

**HEADACHES IN PERPETUITY:  
THE COLLISION BETWEEN COPYRIGHT LAWS AND  
STATUTORY PROTECTIONS FOR CULTURAL HERITAGE**

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*This Essay, delivered as the Copyright Society's 2025 Donald C. Brace Lecture, examines the conflict between copyright laws and statutory protections for cultural heritage including protections for traditional cultural expression.*

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## INTRODUCTION

Thank you to the Copyright Society, and particularly to its President, Dan Cooper, for inviting me to give this evening's 2025 Donald C. Brace Lecture. The topic for my remarks is "*The Collision Between Copyright Laws and Statutory Protections for Cultural Heritage*," with the teaser tag "*Headaches in Perpetuity*." My goal this evening is to examine the impact of cultural heritage laws on the balance between the protection of cultural heritage and the need of content creators for a robust clearly defined public domain. I will focus on the trend towards perpetual protection for copyrightable work in the Italian and French cultural heritage laws and for non-copyrightable works in the proposed WIPO folklore treaty and national laws protecting traditional cultural heritage, focusing on the extent to which those laws incorporate safeguards similar to those inherent in copyright laws. With both the Italian and French laws I will also explore the inherent conflict with the European Union harmonization of the term of copyright and make some predictions about how the conflict might play out in the European Court of Justice.

With the proposed WIPO Traditional Cultural Expression (TCE) instrument and national TCE laws I will examine the conflicts with the pragmatic principles of copyright law which include clearly identifiable owners, clearly defined works, a clear set of rights & exceptions/limitations, and a limited term of protection.

Legal regimes for the protection of cultural heritage are not a recent development. Protection for cultural heritage in Italy can be traced back to edicts issued by Ferdinando de' Medici, Grand Duke of Tuscany, in 1602. And copyright law, while a more recent development, has also been long established. So what has changed? There are several recent developments that raise new questions about the intersection between legal protections for cultural heritage and copyright laws.

The first is the expansion of protections for works of cultural heritage beyond the longstanding protections for the physical objects to now also encompass copyright protection or copyright-equivalent protection for the intangible rights in such objects, often with perpetual duration of protection and often without exceptions for fair use.

The second development is the mandate from the European Union to harmonize the duration of copyright protection across all E.U. member states. That mandate establishes protective boundaries for the public domain, boundaries that are now being invaded by provisions of cultural heritage laws. Italy has noted the conflict between the perpetual impact of its cultural affairs law and the E.U. harmonization of the public domain, as can

be seen in their implementation law which contains a dubious effort to neutralize the impact of the E.U. harmonization directive.

The third development is uses of these laws in contexts beyond protection for the integrity of cultural heritage, uses which at times include imposing content-based restrictions on the creative freedom to create new works and the commercialization of works of heritage as revenue generating commodities.

After examining these points of conflict with copyright law, I will touch briefly on whether there might be perspectives other than copyright for viewing these laws – perspectives that could include moral rights and consumer protection laws. I will close with a discussion of the implications of these laws on film & television productions, literary works & print publications, and merchandise.

### *I. PRAGMATIC BEDROCKS OF COPYRIGHT*

Throughout this evening's discussion I will consider how the cultural heritage laws measure against the framework of four pragmatic bedrocks of copyright law. These bedrocks provide the certainty and predictability that underlay the copyright system, that give it clarity, and that make it a valued & effective tool for protecting creative works while enabling the creation of new creative works. The value of the copyright systems is not only for individual authors whose work is protected, it is equally valuable for other authors who may wish to use existing works as inspiration and source material during the creation of new original works.

The four bedrock principles are: clearly defined works; limited duration of rights with a robust and predictable public domain; clearly defined ownership; and appropriate exceptions and limitations. I will use these bedrocks to assess the extent to which the cultural heritage laws provide pragmatic guidance for the creation of new original works and the extent to which they might interfere with appropriate boundaries for the public domain.

### A. Clearly Defined Works

The first bedrock principle is that copyright protection applies only to original works of human authorship which are fixed in a tangible form of expression.<sup>2</sup> This means that ideas and other intangible creations or works are *not* protected.<sup>3</sup> Section 102(b) of the Copyright Act states:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.<sup>4</sup>

This is consistent with the Copyright Clause of the U.S. Constitution: which, with regards to copyright, provides “Congress shall have the Power... to promote the progress of...useful arts...by securing for limited times to authors...the exclusive right to their writings.”<sup>5</sup>

Aspects of cultural heritage that are not fixed in a tangible form of expression, such as traditions or religious rituals, would not fall within the scope of copyright protection.

