life. Baldessari's work consisted of a reproduction of the *Grande Femme III*, modifying the dimensions and adding certain "clothing elements". The work depicted nine women taller than four meters lined up like fashion show models. Baldessari decided to dress his models in clothes taken from cinema and art, such as tutu from Degas' *Petite denseuse de quartoze ans*. In an interview[40] given by Germano Celant, director and curator of the Fondazione Prada, we can better understand the essence of Baldessari's work and why he took up Giacometti's *femmes*. In fact, Celant underlines how Giacometti is an "*icon of modernity, representing, at the level of the human figure, a stripping away of the flesh, even almost the anorexia of the models*". As a matter of fact, Baldessari's project is not only artistic but also linked to the world of fashion. Through his work, he wants to show how fashion trends change over time. Celant explains that the Baldessari's irony focuses not so much on Giacometti's works as on the art-fashion dichotomy: "fashion passes, art remains".

Fig.30 *Grande Femme III*, Alberto Giacometti (via foundationbeleyer.ch)

[40] See https://tv.exibart.com/report-john-baldessari-the-giacometti-variations-fondazione-prada-milano/

Fig.31 *The Giacometti Variations*, John Baldessari (via fondazioneprada.org)

Having made these preliminary remarks in order to explain the purpose of the work, it is now appropriate to move on to the legal issues. The Giacometti Foundation considers the use of those sculptures to be a violation of copyright, so in December 2010 it took legal action before the industrial and intellectual property Section of the Court of Milan. The judge, *inaudita altera parte*, issued a measure preventing Baldessari from producing and exhibiting his work to the public and ordered its seizure. After Fondazione Prada and Baldessari were sued, the latter defended themselves on the merits by stressing that their work belonged to the so-called Appropriation art movement, the essence of which is precisely to reinterpret other works by giving them another meaning. The Court emphasized that: *"parodic works, mocking or ironic works, but more generally works that revisit another person's work (it is not necessary that they inspire irony or induce laughs, as they may suggest different messages, including tragic, critical or dramatic ones), are such to the extent that they change the meaning of the parodied work, so as to assume the role of an autonomous work of art, worthy of independent protection".* Moreover, in the judgment issued by the Court of Milan, in addition to referring to other judgments of the Italian Supreme Court, it also referred to the discipline of the

American fair use taking into consideration *Rogers v. Koons* case and *Blanch v. Koons* case. This, in my opinion, underlines the need for the introduction of a similar instrument since national courts also refer to it. It is precisely in analyzing the work of Baldessari that the Italian judge takes into consideration certain criteria dictated by Section 107 of the 1976 US Copyright Act: modifications of the original work. According to the judge, the artist in fact intervened both on the dimensions, enlarging the figure, and on the materials, adding clothing and shapes. What Baldessari takes from Giacometti's work is only the physicality of the woman, but if for Giacometti thinness is a symbol of the privations of war, for Baldessari it is a symbol of the extreme stereotypes dictated by the world of fashion[41]. This analysis led to Baldessari's works being considered original and autonomous with respect to Giacometti's and perfectly in line with the protection provided by Article 4 of the Italian Copyright Law. The Court of Milan therefore annulled the precautionary seizure order.

The reasons why I decided to analyze this judgment are various. First of all, the fact that the judge in motivating his decision addresses the concept of Appropriation Art. In fact, the judge underlined the difference between revisitation, which aims at creating a movement, the re-elaboration of a work, which has a critical purpose, and mere plagiarism, which is the slavish reproduction of the work without any secondary meaning. The second reason is perhaps even more interesting, we can in fact see how an Italian court needs to refer to U.S. decisions taking into account the fair use, implicitly underlining how such an instrument would be convenient in Europe and specifically in Italy. The third aspect, on the other hand, concerns the outcome of the decision, in fact, taking into consideration certain criteria such as the modification of the work, the meaning of the work and the purpose of the work, it is impossible not to recognize an appropriated work as an original work, autonomous and worthy of protection.

2.7 Conclusions.

This chapter has been useful in highlighting the technical aspects of European and Italian legislation and putting them into practice by analyzing a number of case studies. Both the European and Italian

[41] Par. 5 Trib. Milano Sez. Proprietà industrial e intellettuale 13/07/11 : " le opere di Baldessari non riproducono né si inspirano ad una o all'altra scultura di Giacometti ("La grande femme II, III o IV), ma all'immagine in genere data dall'artista alla figura femminile, allungata, sottile, ieratica, semplice icona di un'astratta idea di donna, "scarnificata" per i rigori della guerra nella realizzazione di Giacometti, rivisitata da Baldessari per rappresentare la donna moderna, indotta all'estrema magrezza dalla moda, con una sarcastica riflessione sul moderno corpo femminile e sui riti ed eccessi della moda."

cases, although different from each other, have demonstrated how the current legislation is not sufficient to guarantee adequate protection for certain artists. in both cases we have found the need to integrate the legislation and adapt it to this particular artistic movement, which like any other movement has equal dignity and the right to be protected. The analysis of the various cases therefore clearly shows the need for a new instrument. So even if there are instruments in European legislation that give more flexibility to national courts, these are not enough. The two great authorities on the subject, the CJEU and the ECtHR, have often found themselves in two opposing positions, the first with a more restrictive view and the second more liberal. Certainly, a meeting point is the interpretation of exceptions and limitations in the light of fundamental rights and freedom of expression, but there is still a long way to go. The fact that the CJEU considers that the list of exceptions and limitations should be exhaustive and that no external exception based on freedom of expression is allowed is very limiting. In fact, creating an *ad hoc* exception could be a very good solution. The demonstration that the tools provided by the European legal framework are insufficient is given by the Italian judgement in the *Giacometti variations* case, where the judge referred to a foreign tool, the U.S. fair use, to solve the dispute. In the next chapter, this instrument will be analyzed, highlighting its strengths and weaknesses in order to investigate its adequacy in protecting the interests of certain artists belonging to the Appropriation art movement.

CHAPTER 3

TOWARD A FAIR USE FOR VISUAL ARTS: ANALYSIS OF THE U.S. COPYRIGHT LEGAL FRAMEWORK AND CASE LAW.

