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Cultural property law: notes on how to conduct transatlantic dialogues

1. Introduction

The collection of essays to which this paper belongs provides a rich series of top-notch contributions on cultural property law with a focus on the law in Italy. Museum curators, representatives of public offices in charge of the protection of Italian cultural property, and legal experts, have come together to discuss characteristics of the Italian cultural property protection framework and to debate its state of health. I will not attempt to summarise their views and their conclusions in this short contribution, as each speaks in her/his own clear voice. Suffice it to say that the conference at the origin of this publication took place in Florence, on the initiative of the group of comparative law scholars lead by Vittoria Barsotti together with the *Soprintendenza archeologia, belle arti e paesaggio per la città metropolitana di Firenze e le province di Pistoia e Prato* and the presence of the representatives of some of the city's museums, and whose contributions to the conference were truly exceptional. The private sector was as well represented by leading firms and non-profit organisations involved in the protection of cultural property.

As always on similar occasions, comparisons are made. In our case, the comparison that was most frequently made was between the United States and the Italian experience. In this context, it is tempting to construct models of cultural property law in order to look at different national or local experiences and identify their salient features. My modest contribution to the symposium is to explore how best to carry out such an exercise. More specifically, how to avoid some of the pitfalls that stand in the way of fruitful transatlantic dialogues, such as those that are necessary to make progress towards mutual understanding. I will discuss three points that were raised by some of the contributions to the conference, namely: the notion of cultural property as a basis for such dialogues; the role of the public and private sectors in the area of cultural property law; and lastly, cultural property law and the issue of museums' rights over the images of works of art in their collections. I thus hope to provide an example of how to approach cultural property law through the lens of comparative law. I am surely not the first do so. The late John Henry Merryman, one of the leading US comparative law scholars of his generation, has been an inspiring figure in this respect. Many of his works on the topic are landmarks in the field, although in some respect they have also been challenged by more recent scholarship.

2. Cultural property law: a variety of regimes

In the last century, cultural property law has grown into a vast field at the regional, national, and global levels. A dense thicket of rules and regulations dealing with cultural property is now in force across the globe, including rules and regulations enacted by the European Union. Cultural property law has thus been globalised to an extent[1]. Soft law instruments are increasingly complementing hard rules and are relevant especially in governing museum acquisitions, restitutions, and repatriations. Cross border litigation involving cultural property have become increasingly frequent and has often made headlines, and the need to address such litigations has become more urgent, as Marina Schneider's contribution in this volume shows. The very terminology used to approach these subjects is evolving. Many today prefer to speak of 'cultural heritage', rather than of 'cultural property', which has become the term of art in most non-U.S. contexts, because the latter seems to be less comprehensive than the former, although a good case can be made for their equivalence[2]. The contribution of Marco M. Mascolo in this collection highlights how the practice of speaking and writing about cultural heritage is inextricably bounded up with various cultural elements, of which the law is a part.

Nonetheless, for comparative law purposes, and for comparisons to be carried out in the context of scholarly ventures like the conference resulting in the present

1. Casini L., *La globalizzazione dei beni culturali*, Bologna: Il Mulino, 2010; Francioni F., *Cultural Property in International Law*, in Graziadei M., Smith L. eds., *Comparative Property Law: Global Perspectives*, Cheltenham: Edward Elgar, 2018, pp. 374ff.
2. Frigo M., *Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in International Law?*, International Review of the Red Cross 86, 2004, pp. 367-378.