The value of this bedrock for creators of new works is that, for protection to attach, the original work to which it attaches must be fixed, tangible, and clearly identifiable. One of the key factors in determining whether one work infringes another work is whether there is substantial similarity between the works.<sup>6</sup> Substantial similarity can be assessed only where the exact confines of the original work can be determined.

### B. Limited Duration of Rights, Coupled with a Robust and Predictable Public Domain

The second bedrock is a clearly defined and limited duration of protection. While the duration of copyright protection varies from country to country, all copyright laws have a fixed duration of protection which is based on a clear starting date for that duration and a clear end date – after which the work enters the public domain. As just referenced, in the U.S. the Copyright Clause of the Constitution calls for Congress to secure these rights “for limited times.”<sup>7</sup> A limited term of protection enables – and is crucial for – the

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<sup>2</sup> 17 U.S.C. § 102.

<sup>3</sup> Protection also attaches only to works of human authorship. This requirement has led to extensive debates over the scope of protection for works generated by artificial intelligence. *Copyright and Artificial Intelligence*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/ai/>.

<sup>4</sup> 17 U.S.C. § 102(a).

<sup>5</sup> U.S. CONST. art. I, § 8.

<sup>6</sup> To prove copyright infringement, the plaintiff must show (1) that the defendant had access to the plaintiff’s work and (2) that the defendant’s work is substantially similar to protected aspects of the plaintiff’s work. *Feist Publications, Inc. v. Rural Tel. Ser Co. Inc.*, 499 U.S. 340, 361 (1991).

<sup>7</sup> U.S. CONST. art. I, § 8. In June of 1995 I participated in a Congressional Field Hearing on copyright extension in Pasadena. Congressman Sonny Bono pointed out at the Hearing that he and his heirs can own a house forever. They can own a car forever. He argued that they should similarly be able to own the copyrights to his songs *forever*. It fell to another member of the House Subcommittee on Courts and IP to remind Congressman Bono of the Constitutional restriction. His

existence of a robust and predictable public domain, which in turn enables the creation of new creative works. Since works by individual authors are protected for the life of the author plus a set period of years, the 1976 Copyright Act creates a presumption mechanism for situations where the date of an author's death cannot be determined.<sup>8</sup> This adds further predictability of this bedrock principle.

The E.U. provided for a harmonized term of protection for all member states of the E.U. in the Copyright Term Directive.<sup>9</sup> The E.U. not only harmonizes the duration of protection, it also harmonizes the public domain status of works subsequent to the term of copyright.

The Copyright in the Digital Single Market Directive in 2019 provides that “when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.”<sup>10</sup> This provision prevents the application of copyright protection to faithful reproductions of works in digital forms where the original work is already in the public domain.<sup>11</sup> As a result, the directive supports “access to and promotion of culture” and ensures access to European cultural heritage as well as its enrichment.

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response was: “*Well then we need to have a hearing on amending the Constitution!*” Congressman Bono never got his Constitutional amendment, but that hearing led to legislation which became law as Sonny Bono Copyright Term Extension Act. *Public Law 105–298, 105<sup>th</sup> Congress, Oct. 27, 1998 (Section 101 provides: “This title may be referred to as the “Sonny Bono Copyright Term Extension Act”).*

<sup>8</sup> 17 U.S.C. § 302(e) provides: “*Presumption as to Author's Death* – After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefits of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.”

<sup>9</sup> The Copyright Term Directive 2006/116/EC is a consolidated version of the prior EU Directive harmonizing the term of copyright protection (Council Directive 93/98/EEC of 29 October 1993), including all amendments to the prior text of the Directive. Article 1 provides that the term of protection is 70 years from the death of the author. In the case that the author is anonymous or pseudonymous the term for a work is 70 years from the date of first lawful publication. The directive notes that the original goal of the Berne Convention was to protect works for two generations after the death of the author, and that fifty years was no longer sufficient for this purpose. ¶5 of the Preamble.

<sup>10</sup> Article 14 of Directive (EU) 2019/790.

<sup>11</sup> See Recital 53. That recital notes that “[i]n the field of visual arts, the circulation of faithful reproductions of works in the public domain contributes to the access to and promotion of culture, and the access to cultural heritage”; and that “[i]n the digital environment, the protection of such reproductions through copyright or related rights is inconsistent with the expiry of the copyright protection of works.”