"*The Congress shall have Power ...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*" United States Constitutions Article 1, Section 8.Today, copyright is a right that is guaranteed and protected by the Constitution and specific laws, but even before the adoption of the constitution, some states such as Massachusetts or New Hampshire had adopted local copyright acts to guarantee the protection of works.

3.1 Introduction.

This chapter is dedicated to the analysis of the U.S. fair use discipline and to the examination of some emblematic concrete cases. Copyright in the U.S. is regulated by Title 17 of the United States Code, which contains the Copyright Act of 1976. .Those provisions will be examined in depth, so as to give a complete overview of the regulations on the protection of IP related rights in the United States, with specific attention to Section 107, which regulates the instrument of fair use. The last part of this chapter will be devoted to analyzing the aspects that make current fair use unsuitable for Appropriation art cases and the proposals that have been made. To this end, it will be useful to understand how the U.S. courts have interpreted it over time.

3.2 Title 17 of United States Code.

Title 17 is the Section of the United States Code dealing with copyright. Copyright law applies to all works of authorship that are fixed in a tangible medium and may be reproduced. Among these works there are literary, musical, dramatic, pictorial, audiovisual, works etc.[42]. This provision also grants protection to derivative works that are not the result of illegitimate appropriation; however, copyright protection for this type of work is granted only to the material part of the work to which the author has contributed.[43] Protection is granted both to unpublished works and to works published at the time of publication, if the author is a citizen or domiciled in the U.S. Interesting is the provision according to

[42] Cf. 17 U.S. Code § 102.

[43] Cf. 17 U.S. Code § 103.

which by proclamation of the President of the United States protection under Title 17 may be granted to any foreign work published in a country where protection is also granted to works whose authors are citizens or domiciled in the U.S. It's a sort of mutual recognition.

Speaking of mutual recognition, I cannot fail to mention the Uruguay Round Agreements Act (URAA) of 1994. Thanks to this act many creative works were restored to copyright status. The URAA allowed for the re-granting of copyright protection to works that were in the public domain in the U.S. but were protected in their country of origin. This warranty does not apply indiscriminately to every work. To be eligible, the work must meet certain requirements. At the time of creation, the author must come from an eligible source country, i.e. must be a member of the World Trade Organization (WTO) or the Berne Convention or subject to a proclamation of the President of the United States. The work does not have to be in the public domain in the eligible country but must be in the United States. If the work has been published, it must not be published in the United States.[44]

Copyrighted authors can authorize or not the reproduction of their work, create a new derivative work based on their previous work, reproduce their work in public if it is literary, dramatic or audiovisual. The author of a work of visual art, e.g. a painting or a sculpture, has the right to claim his authorship. In the event that the work is distorted or modified he or she can prohibit being identified as the author of the work. The duration of this right corresponds to the duration of the author's life. This right cannot be transferred but can be waived if the author expressly agrees. A distinction should be made between the ownership of the right to a work of visual art and the ownership of any copy of the work. Indeed, the transfer of ownership of a copy does not constitute a transfer of ownership of the rights to the original work. The ownership of copyrights must be distinguished from the ownership of the material medium on which the work is fixed. The transfer of ownership of the material object does not automatically include the transfer of ownership of copyrights. The parties may agree otherwise by means of an agreement.

The transfer of ownership of copyright is possible in two cases: if provided for by law or by written agreement. It is necessary that the note or memorandum of transfer has to be signed by the owner of the rights, on the contrary no certificate is necessary for the validity of the transfer. Any document certifying a transfer of ownership, if it has the signature of the person who executed it, can be registered at the Copyright Office. Registration is carried out in order to obtain a certification of recordation,

[44] Cf. Title 17 U.S. Code §104a.

which is useful for notifying the public of the transfer. In the event of two conflicting transfers, the transfer executed first will prevail only if the registration procedure is carried out within one month of the execution of the transfer, if made in the United States, or within two months if made abroad. Otherwise the second transfer will prevail, if made in good faith. When there is a conflict between the transfer of ownership and a non-exclusive license, the latter shall prevail only if the license is evidenced by a written instrument signed by the owner of the rights and if the license was issued prior to the execution of the transfer. If the license was issued after the transfer the former shall prevail only if issued in good faith.

According to United States law, anyone can be guilty of copyright infringement. The infringer can be a natural person, a State, a State agency or a State employee. The owner of the infringed right can sue the infringer, the court can request all the documentation necessary to establish the infringement such as records from the Copyright Office. The court having jurisdiction over the matter, if it finds that there has been an infringement, may issue a permanent or temporary injunction to eliminate the infringement. The injunction shall be valid throughout the United States. During the pendency of the action, the court may, if it considers it necessary, order the impounding of the material objects constituting the infringement. The copyright owner may claim both damages for actual damages suffered and profits obtained from the infringer. In establishing the infringer's profits the burden of the proof of revenues obtained is on the copyright owner. Alternatively, the copyright owner may claim statutory damages before final judgment is rendered, in an amount of not less than $750 and not more than $30,000. The judge will decide what amount is appropriate in the specific case. Damages in this case may be increased or decreased at the discretion of the court in two cases: by a sum not exceeding $150,000 if the court finds that the infringement was committed voluntarily, by a sum not less than $200 if the court finds that the infringer did not know that he or she was committing a copyright infringement. It is very important to note the case where the infringer believed or had reasonable grounds to believe that its use was a fair use permitted by section 107. The court will in fact remit the statutory damages in any event if the infringer is one of the subjects referred to in §504[45].

[45] Title 17 U.S. Code §504 : "(i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work."

These are the general rules concerning copyright. Chapters 9 to 14 then specifically analyze particular protections depending on the type of work e.g. audiovisual files or sound recordings. For the purposes of this thesis, however, it is not the specific cases that are important, but rather the general discipline.

