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The Jeffersonian model of U.S. cultural property law

During this conference, we have heard a lot about the history of Italian cultural heritage law, how it applies, and about the institutions that apply it. I want to add to the conversation by setting the Italian approach to cultural heritage into a global context. Specifically, I want to compare the Italian model of cultural heritage with the approach that has been taken in the United States, which, for reasons you will soon understand, I will call the Jeffersonian model.

On Sept. 6, 1789, Thomas Jefferson wrote from Paris to his closest friend, James Madison. Madison was engaged at that moment in drafting what would become the U.S. Constitution. Though it stands as the longest letter he is known to have written, Jefferson's Sept. 6 letter to Madison focused on a single question: whether one generation has the power to bind another. This question, Jefferson said, «seems never to have been started either on this or our side of the water. Yet it is a question of such consequences as not only to merit decision, but place also, among the fundamental principles of every government»[1].

On this question Jefferson's views were firm. «The earth», he wrote, «belongs to the living, and not to the dead»[2]. The living, and not the dead.

This meant, Jefferson argued, that the living generation owes no special allegiance to the laws passed by the previous generation – if we decide to keep those laws, that is our choice, but there should be no presumption that old laws should continue in effect. More directly relevant to the questions of culture we are discussing at this conference, Jefferson argued that copyrights should expire after what today we would consider quite a short period of nineteen years. Jefferson even declared that every constitution should expire after the same short period.

Note that Madison did not take his friend's advice. In fact, quite the opposite: the American Constitution he drafted put the dead firmly in charge. The U.S. Constitution is arguably the most difficult on the planet to amend. And both the document itself and the broader system of U.S. constitutionalism (*i.e.*, the norms and practices that fill out the document's outlines) that it undergirds are replete with anti-democratic features: *e.g.*, the unrepresentative U.S. Senate and Electoral College, life tenure for federal judges, or the supermajority required to pass ordinary legislation over a Senate filibuster. These elements cement the decisions of the dead in place; they deprive the living of the capacity for choice.

But set that all aside, and focus on Jefferson's maxim. The proposition that the earth belongs to the living helps us understand the U.S. approach to cultural heritage.

The Italian law we have been talking about at this conference is, of course, built on a 'cultural heritage' model. As a lawyer, I do not understand cultural heritage laws as merely identifying and cataloguing important historical artworks and other cultural artifacts. Cultural heritage laws take action by identifying and restricting the public's use of cultural property. This is done through some form of regulation or intellectual property right. Cultural heritage law as it works out in practical terms is almost inevitably about cultural restriction.

I want to contrast this with the Jeffersonian model, which understands cultural heritage not primarily as a thing to be protected, but as a thing to be *used*. This model, as Jefferson would have it, is concerned primarily with the interests of the living – specifically, in producing today's culture, drawing on the past but also reworking it in ways that may preserve or may destabilize the past. This model is largely indifferent to and perhaps in practice even hostile to cultural particularism and to the stability of any particular culture. The role of IP rights, in this model, is not to preserve old culture. It is to encourage people to make new culture.

Now, here I want to emphasize two important points. The differences between the cultural heritage model and the Jeffersonian model are not black and white. These are models that overlap. Both see a role for preservation. Both see an important interest in public access. But the two models place their emphases differently. The second point we must immediately acknowledge is that one cannot argue that either of these two models is in some sense 'right' or 'wrong.' The different models grow out of deep differences in how we understand what leads to human flourishing. The cultural heritage model situates individuals within a particular culture; it is based on the notion that some well-defined group identity is central to an individual's flourishing. On the other hand, the Jeffersonian

1. Letter from Thomas Jefferson to James Madison, September 6, 1789, available at the Library of Congress, https://www.loc.gov/resource/mtj1.011_0912_0958/?st=text (last accessed 20 Sept 2023).
2. *Ibid.*

Fig. 1 – National Archaeological Museum of Saint-Germain-en-Laye (France), Venus of Brassempouy, 23.000 BC (photo by Bastien M., source https://commons.wikimedia.org/wiki/File:Dame_de_Brassempouy.jpg).

Fig. 2 – Anna Maria Garza, *Brassempouy Beach*, 2018 (source https://www.rehcy.com/store/p231/BrassempouyBeachArtPrint.html).

model is both more cosmopolitan and more present-focused. Which one of these models is more attractive to you has do to with your underlying beliefs about the relative importance of individual autonomy *versus* group identity, and about the virtues of more rapid cultural change *versus* relative cultural stability. Reasonable people, of course, differ on these points, and I am in no position to argue with you or anyone here.