### *C. Defined Ownership*

The third bedrock is clearly defined ownership. Without the ability to identify the owner of rights it is not possible to negotiate licenses, or to determine whether a party asserting rights is indeed the owner of the rights. U.S. copyright law provides a clearly defined definition of the initial owner of the work. The copyright vests initially in the author or authors of the work.<sup>12</sup> In the case of works-made-for-hire, the initial owner is the employer or the commissioning party.<sup>13</sup>

The Copyright Act provides a mechanism for the recordation of subsequent transfers of ownership with the Copyright Office.<sup>14</sup> While recordation is optional, it provides valuable priority rights where there are conflicting transfers.<sup>15</sup> This further contributes to predictably.

### *D. Appropriate Exceptions and Limitations*

In addition to the existence and protection of the public domain, all nations' copyright laws provide for appropriate exceptions to and limitations on the exclusive rights of copyright owners. These are the concepts of fair use, fair dealing, and the 3-step test. In the U.S. we have the four-step fair use test set forth in Section 107.<sup>16</sup> On the international level, the Berne Convention provides that

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<sup>12</sup> 17 U.S.C. § 201(a) provides "Initial Ownership – Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work."

<sup>13</sup> 17 U.S.C. § 201(b) provides: "Works Made for Hire– In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

<sup>14</sup> 17 U.S.C. § 205.

<sup>15</sup> 17 U.S.C. § 205(c) provides: "Recordation as Constructive Notice – Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if: (1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and (2) registration has been made for the work."

<sup>16</sup> 17 U.S.C. § 107 provides: "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 copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted 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."

It shall be a matter for legislation in the Countries of the Berne Union to permit the reproduction of...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 interest of the author.<sup>17</sup>

This provision is commonly referred to as the three-step test. It has been interpreted to mean that exceptions & limitations to the rights of copyright owners are permissible only when three criteria are met: (1) the limitations & exception are not overly broad; (2) they do not conflict with normal exploitation by the rights holder; and (3) they do not do disproportional harm to the rights holders.

That three-step test enabling appropriate exceptions & limitations is reflected in Article 5 of the EU Copyright Directive, as well as in the WIPO Copyright Treaty (the WCT)<sup>18</sup>, and the WIPO Performances & Phonograms Treaty (the WPPT).<sup>19</sup> The result is universal under copyright laws: even where a work is protected, appropriate uses for activities such as parody, satire, commentary, criticism, research, and scholarships that might otherwise be infringing are protected. Statutory language, coupled with judicial guidance, makes it possible for creators of new works to assess with a reasonable level of clarity whether their work may be permissible – even where their work may encompass elements of a third-party's protected work.

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<sup>17</sup> Berne Convention for the Protection of Literary and Artistic Works, Paris Act, art. 9, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

<sup>18</sup> WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 121.

<sup>19</sup> WIPO Performances and Phonograms Treaty art. 19, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997).

## II. ITALY: CULTURAL HERITAGE LAW

### A. Overview of the Italian Law

The tradition of protecting Italian cultural heritage is older than the country itself. The concept of legal protections for Italian cultural heritage dates back centuries, long prior to the country's unification in 1861. One of the earliest legal directives asserting control over cultural objects was issued in 1602 by Ferdinando de' Medici, Grand Duke of Tuscany.<sup>20</sup> That edict provided that the exportation of artworks made by non-living artists from the territory of the Grand Duchy required an export license to be granted by the Academy of the Arts of Drawing. The Edict listed eighteen artists whose works could not be exported from the Grand Duchy's territory – including works of DaVinci, Michelangelo, Raphael, and Correggio.