3.3 Fair use between winning and critical aspects.

Copyright, unlike other rights, is not absolute; in fact, U.S. copyright law allows a subject to make fair use of a protected work under certain conditions. Fair use is the instrument through which a fair balance of the rights at stake can be guaranteed. While the ultimate aim of the copyright law is to protect the rights of authors, it is also to guarantee access to new scientific inventions and to the enjoyment of literary and artistic works. Only through a regulation that allows the use of copyrighted works can a fair balance be achieved. U.S. fair use is a good starting point, but it is not without critical aspects. Fair use allows both the free expression of society and the possibility of parodies, comments on works. It also constitutes a free zone in education. However, the fair use doctrine presents numerous problems and in fact has been called " *the most troublesome in the whole law of copyright* "[46].

A definition of fair use and a discipline is offered by §107 of the U.S. code, which states that: *" Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include*

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copy- righted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copy- righted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

[46] Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

The analysis of the text of this article should be done in the light of the rulings made over the years by the U.S. courts in order to understand the interpretation that has been consolidated over the years.

- *Preamble*: the list of actions described in the preamble to §107 has been interpreted by the courts, specifically in *Campbell v. Acuff-Rose music, Inc*. as illustrative and not as a list permitting a presumption of fairness.
- *Purpose and character of the use* : the two aspects taken into consideration are the commercial use of the work and whether the work is considered transformative enough. At first the commercial use of the work was considered as presumptive of an unfair use[47]. The Supreme Court later recognized that such an approach would be extremely dangerous for the fair application of the §107. As a matter of fact, in *Campbell v. Acuff-Rose music*, *Inc* it stated that : *" [T]he proposition that commercial uses are unfair is extraordinarily inappropriate and harmful. The heart of fair use lies in commercial activity."* Again, the same judgement seems to suggest that the aspect of the transformativeness of the work should be taken into account as the addition of something new, both material and theoretical, such as a new message or a new meaning.
- *Nature of copyrighted work*: this criterion focuses on the factuality of the work and on creativity. However, it seems to be a criterion that always works in favor of the copyright owner in the end, since creativity is recognized in almost every work, even if it is not imaginative as much as factual. The second aspect to take into consideration is whether a work has been published or not. In the *Harper & Row* case[48], the Supreme Court seemed to have created a presumption of unfairness where the original work was unpublished. Congress, however, having been questioned by the publishing industry, overruled this interpretation.
- *Amount and sustainability of the portion used* :in the above-mentioned *Campbell* case, this third factor must be interpreted to be that the purpose of the quantity taken must be taken into account, which could go in favor of the defendant even in the case of a large quantity of material taken. Whereas in the *Harper & Row* case, the criterion used is that of quality in fact if the material taken, even in small quantities, constitutes the "heart" of the work then the use could be considered unfair.

[47] Cf. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) : " Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter."

[48] Cf. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548 (1985)

- *Effect upon the potential market*: this fourth factor should be interpreted to mean that the use of an existing work could influence the market trend in respect of the plaintiff. In the *Campbell* judgment, the court emphasized the fact that the elimination of a demand against one work without the substitution of another cannot be considered for the purposes of this principle.

In essence, we find that the interpretation of the fair use doctrine is left to the discretion of the courts and that a statutory definition leaves little room for certainty in the application of the fair use discipline of a copyrighted work. Despite a normative definition, it is still difficult to qualify a use as fair . These issues have led to consider fair use as pragmatic question to be defined on a case-by-case basis. For this reason, the criteria for defining what constitutes fair use are settled by the courts.

For fair use rights to be effective, it would be necessary for a person, before making fair use of a copyrighted work, to be sure that he or she was acting legally. What is needed and what is lacking is the certainty of the effectiveness. In other words, a subject should have *ex ante* certainty of the legality of his action. Creators are therefore often discouraged from making fair use of a work in view of the high litigation costs that may result. Moreover, another obstacle to the proper realization of the purpose of fair use lies in the burden of proof. In fact, the copyright owner will only have to prove its own use, whereas the defendant will have to prove its fair use, which requires a much greater effort.

3.3 Supreme Court decisions that have contributed to interpret the fair use legislation.

As it has already been pointed out the discipline of fair use is a concrete matter, the Supreme Court has helped to analyze the discipline in depth and over the years has often changed its approach . However, the cases I will analyze in this section do not deal with visual arts, but they were fundamental in building the fair use discipline as we know it today.

The first case, *Sony Corporation of America v. Universal City Studios, Inc.* ,focuses on the aspect of commercial use. The facts concern Sony's creation of a program called Betamax that allowed viewers to record TV programs and review them later. The copyright holders of the recorded programs then suited Sony for copyright infringement . The Court however held that both the use of the Betamax program and the production of it , did not constitute, in light of the four factors, a copyright infringement. That was because the viewers' use of the copy was not for commercial purposes, but private. According to the court therefore , the predominant factor to be taken into consideration was

the first, namely the purpose of the work. If there was no commercial purpose, the use was considered fair.

In *Harper& Row Publishers,Inc. v. Nation Enterprises*, the Supreme Court expanded Sony's focus on the relevance of the commercial use distinction. In *Harper*, the Nation, a news magazine, released unauthorized extracts from an unpublished memoir by President Gerald Ford[49]. Harper acquired exclusive rights to the manuscript and then later sold the first publication rights to the extracts to Time Magazine. The Court ruled that Nation's use of the extracts was unfair, holding that Nation published the extracts for commercial purposes, impacting the market for copyright owners based on Harper's ability to offer the first right of publication. The Court heightened the commerciality analysis by addressing it as a "*separate factor*" that, if encountered, should weigh heavily against a determination of fair use. The Court identified the last factor, the effect of use on the potential market, as "*arguably the most important element of fair use*." In order to pursue the Copyright Act's goal of providing protection for "*the economic incentive to create and disseminate ideas*," the Court sought to guarantee that the new work would not "*supplant*" the original.

In *Campbell v. Acuff- Rose Music* case, the facts concerned the parody of the song *'Oh, Pretty Woman'*, the rights to which were owned by Acuff-Rose, by the rap group 2 Live Crew. The group had transformed the song with new lyrics based on the composition of 'pretty woman'. The Acuff-rose refused permission to release the song of the 2 Live Crew, which they did anyway, so the Acuff-Rose sued them. The Supreme Court while denying a presumption of fairness in the case of parody, emphasized the fact that parody absolutely requires the use of the original work in order to be such. Furthermore, the Court made a clear distinction between parody and satire " *parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.")*[50]. The concrete case was brought within the boundaries of parody and therefore the Court decided in favor of the defendants. The criterion enunciated by the Court in this case seems to create a safe harbor when it comes to parody and thus a glimmer of certainty at least in this case.