That said, if you want to understand the Jeffersonian model, you could not do better than to look at a picture of Monticello, the house that Jefferson, at age twenty-six already an accomplished architect, designed for himself. Or, you can look at University of Virginia's Rotunda, which he also designed and modeled on the Pantheon in Rome. You see that Jefferson is drawing, as of course the Romans did, heavily from Greek classical architecture, to which we might refer as an element of Greece's cultural heritage. But Jefferson did not think of Greek classical architecture in those terms. In Greek classical architecture he saw the power of human rational intellect. But he did not think that quality was Greek, or that Greek classical architecture in some way belonged to Greek culture. Jefferson was an enlightenment universalist. He saw this culture as the inheritance of humankind.

Now, I have to acknowledge that Jefferson surely did not follow in his own life all of the principles he espoused. He was a universalist who wrote in the Declaration that «[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness».

And at the same time, he owned slaves.

Let me leave off with history and turn now to the ways in which the different models cash out in terms of law – either law regulating cultural property, or the *absence* of law regulating it. Note that I am not focusing primarily on physical artifacts, though I think the case for cultural property as national property is often more complex than some will acknowledge. I will tell just a quick story to illustrate that. This story will also move us along to the question I am most interested in, which is how a cultural property framework should think about intangible cultural goods.

Back in 2018 I received a call from an American artist with a legal problem. The problem was related to some artworks the artist created based on pictures she had seen of a Neolithic ivory sculpture called the Venus of Brassempouy. Here is a picture of the Venus sculpture, which

Fig. 3 – London, Giovanni Bellini, *Portrait of doge Leonardo Loredan*, 1501-1502, National Gallery London (photo by National Gallery London, source https://commons.wikimedia.org/wiki/File:Giovanni_Bellini,_portrait_of_Doge_Leonardo_Loredan.jpg).

was carved about 25,000 years ago from a piece of wooly mammoth ivory. It was found in a cave outside a small town in southwest France and is now on display at the French National Archeological Museum, near Paris (*fig.* 1).

And now here is a picture of what the American artist did with the Venus (*fig.* 2). The artist wanted my help because a representative of the French National Museum of Archeology was emailing her demanding that she stop selling her artwork. Use of the image of the Brassempouy Venus for commercial purposes, the museum representative said, was an impermissible use of cultural property and was against French law. I wrote back to him, telling him very politely that he had no claim whatsoever in an American court. I never heard back.

So, is this artifact the cultural property of France? I think the case is weak. Other than the fact that the sculpture was found in a cave located (barely) within the borders of the modern French state, nothing about the artwork would make it especially relevant to French culture, as opposed to the culture of any other nation, or indeed of human culture as a whole. Think for a moment of the name given to the sculpture – the *Venus* – that is a Roman name for a Greek goddess. The name speaks to the fact that this sculpture, and, perhaps most importantly, how we see it, is at odds with any conception of cultural heritage based on national identity. Jefferson would have understood this.

Obviously, the 25,000-year-old Venus of Brassempouy is a polar case; less ancient artworks and artifacts are more justifiably identified as the heritage of a nation, as we understand that term now. But where is the dividing line? At what point does the antiquity of an artifact begin to make identification with the nation – a modern conception – more difficult?

I want to focus, using a specific example, on that question. Is Giovanni Bellini an Italian painter? Or a Venetian one? Or, is there a reason to think that Bellini is part of a wider cultural heritage that flows across national borders, as Jefferson believed Greek classical architecture to be? As best we can tell, Giovanni Bellini was born in Venice, spent all of his eighty-five years there, and never traveled further than Mantua, less than 160 km away. You might respond that Bellini's localism does not matter: if Bellini is Venetian, then the job of the Italian government is to protect his works by anchoring them down in Venice. But that does not entirely answer the question either, because the problem is not only about geography. It is also about time (*fig.* 3).

The man depicted in this Bellini painting, Leonardo Loredan, was one of the most consequential doges in the history of the Venetian Republic. An inhabitant of 15th-century Venice would have understood Bellini's portrait through the lens of Loredan's political career. In particular, Bellini's Venetian contemporaries would be familiar with the decisive role Loredan played in preserving the Venetian Republic in two wars – one against the Ottomans, the other against the Pope. Both wars carried potentially existential consequences for the city-state. Under Loredan's skillful and altogether ruthless leadership, Venice was able to negotiate a peace treaty with the Ottomans, and to keep most of the papal lands it had earlier seized. In Loredan's discipline and canniness, a 15th-century Venetian would see a reflection of Venice's cardinal virtues, as understood and promoted to the world by Venetians themselves.