The first comprehensive Italian cultural heritage law was approved by the Italian Parliament in 1909.<sup>21</sup> The law evolved over time, including during the Fascist era with a comprehensive law enacted in 1939.<sup>22</sup> The law was again revised in 1999.<sup>23</sup> In 2004 the Italian Parliament approved the current Cultural Heritage Code ("CHC").<sup>24</sup>

### B. Protections Accorded By the Cultural Heritage Code for Physical Objects

The CHC provides that any object with a "cultural interest," from an artistic, historical, archaeological or ethno-anthropological viewpoint, may be declared of cultural interest and, consequently, classified as "cultural property." This applies regardless of whether the work is owned by a public entity (state, region, municipality), by a private entity (corporation or not-for-profit organization), or by an individual.<sup>25</sup>

A time limitation applies for a work to qualify as having cultural interest. Objects made by non-living authors more than 70 years ago may be declared of cultural interest, while objects made by living artists or by non-living artists less than 50 years ago cannot be declared of cultural interest and are not subject to cultural heritage protection. Objects with a cultural interest made by a non-living author between 50 and 70 years ago may be

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<sup>20</sup> Carugno, Mazzitti e Zucchelli, *Codice dei Beni Culturali annotato con la giurisprudenza* (Milan: Giuffrè 2006), p 1. See also Report of the International Bar Association Art, Cultural Institutions and Heritage Law Committee, *Art law: Restrictions on the export of cultural property and artwork*, DECEMBER 2020, page 55

(<https://www.ibanet.org/MediaHandler?id=d67cb566-b6d4-4ea4-94e5-04d0ac6c7681>).

<sup>21</sup> See Report of the International Bar Association Art, Cultural Institutions and Heritage Law Committee, *Art law: Restrictions on the export of cultural property and artwork*, DECEMBER 2020, page 55

(<https://www.ibanet.org/MediaHandler?id=d67cb566-b6d4-4ea4-94e5-04d0ac6c7681>).

<sup>22</sup> Legge 29 giugno 1939, n. 1497, G.U. Oct. 14, 1939, n. 241 (It.).

<sup>23</sup> Decreto legislativo 29 ottobre 1999, n. 490, G.U. Dec. 12, 1999, n. 302 (It.).

<sup>24</sup> Decreto legislativo 22 gennaio 2004, n. 42, G.U. Feb. 24, 2004, n. 45 (It.).

<sup>25</sup> D.lgs. 42/2004, art. 10 (It.).

declared of cultural interest only if they show an exceptional interest for the integrity and completeness of the Italian cultural heritage.<sup>26</sup>

If an object is declared of cultural interest, a private owner is entitled to sell or donate it but the State has a pre-emption right to acquire the work.<sup>27</sup> Furthermore, an export license is required to be obtained from the Export Offices of the Ministry of Cultural Property before any such work can leave Italian territory.

Control over aspects of such works is exerted by the State even when the work remains within Italian borders. For example, the owner of the work is under an obligation to preserve the integrity of the work<sup>28</sup>, approvals are required for restoration<sup>29</sup>, and even the movement of the work within Italy, such as for showing at an exhibition, requires approvals. Furthermore, an authorization by the Ministry is required for moving the work from its current location.<sup>30</sup>

### *C. Protections Accorded to Physical Objects by International Conventions*

Italy is not alone in regulating trade in physical objects which are deemed to be of valued cultural heritage. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property deals with illegal export of cultural objects and artwork.<sup>31</sup> Italy has ratified the UNESCO Convention<sup>32</sup> and the Convention is expressly referenced in the CHC.<sup>33</sup> The Convention does not, however, have notable impact in Italy in light of the robust provisions of the CHC domestic law.

Italy also ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects<sup>34</sup>, which similarly deals with the illegal export of cultural objects and

<sup>26</sup> See Report of the International Bar Association Art, Cultural Institutions and Heritage Law Committee, *Art law: Restrictions on the export of cultural property and artwork*, DECEMBER 2020, page 66

(<https://www.ibanet.org/MediaHandler?id=d67cb566-b6d4-4ea4-94e5-04d0ac6c7681>).

<sup>27</sup> D.lgs. 42/2004, art. 59 (It.).

<sup>28</sup> D.lgs. 42/2004, art. 20(1)(a) (It.).

<sup>29</sup> D.lgs. 42/2004, art. 20(4)(It.).

<sup>30</sup> D.lgs. 42/2004, art.20(1)(b)(It.).

<sup>31</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232.

<https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural>

<sup>32</sup> On 2 October 1978 (Law No 873/1978), Italy ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, without adopting any specific reservations or declarations and the Convention became effective on 2 January 1979.

<sup>33</sup> D.lgs. 42/2004, art. 87 (It.).

<sup>34</sup> Unidroit Convention On Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1995, <https://www.unidroit.org/instruments/cultural-property/1995-convention/>. The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organization based in Rome.<sup>77</sup> Its purpose is to study needs and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and

artworks and the return of such works to their rightful owner.<sup>35</sup> Italy is also party to a number of other similar international agreements.<sup>36</sup> Again those treaty obligations largely mirror the provisions of the Italian domestic law in the CHC.