[49] 38th President of the United States of America from 1974 and 1977.

[50] Cf. Campbell, 510 U.S. at 580-81.

3.4 Fair use's issues when it comes to Appropriation art: *Roger v. Koons* case.

That fair use is an important tool and that it has its strengths is unquestionable. However, as was pointed out in the previous paragraph, it has weaknesses, . In paragraph 3.3 I underlined the normative problems, but a concrete example is needed in order to understand the situation in deep. I will consider the case *Roger v. Koons*, which shows that the presence of this regulatory instrument does not always guarantee the protection of creative reuses and Appropriation art.

This case is considered as an "execution warrant" to Appropriation art. The facts concern the sculpture of Jeff Koons, entitled *Strings of Puppies(*fig.33), inspired by the photograph of the artist Art Rogers entitled *Puppies* (fig.32).

Fig.33 *Strings of Puppies,* Jeff Koons.

Fig.32 *Puppies*, Art Rogers

Rogers was commissioned to take the photos and later issued licenses to use the photo he took on postcards for distribution. The plaintiff photographer brought and action of copyright infringement, while Koons claims that the purpose of the sculpture was to comment both the original photo and the political and economic system that created it. Koons argued had only appropriated of *"two people with eight puppies, a bench and a background"* .The sculpture of Koons has important differences compared to the photo of Roger: medium, size, detail, colors. The Court, however, never had the opportunity to see the sculpture live, relying on a graphic reproduction in black and white. In the first instance the case was decided through summary judgment by the United States District Court for the Southern District of New York, which rejected the defenses of Koons, who decided to appeal the decision before the United States Court of Appeals for the Second Circuit. Koons argued that the fundamental difference between the two works lays in the meaning given to the work and that he found nothing so " original" in the composition put forth by Roger. The Court therefore examined the case in light of the criteria set forth in §107 :

- with regard to the purpose of the work, the Court pointed out that Koons' work was " exploitive" and that the artist would produce it for commercial and economic purposes .The Court's interpretation seems to argue that whenever a work is sold it cannot fall under the

protection offered by fair use. Moreover, the Court denied Koons work its intent of criticism, going to act not as a legal body but as an art critic. The Court went even further, not only played the role of an art critic with regard to Koons' work, but also commented on an entire art movement, appropriation art, saying that " *Koons' claim that his infringement of Rogers' work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace… cannot be accepted.*"

- regarding the nature of copyrighted work, the Second Circuit ignored the fact that Roger's work had been published , emphasizing only that it was a "*creative and imaginative*" artwork and therefore fictional in nature. Moreover, the Court did not feel that it should take into consideration the fact that the photograph was commissioned and therefore the work was "factual" in nature. In that sense this second factor would have been to Roger's disadvantage.
- the third factor i.e., the amount and substantiality of the taking, was also used in Roger's favor. In fact, the Second Circuit ruled that : " *the essence of Rogers' photography was copied almost in toto.*" However, as we can see Koons has highly changed the creative process making his work as original and creative as possible.
- the fourth factor was also interpreted by the Court in disfavor of Koons. Once again, the Court wanted to " condemn" Koons, just because he was a high-priced artist and that his works are sold for hundreds of thousands of dollars. Indeed, the fact that Koons' works are exhibited in the world's most famous galleries and sell for a lot of money does not imply that this will somehow have a negative effect on Roger's work, which is positioned in a whole other market.

This ruling essentially demonstrates two issues: the extraordinarily precarious position of appropriation artists and the inconsistency of fair use law when interpreted arbitrarily by the courts. The problem, however, does not stem from the Courts' application of the discipline, but more from the fact that the copyright discipline and specifically the fair use discipline does not seem to keep up with the new frontiers of art. The Second Circuit's decision is emblematic , because it is the first case in which a judge rules regarding copyright infringement in the context of Appropriation art. In many situations in fact cases are negotiated before going to trial.

The case of *Rogers v. Koons* is illustrative of the problems that fair use discipline encounters when it comes to Appropriation art. In fact, generally speaking one of the biggest issues is found in the tendency of the courts to reject the fair use defense when the appropriation of the work concerns the "essence" of the work. Many artists in this movement, however, often appropriate the entire image and thus risking in most cases having their fair use claim rejected. The issue that arises most often , and

which has also been determinant in the *Roger v. Koons* case, is that relating to the economic exploitation of the work. It is clear that the appropriation artist, like any artist , produces his works both out of a creative impulse and to sell them on the market at the best price. The artist's evidentiary work would be enormous; in fact, he would have to prove that his commercial use is not unfair and does not produce any harm to the appropriated work. Moreover, such proof would be nearly impossible to be produced since courts tend to give a broad definition of potential markets. Thus, making the economic factor predominant, the benefit that the new artwork might bring to society is not relevant. Also, regarding fair use in case of parody, where the courts are more liberal, when it comes to Appropriation art is difficult to apply. While it is easier to establish in the case of a musical or literary work the parodic purpose of the same, it is very difficult to do so in the case of images. How can the amount of the copied work be established in this case for this to be fair use? Often to express their parodic purpose, the artists must appropriate the original work almost in its entirety. Parody in fact originated in the literary sphere , as a critique of the work itself and not of society in general. Instead, appropriationist works are often concerned not with critiquing a particular work, but the traditions of the society that work represents. Moreover, there is a fundamental difference between parody in general and the criticism that is made by Appropriation artists. The ultimate goal of parody is to make the audience laugh. Appropriation art, on the other hand, does not want to arouse hilarity , it wants to make its audience think. These are the general points that cause the parody standard to be poorly applied in the case of creative reuses. It was precisely on the basis of these considerations that the Second Circuit denied Koons parody-based defense. Indeed, the Court pointed out that *String of Puppies* did not criticize Rogers' work; it criticized an aspect of society in general and thus could not fall under the definition of fair use in the context of parody. The Court in that case defined parody as: " *"a new art work that makes ridiculous the style and expression of the original*". The Court did not consider the difficulty for a visual artist in critiquing a culture by taking only a small piece of a work. The Second Circuit was unable to capture the essence of Koons' work. *String of Puppies* should be considered a fair use of Rogers' photograph not because Koons changed the material support of the work, but because Koons twisted the message of the work by appropriating a preexisting image.