publication, even the old notion of 'cultural property' denotes such a heterogeneous variety of objects and purposes that it can seriously be doubted whether it is an appropriate tool to conduct comparisons across countries. It is clear, for example, that archaeological objects represent a category of cultural property that is very different from any other kind of cultural property. Archaeology is now a science of its own that attaches the greatest significance to where archaeological objects are found to establish their cultural features. No other form of cultural property poses exactly the same scientific challenges as archaeological objects do. It may be surprising to learn that the opinion of archaeologists around the world converge on this conclusion independently from where they work, or from where they were educated or trained. On the other hand, works of art are subject to a multitude of varying regimes. For example, in Italy, privately owned works of art made by deceased artists more than seventy years ago cannot be permanently exported from Italy if classified as cultural property (Code of Cultural and Landscape Heritage of 2004, arts. 10 and 65). Intangible cultural property poses problems of its own, which are discussed in the brilliant contribution by Sarah Harding. Although cultural property is too vast a category to provide a sound analytical framework to carry out overall comparisons among jurisdictions, one may still wonder, what does the classification of any assets as cultural property achieve in operative terms and whether it does so according to criteria which are justified? One of the contributors to this volume (Sprigman) rightly noted that cultural property regimes are restrictive regimes. They basically enforce a preservationist approach to property for its cultural value, which would ultimately establish a sort of dead hand of the past over the present. It is undeniable that cultural property regimes tend to limit in various ways the use of property, and they are often designed to protect what has been created or handed down to us by previous generations. Having conceded this, property is everywhere governed by a variety of different regimes, depending upon the needs it satisfies or its functions. Unregulated property does not exist anywhere anymore, it probably never existed; to hold otherwise would be to fall prey to a form of irrational Lockeanism, as Louis Hartz observed over fifty years ago[3]. Merryman duly pointed to the necessity to avoid such intellectual trap with respect to cultural property[4]. Therefore, the only question is whether the current regimes applicable to cultural property are appropriate. The question can be answered in different ways depending on which perspectives or interests prevail in the making and enforcement of such regimes. Indeed, there are many interests to be considered and that must be balanced in the regulation of cultural property. In any case, property law, although usually employed to allow the exploitation of resources and the accumulation of capital, is also capable of serving completely different purposes, such as the conservation of certain objects for their cultural value. Here the question is, again, which property regimes? Private property may preserve cultural property, but it alone does not provide access to what is owned. To this end, there must be some feature of its regime that provides a social functionality. Having said this, to get closer to the question of how to conduct a transatlantic dialogue on this issue, it must be recognised that mankind's capacity for destruction must be contained. Great American works of art of the nineteenth century, such as Albert Bierstadt's *The Last Buffalo*, painted in 1888, when buffalos were on the verge of extinction and efforts to preserve them began to gather support, speaks to this infinite capacity. Today, buffalos are 'ecologically extinct' as a wild species in the U.S. Therefore, it is not surprising that forms of property are in place that are designed to preserve and to guarantee access to certain objects (tangible or intangible) for future generations. The notion of sustainability, that is now invoked over and over in a variety of contexts, alludes to the responsibility of the present generation to maintain the conditions in which future generations can thrive. Cultural property law is responsive to this imperative; it tries to avoid the impoverishment and deculturation that results from the loss of a variety of cultural elements, which are beneficial to human development.

3. Different cultural and socio-economic backgrounds, different laws

Cultural property is shaped by a mindset, and that mindset is variable from place to place. Variations within any locality point to the possibility of even further pluralism. The Italian cultural heritage is made up of very different components. There is no single unifying thread in such a complex subject. The U.S. cultural patrimony is even more varied and the contribution by Carl Brandon Strehlke in this collection is a wonderful reminder of the tensions over the interpretations of that notion. The notion of cultural property is now encoded in a very large number of international instruments, which are especially relevant for the protection of cultural property in armed conflicts and to secure the return of cultural property that was illicitly

3. The notion of 'irrational Lockeanism' was advanced Louis Hartz, Professor at Harvard, in *The Liberal Tradition in America*, New York: Harcourt Brace and Co., 1955, to describe and criticise a tendency prevailing in America to adhere closely Lockean principles and ideals that preclude all other political alternatives and possibilities. This way of thinking, in its extreme forms, has no language for talking about the common good, the public good, or other sorts of collective goods or benefit.
4. Merryman J.H., *The public interest in cultural property*, California Law Review 77, 1989, p. 339.

transferred. Nonetheless, the definition of cultural property and its regulation is often largely left to national legislators. The reason for this choice is not too difficult to see: cultural property receives its status from the appreciation of certain values expressed by a community. They can be identified in various ways (and may overlap with those identified by other communities). On the other hand, it is clear that many instances of cultural property have a universal value as well. For example, Picasso's *Guernica* (1937) may be taken as a universal work of art against the horrors of war, although its origins lie in a specific place and a particular historical setting. This is why Picasso decided that the painting should not be sent back to Spain while dictator Francisco Franco was alive. The Statue of Liberty is an American monument that stands as a universal symbol of liberty, and yet it is, first and foremost, an expression of America's imagery (although it was donated to the U.S. by the French people!). Cultural property never represents a gaze from nowhere, but is always a form of situated knowledge, even when projected globally. International markets for art and other forms of cultural property are part of those forces that push for that universal recognition of value. Contemporary art itself seems to be driven by such a desire for international recognition, and by the aspiration to transcend the local and the national. Curators of collections of eminent museums work towards realising this same goal.

