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THE RISE OF PSEUDO-INTELLECTUAL PROPERTY AND THE END OF PUBLIC DOMAIN

I. In less than two hundred pages, including images, the book edited by Daniele Manacorda (archaeologist) and Mirco Modolo (archaeologist and archivist) manages to offer an effective summary of the lively debate on the legal regime of cultural heritage images in Italy. The book collects the proceedings of a conference promoted by the *Fondazione Aglaia* and held in Florence on 12 June 2022.[1]

The work is, in essence, a multidisciplinary manifesto for the liberalization of cultural heritage images. This may be already hinted in the copyright notice, which states verbatim: 'the images published on the cover and in the following pages [...] are subject to the restrictions on the use of reproductions of public cultural heritage stated by the articles 107-108 of the Italian Code on Cultural Heritage, which are contested in this work [...]'.

In doing so, the editors immediately establish their position, and do not try to clothe themselves in pretenses of neutrality. Nonetheless, the book incorporates diverse visions, and through both the text and the bibliographical apparatus it gives voice to authors arguing against the liberalization of images, starting with representatives of the *Società Italiana di Ingegneria Culturale* (Italian Society for Cultural Engineering).

II. The book, preceded by Carolina Megale's foreword and Paolo Baldi's greetings, is composed of three parts: an introduction articulated in two chapters authored by the editors of the work, a second part that collects contributions from scholars with different expertise in the fields of law (Giorgio Resta), economics (Massimo Fantini), public

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[1] Daniele Manacorda and Mirco Modolo (eds), *Le immagini del patrimonio culturale. Un'eredità condivisa?* (Pacini 2023).

administration of cultural heritage (Laura Moro) and enjoyment of cultural heritage (Grazia Semeraro, Andrea Brugnoli) and a third and final part including some experiences from the public and private sector (Daniele Malfitana, Antonina Mazzaglia, Martina Bagnoli, Beppe Moiso, Tommaso Montonati, Claudia Baroncini, Stefano Monti, Riccardo Falcinelli, Iolanda Pensa, Fabio Viola).

In his addendum to the first introductory chapter, Daniele Manacorda recalls the most recent legislative changes. In particular, he refers to d.m.11.04.2023, n. 161, 'linee guida per la determinazione degli importi minimi dei canoni e dei corrispettivi per la concessione d'uso dei beni in consegna agli istituti e luoghi della cultura statali del Ministero della Cultura' [Ministerial Decree no. 161 of 11 April 2023, on the subject of fees and charges for the concession of use of the Italian State's cultural heritage]. In this regard, Manacorda notes: 'with this decree, we are dramatically going back in time: payment is re-established also for the reproduction of images in scientific journals, heavily striking young people in a very delicate moment of their professional growth' (my translation).

The book should be read alongside other contributions that have recently been published on the subject. I am thinking in particular of issue no. 3 of 2023 of the journal 'Aedon', in which the editors of the book engage in a dialogue with other experts in this domain, and in particular with administrative law scholars; as well as of Eleonora Landini's interview with the director of the Egyptian Museum in Turin, Christian Greco, published under the title 'La cittadinanza cresce al museo [Citizenship grows at the museum]', published in the online version of the journal 'Il Mulino'. This latter piece also touches upon Open Access to images of cultural heritage (a topic explored in depth in the chapter authored by Beppe Moiso and Tommaso Montonati, with more specific reference to the experience of the prestigious Egyptian Museum in Turin).

III. The book edited by Manacorda and Modolo helps the reader to understand the ways in which the legal regime concerning cultural heritage images is complex and contradictory. It is complex because it stands at the crossroads of at least four disciplines: intellectual property, personality rights, cultural heritage public law, and EU public sector information law (with particular reference to the Open Data Directive (EU) 2019/1024). It is also complex because it concerns the balancing of constitutional rights.

And finally, it is complex because – as Mirco Modolo's well-documented and in-depth piece explains – the current Italian legislation is the result of a long and fluctuating history, in which the drivers of liberalization have always been exposed to counterforces supporting the State's proprietary assertions. The outcome is today's messy patchwork, and its first victim is the (mythical) coherence of the legal system.

Likewise, the Italian legal regime is contradictory because one does not fully understand the reasons against the liberalization of images, which seek to legitimate the State's exclusive power to control the reproduction of cultural goods. Are these aiming at enhancing the State's prospects for profit, in the hope of comprehensively enforcing its rights (and without knowing how to do so)? Is the commercialization of images that are part of the State's cultural heritage supposed to fill cultural institutions' meagre coffers? This would be in spite of what the *Corte dei Conti* (the Italian Supreme Audit Institution] has also recently pointed out, which is also noted in some of the chapters of the book – in particular, the one by Massimo Fantini: operating costs exceed revenues. Or, finally, is this happening because the State wishes to retain the exclusive power to decide who can reproduce cultural heritage and how, and therefore exclusively assess if the use of the in question is compatible with its cultural heritage value (*decorum*)?