The effects of this ruling are manifold. In addition to creating further uncertainty, it has also caused disarray among Appropriation artists. Only artists who can financially support a litigation may dare in expressing their art through creative reuses. Indirectly, the effects of the Koons ruling inhibit artists' freedom of expression and the principle of equality among them. It is necessary first to emphasize the artistic dignity of this movement. So, unless the courts make up their minds in applying the standard of parody, which originated in the musical and literary fields, even in the case of visual arts, a new

standard needs to be created. A new, more appropriation-sensitive standard that recognizes the benefits that this type of art can bring to the community. The Second Circuit in fact did not even bother to comment on the fact that for the first time a case of Appropriationism was being handled and that therefore preexisting standards may not be appropriate for this new type of subject matter.

3.5 Other Koons' cases which show inconsistency in applying fair use standard.

Two other more recent cases also concerning Koons will be analyzed in this section. The two cases in question are *United Feature Syndicate, Inc. v. Koons* and *Blanch v. Koons*, those are important in my view because they show how the courts applies the same standard in two different ways and demonstrates once again how the fair use discipline is surrounded by uncertainty. Moreover, the fact that once again the protagonist of the legal case is Jeff Koons is emblematic, in fact this shows how artists of a certain caliber are often targeted for large sums of money.

3.5.1 United Feature Syndicate, Inc. v. Koons.

The facts concerned the production by Jeff Koons of four identical sculptures named *Wild Boy and Puppy* (fig.34), which represented the image of *Odie* (fig.35), the little dog from the *Garfield* comic strip. All copyrights related to the Garfield comic strip were held by the United Feature Syndicate (UFS), a U.S. company. UFS also holds nearly 400 licenses for the use of products related to other Garfield characters. Among other characters, UFS holds all copyrights related to *Odie*. The plaintiff therefore decided to sue Jeff Koons for unauthorized use of *Odie*'s image.

Fig. 34 *Wild Boy and Puppy*, Koons (via Artnet.)

Fig.35 Odie (via Wikipedia)

The sculptures were included in Koons' exhibition entitled *" the Banality show*," which encompassed a collection of images that are part of popular culture. In the deposition that Koons gave during the trial he admitted that the puppy in his sculpture was inspired by the image of "*Odie*" taken from some postcard. Also, in his deposition Koons explains how he instructed his craftsmen to create the work and how essentially the changes on *Odie*'s 'image were related to three-dimensionality and the fact that the dog's tongue had changed proportions due to technical issues with the sculpture. Koons obviously based his defense on the doctrine of fair use. However, the Court , also making extensive reference to the *Roger v. Koons case*, decided against Koons, again giving very little weight to the purpose of social criticism and ruling all based on the commercial nature of the work and not artistic.

3.5.2 Blanch v. Koons

The facts concern Koons' work entitled *Niagara* (fig.35), jointly commissioned by Deutsche Bank and Guggenheim. To create his painting Koons took a photo, *Silk Sandals by Gucci* (fig.36), taken by the fashion photographer Andrea Blanch and digitally edited it . The work depicts four pairs of women's feet dangling over sweets, serving as the background is the image of Niagara Falls.

Fig. 35 *Niagara*, Jeff Koons (via guggenheim.org)

Fig.36 *Silk Sandals by Gucci,* Blanch (via Dandi.Media)

In an affidavit produced by Koons, the artist explains the meaning of his work and where he got his inspiration from. Koons in fact was inspired by a billboard in Rome, after which he decided to express through this image the three basic desires of humanity : food, play and sex. The Court in addressing this case focuses on Koons' intent, in fact the artist uses Blanch's image solely to create a commentary on the influence of mass media on society. The different purposes of the two authors , according to the court were indicative of the fact that Koons had not simply taken Blanch's photograph and copied it but had transformed it. The Court then ruled in the sense that Koons' use of Blanch's photograph was fair, and that since the purpose of the copyright law is to promote the new arts, this is achieved not by prohibiting Koons from appropriating the image but to the contrary. Finally, then, the Second Circuit recognized the importance of Appropriationism that falls under the discipline of fair use.

Even if the Court in this case, gave a correct interpretation and application to the fair use discipline, this does not mean that every issue related to it has been overcome. On the contrary, seeing a Court behave differently in essentially the same cases shows once again how the fair use discipline is governed mainly by uncertainty.

3.6 Some proposed solutions to adapt fair use to visual arts.

It is interesting to note that all scholars who have bothered to address this issue have done so in the direction of expanding a protection for Appropriation art and not the other way around. Some have thought to approach the problem using all other kinds of standards, considering fair use wholly inadequate, while others have tried to come up with proposals that would modify the pre-existing standard.

3.6.1 First Amendment proposal : artwork as a visual speech.

"*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."* So reads the First Amendment of the U.S. Constitution defending every citizen's freedom of expression. It is precisely on the basis of guaranteed First Amendment rights that the proposal brought forward by Patricia Krieg, the only commentator who has considered this possibility, is focused. Krieg in fact considers the excessive power given to copyright owners by the copyright law to be in contrast with the fundamental right of freedom of expression. She suggests replacing the fair use standard with the First Amendment standard when it comes to visual arts, considering fair use in essence hostile to creative reuses. Her idea is to consider the appropriation of a work as a visual speech that can enrich the " ideas' marketplace" of the community. Krieg points out that this standard can be applied when the second work is not a substitute for the first and when it has transformed the first conceptually or physically. The novelty of this theory lies in treating the issue of Appropriationism as an entirely new area of copyright law. However, while *prima facie* this theory may seem totally innovative with respect to the fair use standard, in fact it is not. Having to affix limits to her standard, Krieg develops some that are *de facto* relatable to the fair use discipline: the transformativeness of the work and its economic effect on the market. Furthermore, the invocation of the First Amendment is superfluous. Since copyright law indirectly protects freedom of expression, this is often emphasized by courts that rule that First Amendment rights are sufficiently guaranteed by copyright law.