John Henry Merryman approached the debate on this point by distinguishing nationalist and internationalist approaches to the protection of cultural property. Merryman remarked that one side of the debate revolves around the notion of cultural nationalism, which asserts that cultural property should belong to the nation that produced it. When elaborating on this concept, Merryman noted that: «At its best cultural nationalism is based on the relation between cultural property and cultural definition. For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. Such artifacts are important to cultural definition and expression, to shared identity and community. […] A people deprived of its artifacts is culturally impoverished»[5]. For Merryman, cultural internationalism stands instead for the idea that cultural property belongs to all humankind and so its allocation should not be determined politics, origin, or ownership, but rather by higher principles. The main higher principles being the preservation, integrity, and distribution/access of cultural property.

The distinctions drawn by Merryman have become deeply engrained in the debates over the missions of the foremost museums and the restitution of cultural objects to their places of origin. Such distinctions are now challenged, *inter alia*, because they ignore the past, the colonial histories that are behind the collections of many museums, and the resulting enduring impoverishment that such collections inflict on communities around the world [6]. One should also keep in mind that even the most international museums have distinctly local roots. Entering one of these museums, with their huge halls, their shops, and cafés, one may have the impression of entering a nowhere place, a sort self-contained, isolated bubble, preserving an exceptional set of treasures as an archive. On the contrary, such collections reflect trends and habits that deeply connect to the passions and the vision of those who first established them, and then defended the need for such ambitious institutions. From an Italian point of view, it is probably wrong to affirm that the tendency to maintain certain artistic artefacts in place is to be ascribed to nationalism, if nationalism is understood as that tendency of political thought that prevailed in the nineteenth century and in the first half of the twentieth century (now unfortunately resurging from its grave). The history of the preservationist approach that has been developing in Italy since the sixteenth century contradicts this hypothesis, as it is impossible to relate those early efforts towards the protection of cultural property to nationalism, however conceived. Nor can the claims of autochthonous peoples to their own cultural property be truly understood in terms of nationalism. These claims do not need such support to find justification, but Merryman's approach would put these claims, too, under the label of 'nationalism'. Having said this, it is true that in certain periods of our country's (Italy's) history, and clearly under fascism, nationalist ideologues made loud proclamations about the link between the nation and its art[7].

Let us then turn to the notions of cultural property that emerge from the Italian and the U.S. experience. It is obviously very difficult to generalise and to produce a convincing overall portrait of these experiences. To provide a limited sample of such an analysis one can reflect on the very different trajectory of painting in nineteenth-century Europe and the U.S. The history of nineteenth North American visual culture, which accompanied the creation of a totally new system of 'American' values, is built on premises that are very different from those prevailing in the capitals of old Europe[8]. This is also true for the sociology

5. Merryman J.H., *Thinking About the Elgin Marbles*, Michigan Law Review 83, 1985, pp. 1912-1913; see also, Id, *Two Ways of Thinking about Cultural Property*, American Journal of International Law 80, 1986, p. 831.

6. See, *e.g.*, Soirila P., *Indeterminacy in the Cultural Property Restitution Debate*, International Journal of Cultural Policy 28, 2022, pp. 1-16.

7. For an overview, Chiti E., Gardini G., Sandulli A., *L'ordinamento giuridico e la costruzione dell'identità culturale italiana*, in Ferrara L., Sorace D. eds., *A 150 anni dall'unificazione amministrativa italiana. Studi*, Firenze: Firenze University Press, 2016, vol. VI, pp. 15 ff.