Of concern here is not only the phantom of censorship, as denounced in particular by Daniele Manacorda, but also a sense of the ridiculous. The same State that claims the exclusive power to evaluate the suitability of uses of cultural heritage recently launched, through the Italian Ministry of Tourism, the national promotion campaign called 'Open to meraviglia' (literally: 'open to wonder'), in which the unfortunate and innocent Botticelli's Venus has been transfigured into a young influencer.

Contradictions emerge most clearly in the cases brought before some Italian courts (in particular, Tribunale di Venezia and Tribunale di Firenze) by the Italian State, concerning well-known works such as Michelangelo's David and the Leonardo's Vitruvian Man. These cases are reconstructed in a systemic and comparative perspective in Giorgio Resta's lucid and incisive chapter. In these decisions, the State initiated an action for the unauthorized reproduction of cultural goods for commercial purposes, by well-known and commercially powerful companies (with arguably deep pockets). Did the State act in order to claim the use is incompatible with the purpose and value of the cultural heritage or to obtain, in case of infringement, the payment of damages?

If big and economically powerful companies interested in using images of the Italian cultural heritage were to 'smell a rat' and look elsewhere – towards other free sources such as the archives of several museums abroad available on open access or, with reference to images of cultural assets outside the control of the Italian state, to Wikipedia and Wikicommons – our Leviathan would most likely be left with 'poorer' customers. They would largely be niche scientific publishers (such as university presses or specialized publishers), not the large oligopolies like Elsevier and Springer-Nature.

In this scenario, the hope of making profits would dramatically collapse, and in many cases the revenue could be reduced to what is collected today through reciprocal exchanges of public money, i.e. taxpayers' money (e.g., consider the case where the university press of a public university 'X' pays State's museum 'Y' for the reproduction of the image of the item 'Z'). The issue with commercial exploitation, if any, is manifest in the role that Big Tech plays in image management (now through artificial intelligence) but this, the evidence suggests, cannot be tackled by means of state proprietary claims.

IV. Before concluding, a few words must be said about two major problems triggered by the idea of exclusive State control of cultural heritage images, which arise from the complexity and contradictions described above.

The end of the public domain. According to a proper understanding of the concept, in the public domain the fundamental freedoms of information of expression and thought are the rule, while exclusive rights constitute the exception. When legislators create exclusive rights, they necessarily limit the duration and scope of the exclusivity. For example, copyright expires seventy years after the death of the author and does not cover ideas, but only their expression. Intellectual property (understood as a macro-category including copyright, patents for invention, trademarks, industrial designs, and trade secret) broadly respects this principle. This is a pillar of democratic societies that finds a declination, also illustrated in Resta's contribution, in another principle: the *numerus clausus* of intellectual property rights. Only the legislator can establish new exclusive rights, by using the balancing techniques that are typical of private law. Judges cannot do so, nor can legislators by resorting, through public law, to the creation of masked and anomalous forms of intellectual property (or pseudo-intellectual property).

Liquid law and utter confusion. As a proud realist, the writer feels no nostalgia for a longed-for (and never existing) golden age in which law corresponded to a robust, stable and just legal 'system'. If stability exists, it is very often imposed by the strongest, and is therefore a source of injustice. As for the Italian legal regime of cultural property images, there is no stability, and no move towards more advanced models – such as the Dutch and American ones – has been made. There is only a great deal of confusion. While much of the most recent debate has focused on the above-mentioned Ministerial Decree 2023/161, incorporating the guidelines for fees and concessions, the most disturbing facet of the State's exclusive control occurs in the very inventive (and, indeed, confusing) case law on the reproduction of cultural heritage images. In the opinions written by some judges, the exclusive control of the Italian State would find its basis in the Italian Cultural Heritage Code, and in the rules of the Civil Code that protect the personality right in the image of persons (Article 10 of the Civil Code). This would be, in short, a paradigmatic example of the destruction of the public domain and a violation of the principle of the *numerus clausus* of intellectual property rights, by the judicial introduction of a pseudo-intellectual property right masked as a personality right.

Needless to say, the arguments roughly sketched here are reproposed and elaborated with skill and passion in book edited by Daniele Manacorda and Mirco Modolo, the reading of which is highly recommended.