3.6.2 Modified fair use proposal: the importance of what is copied and by whom.

This second type of proposal seems to be more appropriate and more easily applied. It is based on the fact that the *ratio* behind the fair us doctrine is not wrong, but that its application often is. The two

commentators who supported these proposals are John Carlin and Sonya del Peral. In his article,[51] Carlin argues that the flexibility of fair use would be crucial for courts in order to differentiate artistic expressions from mere economic exploitation. However, it is important to remember that the article in question was written before the *Koons* decision. First of all, Carlin refuses to consider the four - factor - structure of fair use. Carlin considers relevant to analyze what is being copied and who is doing it in order to distinguish economic exploitation from creative expression. Carlin's test is to identify whether the copied work is part of the general culture or whether it is the result of the artist's creativity. Another requirement he sets is related to the copied artist, preferably this one should no longer be alive or should no longer exhibit his works. Carlin also argues that if the second work is replicated only once then this is indicative of a presumption of fair use. Carlin's proposal places emphasis on the purpose of the work and the nature of copyrighted work. By creating new standards, however ,he creates new problems that are often counterproductive for Appropriation artists. We have already pointed out that the *Koons* decision intervenes after Carlin's proposal. But how would the Koons affair have ended if the fair use modified by Carlin had been applied? As far as the first step of the marketplace is concerned, *String of Puppies* would have passed it successfully, not going the work of Koons to affect the Rogers marketplace in any way. However, the same is not true for the other criteria : there are four copies of *String of Puppies* and not one, the appropriated image is not part of the general culture, and furthermore Roger is perfectly active and continues to exhibit his works. So, the defense based on the Carlin's proposal would have failed. It is also essential to focus on the marketplace criterion. Undoubtedly, today it is necessary to untie the presumption of unfairness from the fact that the artist sells his work at a high price, because this would penalize the most valued artists. However, it can often happen that, even if the intention of the second artist is not to create economic harm to the first, this happens anyway. It is necessary to change the presumption of unfairness of the use but not neglecting the rights of the copyright owner. Another problematic aspect of Carlin's theory is that of whether the appropriate image is part of the " shared cultural vocabulary." Thus unintentionally, Carlin limits authors' choice of subject matter to certain categories. Secondly, how and in what way can an image be defined in the sense that it is part of the general vocabulary of society ? Although Carlin's theory is more applicable than Krieg's , it still has issues to be solved.

In brief, the proposals presented by both Krieg and Carlin , are important because they mark an opening toward the issue of appropriationism and emphasize how this thematic is very much felt , yet they remain at a more philosophical than normative level and are de facto difficult to apply.

[51] John Carlin, Culture Vultures: Artistic Appropriation and Intellectual Property Law, 13 Colum.-VLA J.L. & Arts 103

3.6.3 A customized fair use for Appropriation art.

The above proposals indicate the need to reconsider fair use, perhaps by creating a special discipline for visual arts and Appropriationism. This standard elaborated E. Kenly Ames suggests basing the presumption of fair use on the type of secondary work created and whether this work is not a substitute in the marketplace for the first. Once these requirements are met, the artist may decide to appropriate an image in the manner he prefers in order to make a comment or critique on contemporary culture. The author, however, does not intend to suggest the need to create a different fair use standard for each subject matter; he believes that fair use is adequately designed to cover most situations, but not the case of creative reuses that raise different problematics. Ames elaborates her proposal in the footsteps of the traditional four-factor discipline of fair use, because she believes judges are more familiar with this approach. This section will therefore analyze the four factors in accordance with the innovations suggested by Ames :

- *Purpose and character of the use*: the secondary work must obviously be a work of visual art, created for the purpose of criticism and social commentary. The copyright owner could potentially overturn this presumption; however, it seems very difficult since one of the constituent elements of appropriation art is precisely criticism. The focus on whether the secondary work should constitute a work of visual art is essential. For although the role of the judge is not to adjudicate whether a work is worthy of being called a work of art, and it is not the judge's job to question what art is, this often happens. In this case the courts will only have to ask whether a work constitutes a work of visual art or not. Regarding the definition of visual art, please refer to that offered by Title 17 U.S. Code § 101.[52] In addition, Ames emphasizes

[52] Title 17 U.S. Code § 101: "A 'work of visual art' is a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.
A work of visual art does not include: any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; any portion or part of any item described in clause or ; any work made for hire; or any work not subject to copyright protection under this title."

that the fact that the artist places a commercial value on his or her work should not influence the judgment.

- *Nature of copyrighted work*: the traditional fact/fictional criterion is not helpful, because any creation is the result of a creative effort of its author, so that standard would seem to go against the appropriationist artist. The test should be whether an astute observer would be able to recognize the type of image being criticized/commented on.
- *Amount and substantiality of copying*: as has already been pointed out, often an artist in order to criticize or comment on a particular aspect , in the visual arts , has the need to copy almost in its entirety the original work. That is why Ames argues that not too much importance should be given to this factor.
- *Effect on the potential market for the copyrighted work*: regarding this factor Ames argues that the copyright owner should demonstrate actual harm in the marketplace of his or her work. In addition, the remark regarding any licenses that the copyright holder might issue is superfluous. In fact, it is reasonable to think that an artist who is criticized and who issues a license for this criticism would either not issue it at all or would increase the fee because of the criticism. Only very wealthy artists would be able to afford the creation of a critical work. The test should concern first of all the market in which the original work is sold or potentially sold, and secondly, it must be assessed whether in concrete terms the secondary work can constitute a substitute for the primary work. If the copyright owner is able to demonstrate that substitution can occur in the relevant marketplace then the presumption of the first factor is overcome.

The protection afforded by this type of fair use is limited to the creation of secondary works of visual art; it does not expand to protect the creation of derivative works[53], which instead in this case will have to be subject to a license application. Any kind of derivative work in fact could constitute a substitute in the marketplace for the original work and thus be potentially harmful.