8. Rossi Pinelli O., *Arte di frontiera. Pittura e identità nazionale nell'Ottocento nord-americano*, Roma: NIS, 2° ristampa, 2002.

of the profession. The art that developed in the U.S. was created by painters who sometimes travelled to Europe to learn the basics of the profession, but many painters were on the other hand entirely self-taught and owed little or nothing to an apprenticeship at an academy; they were always supported financially by the emerging classes of individual communities. Over the course of a century, these artists shared the need to witness and transmit both the enchantment of untouched nature, offered to them by 'God' so they could inhabit it, and the specificity of their own new lineage projected into the future (the shadows of the problematic colonial nature of such ideologies both obvious and being beyond the scope of the present contribution). They were the architects of the first modern republic. In the 'New World' it soon became clear that images were more powerful than words, and therefore more suitable for creating a shared sense of community and transmitting identity values. In the twentieth century, cinema would inherit and celebrate the same nature and values with a communicative power that transcended national boundaries and lead it to success beyond the ocean, conquering Europe over the course of the last century. Some aspects of the U.S. experience show the influence of an elitist view of art, but this is much more apparent in Europe during the Romantic age and beyond. On our side of the Atlantic, this elitist view was eventually set aside only to celebrate the pleasures of bourgeois life, like in Claude Monet's *Le Déjeuner sur l'herbe* (1866), or to depict the miserable side of it, represented by the destitute family showing up at the pawnbroker's shop in Domenico Induno's *Il Monte di Pietà* (1879)[9]. Therefore, the foundational imagery of the American art experience – especially in the visual arts – has been markedly different from the one prevailing in the European setting. It has been infused with a vision of the destiny of the country which was lacking in Europe. Two of its distinctive features, among many, may be mentioned. Firstly, nothing existed in the U.S. comparable to Europe's centuries-old canon of works of art promoted by princely courts, with painters and sculptors exploiting the resources provided by classical mythology and sculpture. Secondly, the presence of churches and religious congregations in several European countries, which, through popular devotion, insisted on religious motifs and biblical and evangelical narratives, originated a large production of religious art. This has no equivalent in the U.S. and poses its own problems in terms of protection and promotion (as discussed in Timothy Verdon's contribution to this collection). Cultural property protection is therefore shaped by different forces in different countries and places. To return to one of the themes of this contribution, it is hardly surprising to find that in the U.S. a different view of the boundaries and purposes of cultural propery prevails over that generally found in Europe. This view takes issue with some aspects of the European approach to cultural property. It argues that the present should take precedence over the past, and that this can be achieved, even in this field, by embracing market forces in the American tradition. However, alternative viewpoints exist in the United States as well. For example, Joseph L. Sax's *Playing Darts with a Rembrandt*[10], shows how the relationship between private property approaches, which rely heavily on the idea of private property as an incentive to produce cultural property, and public interests in cultural property, is tense and problematic.

4. The role of the State and of the private sector

The circumstance that the U.S. and the Italian experiences in the field of cultural property diverge over the role of the state and the respective roles of public and private law as far as the protection of cultural property is concerned, is mirrored in the organisation and financing of museums in the two countries, as discussed by the contribution of Adine Varah to this collection. For decades, in Italy, the idea that the state has a major role in protecting cultural property has been taken to be almost self-evident. The comprehensive approach to the regulation of cultural property by the state and the role of public law in this context that is reflected in the *Code of Cultural Heritage and Landscape* (2004) is telling in this respect. Having secured the state's central role in this matter, the *Code of Cultural Heritage and Landscape* also regulates forms of collaboration between the state and other public institutions with private actors, and civil society organisations[11]. The role reserved to the state in Italy stands in stark contrast with the U.S. approach[12], which is at best piecemeal from the Italian perspective as far as the role of the state in the protection of cultural property is concerned[13]. The contrast is marked not just with the U.S., but also with other countries like the U.K., in which

9. I owe the reference to this painting to my friend professor Jorge L. Esquirol.

10. Sax J.L., *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*, Ann Arbor: University of Michigan Press, 1999.

11. Casini L., *Ereditare il futuro: dilemmi sul patrimonio culturale*, Bologna: Il Mulino, 2016, p. 105 ss.

12. See, *e.g.*, Merryman J.H., *'Protection' of Cultural 'Heritage'?*, American Journal of Comparative Law Supp. 38, 1990, p. 513.