We must ask now how a modern Venetian might understand this portrait. Surely as a beautifully executed painting. But does it speak to the modern Venetian as part of his or her 'cultural heritage'? Loredan's dogeship, and the wars he fought, are deep in the past. Of course, the consequences of those long-ago struggles are still relevant to modern Venetians. But the consequences are likewise relevant, I would argue, to everyone in the west. The Venetian Republic's struggle against papal authority was

Fig. 4 – Feta cheese (source https://www.flickr.com/photos/like_the_grand_canyon/5209848098).

Fig. 5 – Bulgarian sheep cheese (photo taken by author).

one theatre in a broader European struggle – sustained over centuries, often intensely violent – which pitted secular against religious authority. And, of course, those struggles fed politico-religious conflicts that sent waves of Italian and European immigrants and refugees to the New World. So, in this web of interconnected historical and political threads, whose cultural heritage is Bellini? Venice's, surely. But also, Rouen's, and Amsterdam's and Hamburg's and New York's.

The tendency to equate cultural heritage with national heritage is a blunt way of understanding any of the important questions that cultural heritage raises. That equation tends to underplay the ways in which, at least in the west, particular artworks and artifacts are drawing from, and contributing to, intellectual currents that are flowing across European borders, either the borders of the time or the ones we know now.

My take-away here is that even with respect to tangible cultural artifacts, the foundations of cultural heritage law based in national heritage are shakier than they may appear at first to be. This is not to say that nations do not have reasons to promulgate and enforce such laws. The presence of artistic treasures on a government's territory is part of a government's prestige. And when it becomes a focus of tourism, art is also an economic asset. These are all perfectly valid interests that support rules about the disposition of tangible cultural artifacts. But they probably do not support as pervasive a set of rules as the Italian system imposes.

The difficulties deepen when we turn to intangible cultural heritage, and the cultural property rules that cover intangibles (*figs.* 4-5).

Here you see two packets of cheese – one from Greece and marked 'feta,' the other from Bulgaria, and marked, quite unhelpfully, 'Bulgarian Sheep's Cheese.' I say unhelpfully because the Bulgarian cheese was until quite recently marked feta. And that is a defensible label for it, given that like the Greek cheese it is made of sheep milk, it is made by the same process, and it is made in a region of Bulgaria that borders Greece, where many of the people are ethnically Greek, and where many speak the Greek language.

It is a branch of cultural heritage law that forced the Bulgarian cheesemakers to re-label their cheese. That law is the international regime of geographic indications, or GIs. GIs are source-identifiers, akin to collective trademarks, that designate a given geographic location as the sole legitimate source of a good on the basis of a conclusion that a particular good is part of the cultural heritage of a particular place. Well-known examples include Bordeaux (for wine) and Parmesan (for cheese). The notion, roughly, is that some combination of the physical characteristics of a region (referred to as *terroir*) plus local knowledge yields distinctive products. Use of the name with products from another location, this line of reasoning goes, is simply misleading to consumers. And this is why we see the Bulgarian cheese re-labeled, in a way that makes it difficult for consumers to understand what, in fact, it is.

There are many conceptual and practical difficulties with the protection of GIs. First is that the empirical evidence for the centrality of terroir is, to put it charitably, thin. Of course, soil and climate contribute to the taste of wine, or cheese. But the idea that a particular terroir is unique,

that it cannot be replicated anywhere else in the world, would be a surprise to the Portuguese immigrants who since the 16th century have been making quite excellent Port wine in South Africa's Western Cape region. As with the Bulgarian cheese re-labeling forced by Greek claims of cultural heritage, the South African wine has been re-labeled (often with uninformative names like 'Cape Vintage,' or 'Cape Tawny') in response to Portuguese claims of cultural heritage. It is important to note that for wine and spirits GIs, the legal prohibition is not simply against false identification of the geographic origin of the wine in the bottle. The prohibition extends to *comparison* or *reference*. It would be illegal, for example, for the South African producers to refer to their product as 'Cape Port' or even as 'Port-style fortified wine,' even if the producers use the grapes and the methods traditional to the Douro region of Portugal.