In conclusion, the standard proposed by Ames is certainly quite easy to apply. It is for sure a standard that poses much in favor of the appropriationist artist, but not without limiting its scope. It always offers the copyright owner the opportunity to subvert the presumption and present evidence in support

[53] Title 17 U.S. Code §101: " A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

of his thesis. moreover, this standard is limited to a narrow category of art, the visual arts, and places emphasis on the parodic purpose of the appropriationist work. Perhaps this last aspect constitutes a critical point of this theory, in fact Amess takes into consideration only those works that have a critical purpose or commentary, and it is true that Appropriation art in most cases has the element of criticism, but it is not always so. So once again something is left uncovered. All those artists who do not use appropriative art as a critique, but as a means and inspiration to express their own philosophy , their own concept their own way of seeing the world. However surely if the Ames standard were applied we would have taken a big step forward.

3.6.4 Fair use Board proposal; toward ex ante certainty of legality.

Amongst the various proposals and possible solutions, the one that I consider one of the most interesting concerns the possibility of obtaining *ex ante* certainty of legality at a low cost. This solution was outlined by Michael W. Carrol , professor of law and head of department at the American University of Washington. Professor Caroll suggests creating a Fair Use Board in the U.S. Copyright Office. A body competent to decide whether a work falls within the concept of fair use or not. The Fair Use Board will notify the copyright owner upon receipt of the petition. If the Board decides that the work falls within the protection granted by fair use, then the petitioner will be immune from liability for copyright infringement in the future. In any case, the decision may be appealed to the register of copyright, and its decisions will be reviewable before the federal courts. The Board should consist of three members, one chief judge and two associates. These judges should theoretically be impartial, efficient and wise. The members should be chosen from lawyers experienced in the field. The term of office of the judges would be six years renewable. With regard to the administrative procedure, Professor Caroll states that it should be opened at the request of the potential fair user. With regard to the filing fee, the professor assumes that the procedure is self-funding, although this could create economic discrimination for those who do not have the financial capacity to afford this type of procedure. The copyright owner, having become aware of the procedure, would have two solutions: either terminate the procedure by requesting a declaratory judgment or participate in the administrative procedure with a 20-day deadline to submit its observations. At this point the petitioner would have another seven days to reply and within the forty-five-day period the judges would have to produce a decision. Professor Caroll's idea would be to create a procedure in which the parties can represent themselves but does not exclude the possibility of being represented by third subjects working in this field. The petition should contain a copy of the copyrighted work and copy of the petitioner's work or

if not yet created a description of the future work. Technical testimonies are allowed with regard to the fourth criterion of §107. This proposal, if implemented, could benefit not only potential fair users who cannot afford or do not want to pay for a license, but also society. The creation of a fair use board would help create greater awareness of the copyright discipline and the fair use tool itself.

3.6.5 The royalty system: the importance of the economic standard of fair use.

The last proposal that will be analyzed is that of Brittani Everson, who proposes a reformulation of fair use from an economic perspective. Everson assumes that courts in deciding cases related to visual art, in the context of fair use, are often influenced by an aesthetic judgment about the work. Everson therefore aims to use a fact-based economic standard. She assumes that the copyright discipline was created first and foremost to protect the economic efforts that an artist incurs in creating a work. These economic costs are very high when compared to the costs that an artist who appropriates another work must incur to create a new one. Economists such as William M. Landes and Richard A. Posner, in their publication entitled "*An Economic Analysis of Copyright Law*" , argue that the copyright law should assume a cost-benefit standard, which takes into account the benefits drawn from incentivizing artists to create new works minus the costs of limiting access to works. The approach is based on a two-step test that can be applied only in Appropriation art cases. The first step is to adjudicate whether the artist who appropriated an existing work did so for commercial purposes. When talking about commercial purposes it means that the court should make sure that the artist has made a profit either from the sale or exhibition of his or her artwork. The artist who does not profit from his work could then appropriate any image. This is an *escamotage* to protect small artists. Copyirght owners of the work used would receive royalties based on the percentage of profits earned by the artist that appropriated the work. Unlike the current system, which provides for variability in damages based on the amount of copied material, the percentage of royalties would always be fixed. It is a system similar to compolsury licenses, which, however, are a limitation for small artists.

3.6.6 T*he Uniform Domain Name Dispute Resolution Policy (UDRP) and Dispute Resolution Procedure for the Visual Arts (DRPVA).*

This is a very recent proposal presented by Rachel Isabelle Butt in her article " *Appropriation Art and Fair Use."* This arbitration method is already used in cybersecurity to resolve cases related to cybersquatting.[54] It is a tool that was jointly developed by the Internet Corporation for Assigned Names and Numbers (ICANN)[55] and by the World Intellectual Property Organization (WIPO).

Basically, the UDRP procedure stipulates that those who wish to enjoy it must register their trademark by adhering to this procedure. If the trademark owner becomes aware that a person has registered a domain with the name of his trademark then he may file a complaint with a body competent to resolve this type of dispute. there is a twenty-day deadline for the respondent to present his defense. There is no provision for oral discussion. The panel will decide by taking into consideration three criteria:

- Whether the registered domain has the same or similar name as the trademark such that it is likely to cause confusion
- Whether the registered domain has the same or similar name as the trademark such that it is likely to cause confusion
- Whether the domain was registered and used in bad faith

The panel may consist of one or three members, all members are selected on the basis of their subject matter expertise. However, the UDPR does not constitute a replacement for the judicial process. In fact, at any time either party can bring the case to the courtroom.

The strengths of this method are several. First, it makes it possible to resolve international disputes for which the courts are unable to give a uniform decision. In addition, the costs and time of arbitration are considerably less than those of trial. Along the lines of this specialized arbitration Butt proposes to create a similar one for fair use, where anyone who registers with the Copyirght Office agrees to be subject to the Dispute Resolution Procedure for the Visual Arts (DRPVA). The panel would be constituted of arbitrators experienced in the field of visual arts , who are far more competent in resolving this type of dispute than the ordinary observer test used in the courts , because they possess the necessary knowledge regarding art history. Furthermore, the arbitration award in question would

[54] The expression cybersquatting (also called domain grabbing) refers to the phenomenon of acquiring ownership of domain names corresponding to generic names, trademarks of others, or names of persons in order to resell or otherwise profit from them.