13. The reasons for a more comprehensive approach to the regulation of cultural property in Italy does not simply lie in different conceptions of the role of the state in a modern society, but even more in the perception and in the consideration that the Italian cultural heritage is to be understood within an overall framework that has been built through the centuries, and that its value lies precisely in this complexity.

private collections of art are much more predominant than in Italy. It is tempting to consider this difference to be a by-product of a different vision of the role of the state in managing cultural heritage and cultural events in different countries. Article 9 of the Italian Constitution highlights this role and Paolo Liverani's lucid contribution to this collection makes clear how this constitutional provision should be understood. Still, to a disenchanted observer, the role played in Italy by the state in the field of cultural property appears to owe more to historical accident than to the constant working of an ideology that extols the role of the state as a protector and patron of the country's cultural heritage. With the end of the ancient regime, the inevitable consequence of the decline of the fortunes of the nobility and of certain grand families was written. In one way or another their collections ended up in the hands of the state, or of the closest the municipality; these being the only entities that could take care of them and provide for their conservation. Some of Rome's outstanding art collections are still in private hands, and are still linked to the history of noble families, like the Colonna art gallery, and the collections of the Doria-Pamphilij and Pallavicini-Rospigliosi families. However, many outstanding private art collections ended up in public hands with the decline of certain dynasties, like the famous Palazzo Barberini or the wonderful Villa Borghese (my favourite museum in Rome). The Uffizi in Florence was, of course, once the property of the Medici family. The last heir of the Medici family left the Medici's art collections to the city of Florence, decreeing that they could never be moved from that city. Eventually, the Italian state took over the collection and established the museum. Historical facts like these are the foundations of the huge collections of art owned by the Italian state. Professor Acidini's contribution in this volume shows nonetheless that the effort by public powers – encouraged by artists and public intellectuals – to preserve the patrimony left on Italian soil during classical antiquity and in the past centuries, has been important to support the idea that the conservation of cultural property is a task of the state. With the unification of Italy, this theme was further highlighted[14]. However, it is not to be taken for granted that Italians have an instinct for the preservation of cultural property simply because the country is so rich in it. We are responsible for countless acts of destruction and neglect of our cultural patrimony. Nonetheless in our country the role of public institutions in defending and protecting cultural property is still absolutely essential[15]. The *Soprintendenze* under the authority of the Ministry of Culture possesses a high level of expertise, which makes them a fundamental pillar of the system of cultural property protection in our country. Their sense of mission is a vital component of the system, as Jennifer Celani's contribution makes clear. These are institutions that represent the upper level of Italian civil service. They can justly be proud of their achievements particularly when considering the delicate and complex tasks they are entrusted with. Just like Italy's National Health Service, which is the target of constant criticism, but still performs at a top level in international comparisons, the role of these and other public institutions in preserving cultural property cannot simply be replaced by private actors. No private actor would have the expertise, the independence, and the sense of mission that is required to perform the functions that are entrusted to the *Soprintendenze* first established over one hundred and fifty years ago[16].

Within this context, in recent decades there has been a tendency to open cultural property preservation, restoration, maintenance or valorization of cultural property to the contributions of private actors and civil society organisations[17]. There are various ways to do so, under booth the national and the regional legislations, as shown by the contribution of Abatista in this volume. At top museums, foreign professionals can now be appointed as directors, which was previously prohibited by law[18]. This reform has brought to Italy new approaches in this respect. Lorenzo Casini's contribution to this collection points to the notion of '*valorizzazione*' ('valorization') as an important addition to the tasks presently pursued by museums, and more generally by the system of cultural property protection, as laid down in the *Code of Cultural Heritage and Landscape*. According to article 6 of the *Code*: «Valorisation consists in exercising functions and regulating activities aimed at promoting knowledge of the cultural heritage and ensuring

14. Fusar Poli E., *«La causa della conservazione del bello». Modelli teorici e statuti giuridici per il patrimonio storico-artistico italiano nel secondo Ottocento*, Milano: Giuffrè, 2006; Sau A., *Il contributo della disciplina sulla tutela e valorizzazione del patrimonio culturale alla costruzione dello Stato unitario*, in Ferrara L., Sorace D. eds., *A 150 anni dall'unificazione amministrativa italiana. Studi*, Firenze: Firenze University Press, 2016, vol. VI.