Restrictions on the sale, transfer, restoration, or other aspects of the physical object does not implicate aspects of copyright law because those provisions apply to the physical objects and not to intangible rights in the objects.<sup>37</sup> So where do complications arise with regards to copyright law? The complications arise because the revised Italian code protects not only the physical object, it also creates relatively new copyright-equivalent rights.

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groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.” *About UNIDROIT*, UNIDROIT, <https://www.unidroit.org/about-unidroit/> (last visited March 29, 2026).

<sup>35</sup> The ratification of the UNIDROIT Convention in 2000 resulted in two notable changes in Italian law:

- 1) The Italian Civil Code (Article 1153) provides that a good faith purchaser of a stolen property may become the legitimate owner of that property if they acquired possession of the property and the ownership was transferred in accordance with an adequate title (eg, sale, donation). A plaintiff may, however, bring a claim under the UNIDROIT Convention against the possessor of a stolen item may prevail over a good faith buyer but is obliged to pay the good faith buyer compensation; and
- 2) in the case of an illegally exported cultural object, a possessor who acquired the object after it was illegally exported is entitled, at the time of its return, to payment by the requesting state of fair and reasonable compensation, provided that the possessor neither knew nor reasonably ought to have known at the time of acquisition that the object had been illegally exported. The requesting state shall make its request for return within a period of three years from the time it knew the location of the cultural object and the identity of its possessor, and in any case within a period of 50 years from the date of the illegal exportation.

<sup>36</sup> Those international instruments include: Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40; Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151; European Convention on the Protection of the Archaeological Heritage, May 6, 1969, 788 U.N.T.S. 227, 8 I.L.M. 736; European Cultural Convention European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 139; and Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Bilateral agreements include: 2017 Bilateral Agreement between Italy and Greece to fight the illicit traffic of cultural property; 2008 Bilateral Agreement between Italy and Switzerland on the import and repatriation of cultural property; and 2001 Memorandum of Understanding against the art trafficking between Italy and the US, concerning the imposition of import restrictions of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy (the Memorandum was amended in 2016).

<sup>37</sup> “Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.” 17 U.S. Code § 202 (Ownership of copyright as distinct from ownership of material object).

#### *D. Creation of Copyright-Type Protection*

The 2004 Code of Cultural Heritage and Landscape law expanded the scope of the Heritage law to cover not only the works themselves but also reproductions of the work.<sup>38</sup> The Code permits cultural institutions, such as museums, to seek compensation for the commercial reproduction of cultural properties.<sup>39</sup> Specifically, Article 108 of the Code requires payment of a concession fee for the reproduction of images of state-owned cultural heritage which is otherwise in the public domain if the reproduction is for profit. Film & television productions and print publications are “for profit”, so the impact is not limited to purely commercial products such as items of merchandise.

#### *E. Claims Asserted Pursuant to the Italian Law*

The devil can often lurk in the ways in which laws are actually used in practice. The following are examples of claims that have been asserted under the Italian cultural heritage law, juxtaposed with a few examples of uses that would not be subject to claims.

##### 1. Examples of claims that have been asserted

###### a. *Vitruvian Man* puzzle

The German puzzle Ravensburger manufacturer produced a wooden jigsaw puzzle based on Da Vinci’s drawing created in 1490 of “*Vitruvian Man*,” which was inspired by the Roman architect Vitruvius.<sup>40</sup> The original drawing resides in the Gallerie dell’ Accademia in Venice.<sup>41</sup> For more than a decade, Ravensburger sold a 1,000-piece puzzle with the image of the famed drawing. But in 2019, the Italian government and the Gallerie dell’ Accademia demanded that Ravensburger stop selling the puzzle and pay a licensing fee.<sup>42</sup> Ravensburger refused, arguing in part that the Italian code did not apply outside Italy.<sup>43</sup>

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<sup>38</sup> D.lgs. 42/2004 (It.).

<sup>39</sup> *Id.*

<sup>40</sup> Derrick Bryson Taylor, *Da Vinci’s Been Dead for 500 Years. Who Gets To Profit From His Work?*, N.Y. TIMES (Apr. 10, 2024), <http://nytimes.com/2024/04/10/world/europe/vitruvian-man-puzzle-leonardo-da-vinci-ravensburger.html>.