[55] " ICANN is a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable. It promotes competition and develops policy on the Internet's unique identifiers. Through its coordination role of the Internet's naming system, it does have an important impact on the expansion and evolution of the Internet." https://www.icann.org/get-started

be enforceable worldwide , going to eliminate that difference in treatment that exists between foreign jurisdictions in art matters, which in itself is a transnational phenomenon. In addition, this methodology by virtue of its low costs would allow every artist , even the less wealthy, to defend themselves and their art. Moreover, reversing the burden of proof on the copyright holder of the original work is a means of reducing the number of litigations. In fact, the artist before initiating legal action must well document and find all the information necessary to file a claim.

The copyright owner before filing the claim must ensure that :

- the secondary work is identical or similar to his or her
- that the second artist has not registered any copyright on their work
- that he or she has evidences that support copyright infringement

Within fourteen days after the filing of the complaint the panel will decide , the decision will be effective after ten days. A system of damages similar to that established by the copyright law currently in force and referred to above is provided for. The panel decision would be appealable to the secondary courts, however grounds for appeal can only be a procedural defect and not the content of the decision itself.

3.7 Is fair use the solution?

To the state of facts and analysis in this elaborate, the final answer to this question is : no. But before giving a clear-cut answer, it is necessary to analyze why. There is no doubt that fair use is a valid and effective tool in many situations and that it is certainly much more up-to-date than the exceptions and limitations to copyright offered by European law. However, when it comes to creative reuses and Appropriation art, we find that fair use as formulated to date is not suitable. The first problem certainly concerns the fact that the definition of copyright infringement was not elaborated taking into account the customs of the art world, where we have seen that Appropriation has always existed. The second problem basically concerns the application of the law by the courts, which often disagree with each other, creating confusion for artists. Basically, the four factors in the regulations are not suitable and often not interpreted congruently when the facts concern visual arts. In addition, another issue that I think is very important concerns the expertise of the courts, in fact often judges who are not experienced or accustomed to dealing with situations related to the visual arts , overstep their legal competence , examining cases according to their own personal taste. The main problem of the courts

is that they are unable to contextualize a work of art within an art movement , but in general they are unable to grasp the fact that all art is derivative.

Most of the proposals that have been made , some of which have been analyzed in the preceding paragraphs, all have in common that an ad hoc discipline should be devised along the lines of fair use with regard to the art world. Not all the proposals presented are easily applicable and some are more valid than others, the road to a final solution is still long, but I think an appropriate solution might be to take the main points of the most valid theories and create a unified one made only from the strengths of all the others. I don't think it's enough to just reform the fair use discipline, but more to create an *ad hoc* system that can ensure both out-of-court and in-court protection of artists' rights. For example, creating a body that can prevent litigation, such as the Fair use Board, proposed by Carrol might be a good way to try to eliminate the state of uncertainty that surrounds this discipline. The Fair use Board represents both a means of obtaining a prior judicial pronouncement on a given situation , and a way of giving entities who actually have subject matter expertise the power to decide. The Board in my opinion should be composed of individuals who are experts in legal matters, hence judges, assisted by technical advisors, therefore highly specialized individuals who can give their contribution at the technical level regarding visual arts. A technical team, in my opinion should always be present, even when litigation comes to the courtroom. As in many criminal laws matters for example, the judge may request the help of specialized technical advisors , even in the case of copyright infringement in the field of visual arts the judge should be able to be directed as to the technical aspect and then make his own decision. In addition, the four factors proposed by §107 of the U.S. code should be interpreted by the courts in light of the subject matter when it comes to Appropriation art. In order for fair use to be an instrument that ensures equality, it is necessary for it to be applied and interpreted according to the specific case. So, specifying at the normative level guidelines for the interpretation of the four factors when it comes to visual art could help. In conclusion, although this thesis proposes a very pro-appropriationist view, obviously the artists creators of the original works should not be left behind. However, the proposal that seems to me to be most comprehensive and in line with all the needs of the case is the one related to the establishment of an arbitration system, involving a panel of experts capable of judging in the field of visual arts namely, Dispute Resolution Procedure for the Visual Arts (DRPVA).

Copyright as has been repeatedly emphasized is a matter of balancing the interests at stake, so the rights of copyright owner cannot be nullified in the name of indiscriminate free access to any kind of copyrighted work and freedom of expression. So, a system based on a percentage of royalties due to

the artist by virtue of the profits earned might be a fair balance. Obviously I believe that this percentage should be minimal so that even less wealthy artists can benefit from this scheme.

CONCLUSIONS

The aspects that emerged at the conclusion of this dissertation are many. The first chapter , through a chronological analysis of art history, highlighted and demonstrated how in fact all art is derivative and how Appropriationism before being an art movement is the essence of artistic inspiration. It is precisely because of this evidence that the problem between appropriationism in the visual arts and the law cannot be ignored. I then decided to dedicate the second chapter to European law in order to compare two great worlds, European and American copyright law, to see which of the two approaches best ensured the balance of interests at stake when it comes to copyright law and visual arts. From my review, I found that European law is not really in line with current artistic developments and that the system of exceptions and limitations to copyright does not allow the free creative expression of certain artists. It is precisely in the *Giacometti variation* case , that an Italian court finds itself having to refer to a foreign instrument to resolve a dispute, basically finding itself in a *vacuum legis*. Turning then to the examination of the U.S. system and fair use, again I found a lot of uncertainty in this area. Even if fair use is a step forward compared to the exceptions and limitations to copyright at the European level, case law has shown that even this is not strictly suitable when applied to the world of visual arts. In essence to date there is no perfectly suitable instrument that can solve the problem between creative reuses and copyright law in the visual arts. However, many proposals have been advanced in the U.S. system. , many of which if properly combined would potentially be able to fix some of the problems associated with uncertainty in this area. The issue can be solved in my opinion by following two steps: reforming the entire U.S. fair use system and being able to apply it globally. Art in fact is not a phenomenon that stops at national borders and therefore it is necessary to guarantee equal treatment to artists wherever they are in the world .

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