15. Montanari T., *Privati del patrimonio*, Torino: Einaudi, 2015.

16. Verrastro F., *Nascita e sviluppo delle sopraintendenze per il patrimonio storico-artistico (1861-1904)*, Le Carte e la Storia, Rivista di storia delle istituzioni 1, 2007, pp. 135-157.

17. Ponzini D., *The Process of Privatisation of Cultural Heritage and the Arts in Italy: Analysis and Perspectives*, International Journal of Heritage Studies 16, 2010, pp. 508-521; Zan L., Bonini Baraldi S., Gordon C., *Cultural Heritage Between Centralisation and Decentralisation*, International Journal of Cultural Policy 13, 2007, pp. 49-70.

18. Marzano M., Castellini M., *The Reform of the Italian Ministry of Cultural Heritage: Implications for Governance of the Museum System*, The Journal of Arts Management, Law, and Society 48, 2018, pp. 206-220. On the effects of the reform on museum performances as studied by economists: Bergantino A.S, Intini M., *Museums' Performance and Directors' Recruitment Process. An Assessment of the Recent Italian Reform* (January 17, 2022) available at SSRN: ssrn.com/abstract=4011109 (last accessed 20 Sept. 2023); Alfano M.R., Baraldi A.L., Cantabene C., *Eppur si muove: An Evaluation of Museum Policy Reform in Italy*, Journal of Cultural Econnomics 47, 2023, pp. 97-131.

the best conditions for its public use and enjoyment, in order to promote the development of culture […]. The Republic encourages and supports the participation of private individuals or associations in the enhancement of the cultural heritage»[19]. This idea is promoted to let cultural property have an empowering function for the public[20].
This is not the occasion to fully assess the results of this relatively new legislative policy. It is true that all these reforms have been accompanied by criticism of the Italian government's declining investment in the protection of Italy's cultural heritage, which has been understood as a process of creeping (and sometimes not so creeping[21]) privatisation of cultural resources that belong to the public[22]. In the future, a major threat to the maintenance and the improvement of the Italian model of managing cultural property is probably the risk of the lack of personnel with adequate training to manage cultural property. The participation of private investors in the conservation of cultural property owned by the state or by the public sector is seldom accompanied by the allocation of funds for the training of personnel in the required skills. The funding cuts to cultural institutions and the low level of investment in them, is thus bound to produce a shortage of professional expertise, which is already a reality and will be even more so in the future. Alberto Garlandini, President of the International Council of Museums (ICOM), highlighted this danger in a recent interview, noting the dramatic effects on the fruition of the cultural patrimony and the public's access to it[23].

5. Public domain, and the photographic reproduction of works of art owned by museums

Lastly, I would like to address the question of who owns the rights to the photographic images of those artworks found in public collections that are now in the public domain. Once more, this discussion sheds light on how cultural property is conceived in Italy and in the U.S., and how each experience features in a comparative analysis.
To take as a starting point the American experience, most museums allow visitors to take pictures of works of art belonging to their collections. This is permitted under the fair use exception provided by U.S. copyright law, even if these works were still subject to copyright, which is not the case I intend to discuss. At the same time, there is a tendency of some museums to claim copyright over reproductions of works of art in their collections, although these pictures are mere reproductions, which show no degree of originality (it must be kept in mind that originality is necessary to assert claims based on copyright). The practice of some museums to allow the distribution of images of works in their collections that are in the public domain under the Creative Commons Zero licence (a protocol that permits every type of use not prohibited by law) implicitly confirms that these institutions have not waived their claims to copyright, although they allow wide access to the images of the artworks they hold. As observed by Cameron, if museums pursue the policy of claiming copyright over their collections to secure their commercial exploitation they fall into a sort of double bind. The revenue obtained by the museum from licensing images: «…will enable the museum to continue protecting the public domain works already in its collection […but] museums are both serving the public by preserving this art and harming the public by falsely claiming copyright in public domain images»[24].
In Europe, article 14 of Directive 2019/790 on copyright and related rights in the Digital Single Market points in a different direction with respect to works of 'visual art'. If these works are in the public domain, the above-mentioned article provides that: «…any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation». Nonetheless, even this provision does not solve every problem. As noted by Wallace and Euler: «Even if article 14 prevents owners from enforcing the rights claimed in photographic reproductions, no part of the law includes positive obligations to allow onsite photography or release digital reproductions»[25]. This means that the promise implicitly contained in article 14 of the directive – of a greater access to images of visual art that are outside the public domain – may turn out to be empty[26]. With respect to the Italian situation, it should be remembered that Italy implemented the directive «without prejudice» to the rules of the *Code of Cultural Heritage and Landscape* on reproductions of cultural property, as Felicia Caponigri duly notes in her contribution on this subject in