One suspects that the broad scope of the prohibition is not really about cultural heritage. It is about the desire of the traditional producers to limit competition. It is perhaps not surprising that, in general, it is the Europeans who have worked to enforce these rules upon the New World, and it is the New World, most often, that has resisted. To be clear, all GIs do is bar the use of certain descriptive words or place-names. They do not bar the mimicking of style, taste, or appearance. In other words, wine called Chablis, but not made in Chablis, runs afoul of the GI rule. But nothing stops a winemaker in Australia from making a wine that tastes like Chablis – Gis mean that they cannot call it Chablis, or something that employs the name as a comparator, like 'Chablis-style.' The result is consumer confusion, which is precisely what the law claims it is trying to avoid. The confusion is created by, and indeed is *intended by*, this branch of cultural heritage law.

If I had my way these rules would be scaled back substantially. I would, at a minimum, permit competitors to use the place-name to compare or refer to, the traditional product. To inform consumers, in other words, that the South African fortified wine they are looking at on the wine store shelf will in fact taste like port – however forcibly the proponents of *terroir* might insist otherwise.

I want to talk about another aspect of resistance to cultural property regulation, having to do with the Walt Disney Company's famous mouse, Mickey.

Mickey Mouse is an interesting and timely case. The copyright term in the United States is, as it is in the EU, the life of the author plus seventy years. That is, to be blunt, absurdly long. A term that long is, in terms of its present economic value, barely distinguishable from a perpetual term. The U.S. Constitution specifically forbids perpetual copyright terms, providing that copyrights may only be granted for 'limited times.' And yet in a 2003-decision, *Eldred v. Ashcroft*, the U.S. Supreme Court permitted Congress to lengthen the copyright term from life-plus-fifty to life-plus-seventy because even though the longer term is nearly perpetual in economic terms it is, the court said, mathematically finite.

Despite the length of the term, Mickey's copyright, or more precisely, the copyright on the original version of him, is set to expire in 2024. Which raises the question whether we should continue after copyright expires to regulate Mickey Mouse as a form of American cultural property, which surely he is.

In my view, the Supreme Court has already answered that question, and the answer is no. In 2003, the same year in which it approved longer copyright terms in the *Eldred* case, the Supreme Court decided another case, *Dastar v. 20th Century Fox*, which is arguably of greater long-term consequence. In that case, the Court inquired into whether an artistic work for which the copyright term had expired could be protected perpetually by *trademark law – i.e.*, protected on the grounds that people had come to recognize the work as coming from a particular source, and allowing it to be reproduced by competitors would confuse consumers about the source of the product. If you apply that concern to Mickey Mouse, it is pretty clear at this point that people identify the image with the Walt Disney Company, and if we apply trademark law, Mickey would be protected by the law as *Disney's* cultural heritage, even when the copyright term has expired.

The Supreme Court said that trademark does not work that way. The Court noted that the Constitution requires copyright terms to be limited, and that it would not interpret trademark law in a way that would prevent artistic works like Mickey Mouse from moving into the public domain. So, when Mickey's copyright runs out in 2024, the mouse will be, as the great Justice Louis Brandeis once put it, «free as air to common use».

Although the *Dastar* decision has not been understood this way in the U.S., it is, I would submit, a decision about cultural heritage. It is, to be more precise, a decision that permits the public to access an important part of America's cultural heritage, and, if they wish, to exploit it, and even to destabilize and subvert its meaning. The decision thus reinforces the skeptical American approach to the entire enterprise of constructing cultural heritage through cultural property rules. Our nation's cultural heritage is, to borrow a phrase, for the living.

With that said, let me end this speech by returning to a story from America's founding. I already spoke about Thomas Jefferson. I want to end with a mention of John Adams, one of the most important figures in the founding and the second president of the United States. Adams and Jefferson were what we today in American slang would describe as 'frenemies.' It was Adams who persuaded

Jefferson to take on the task of the Declaration of Independence, because, Adams later said, Jefferson was simply the better writer. The two men later fell out over party politics before reconciling late in life. In one of the most unlikely incidents of the founding era, both men died on July 4, 1826, the 50th anniversary of the signing of the Declaration that Adams had provoked and Jefferson had drafted, at the risk of both men's lives. On his deathbed, more than 500 miles north of the bed in Monticello where Jefferson lay dying, Adams' last words were «Jefferson lives».

Adams was mistaken. But in another sense, he was right. In America's approach to cultural heritage and cultural property, Jefferson lives.

Nota

The author thanks the conference organizers for their hospitality and their work in organizing a wonderful event.