19. Arts. 111 ff. of the *Code* provide detailed rules on the way *valorizzazione* is to be governed.
20. Casini, 2016.
21. Benedikter R., *Privatisation of Italian Cultural Heritage*, International Journal of Heritage Studies 10, 2004, pp. 369-389.
22. See, *e.g.*, Montanari, 2015; De Cesari C., *Heritage Beyond the Nation-State?*, Current Anthropology 61, 2020, pp. 30-56.
23. *G20 Cultura – Focus sui musei – Lorenzo Casini e Alberto Garlandini*, Rome, 29-30 July 2021, available at www.youtube.com/watch?v=XrOKugNF0Gc (last accessed 8 March 2023).
24. Cameron C.T., *In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works*, Texas Intellectual Property Law Journal 15, 2006, p. 61.
25. Wallace A., Euler E., *Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments,* IIC-International Review of Intellectual Property and Competition Law 51, 2020, p. 844.
26. *Ivi*, p. 836.

the present volume. Therefore, regarding cultural property, even if a certain piece of visual art is in the public domain, some restrictive rules apply. The *Code*, at article 107, makes the reproduction of cultural property conditional upon obtaining a licence granted by the entities that are the custodians of works in the public domain. The following article of the *Code* further specifies, at article 108, that certain licences are granted without a fee, in particular licences for «reproductions requested or carried out by private individuals for personal use or study purposes, or by public or private entities for the purpose of valorisation, provided that they are carried out on a non-profit basis». Still, these rules enable Italian museums to limit various uses of the images of works of art entrusted to their custody, even if those works are in the public domain, as Caponigri shows in her contribution to the volume. Despite these rules, as a matter of fact, Italy has flourishing markets of various goods featuring (low quality) reproductions of artworks in the public domain that belong to the collections of public museums[27]. In any case, it is tempting to say that, although the U.S. and the Italian approach to the regulation of cultural property start from different premises, they meet at some points. For sure, in both countries limitations on the use of these images generates direct costs. These include costs related to the need to monitor and react to infringements, which affect both economic and cultural aspects (such as the non-dissemination of high-quality images of works, resulting from the need to 'protect' them from 'improper' use). Whether similar considerations shall eventually foster a new approach to the matter is yet to be seen, but Barbara Pasa's contribution to this collection boldly advocates it, arguing that culture must fully exploit its empowering potential, so that our legislation must respond to new needs. Lucrezia Palandri's contribution as well focuses on the possibilities that digitalisation provides opens for increased access, and the development of innovative ways to disseminate and promote cultural heritage. Finally, Italy now has an ambitious project of digitalisation of its cultural patrimony run by the *Istituto centrale per la digitalizzazione del patrimonio culturale.* This Institute recently launched a project funded through the National Recovery and Resilience Plan ('NRRP') that should lead to the digitalisation of the collections of over seventy museums and archaeological areas. Perhaps similar initiatives shall help to rethink what is owed to the public, at least as far as digital copies of works of art in the public domain are concerned.

27. Hollberg C., *Tutelare l'immagine del David. Il precedente dei beni culturali*, in Liberati Buccianti G. ed., *L'opera d'arte nel mercato: principi e regole*, Torino: Giappichelli, 2019, p. 122.

Nota

I wish to thank Michael Gardiner for his careful reading of the text. All remaining errors are mine.