<sup>41</sup> *The Vitruvian Man - by Leonardo da Vinci*, LEONARDO DA VINCI, <https://www.leonardodavinci.net/the-vitruvian-man.jsp> (last visited March 30, 2026).

<sup>42</sup> Lydia Filipsson, *Case Review: Case Review: Ravensburger v. Italian Ministry of Culture (LG Stuttgart, Judgment of 14.03.2024 – 17 O 247/22)*, CTR. FOR ART L. (Oct. 19, 2024), <https://itsartlaw.org/case-review/case-review-ravensburger-v-italian-ministry-of-culture/>.

<sup>43</sup> Taylor, *supra* note 40.

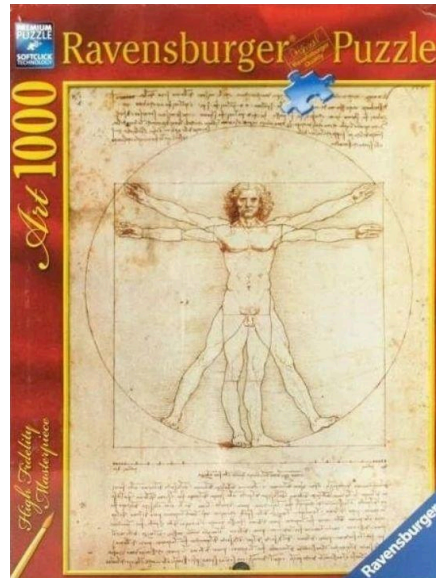


Figure 1: Image of Puzzle sold by Ravensburger<sup>44</sup>

In 2022, a Venice court ordered the company to pay a penalty of €1,500 for each day the company delayed payment.<sup>45</sup> But a court in Germany subsequently sided with Ravensburger, ruling that the company did not have to pay up and that Italy’s cultural heritage code does not apply beyond its borders.<sup>46</sup> The court ruled that the Italian code broke with European law, which standardizes copyright protections for 70 years after the death of the artist.<sup>47</sup> (Da Vinci has been dead for more than 500 years.) The German court stated that “The Italian state does not have the regulatory power to apply it outside Italian territory,” “The opposite view would violate the sovereignty of the individual states and must therefore be rejected.”<sup>48</sup>

Italy continued to push back. A spokesman for the Italian government referred to the German ruling as “abnormal” and vowed that the government would challenge it before

<sup>44</sup> Deborah De Angelis and Brigette Vezina, *The Vitruvian Man: A Puzzling Case for the Public Domain*, COMMUNIA (March 1, 2023), <https://communia-association.org/2023/03/01/the-vitruvian-man-a-puzzling-case-for-the-public-domain/>.

<sup>45</sup> Daniel Borgogni, *Extraterritorial application of the Italian Cultural Heritage Code: the Court of Venice orders Ravensburger to cease the marketing of its puzzles with the image of the Vitruvian Man*, LEXOLOGY (Feb. 28, 2023), <https://www.lexology.com/library/detail.aspx?g=a9343f3b-f0a2-40d0-bb4d-93157aac96a8>.

<sup>46</sup> Taylor, *supra* note 40.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

“every national, international and community court.”<sup>49</sup> At this point the reported trail goes cold. But it appears that Ravensburger stopped selling the puzzle worldwide and may have reached some form of a settlement.<sup>50</sup>

There are several takeaways from this dispute. The first is that the Italian government will pursue claims against uses that are not derogatory and not offensive to the original work; the second is the rather obvious clarification that Italian domestic law cannot be enforced outside of Italy; and the third is the German court’s reference to the conflict between the Italian law and E.U. harmonization of the duration of copyright – a point that I will explore in greater detail later in this evening’s discussion.

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<sup>49</sup> *Id.*

<sup>50</sup> While Ravensburger ceased distributing this puzzle, other puzzle versions of DaVinci’s *Vitruvian Man* drawing can be found on Amazon. See, e.g., *EuroGraphics Vitruvian Man by Leonard Da Vinci 1000 Piece Puzzle*, AMAZON, [https://www.amazon.com/EuroGraphics-Vitruvian-Leonard-Vinci-Puzzle/dp/B0039ZGA02/ref=sr\\_1\\_6?crid=2K04T3Z5YYL0V&dib=eyJ2IjoiMSJ9.Qt6BMWvsIzbI2Yhn9c6FwNHyaATNOkGQ6OG41acHgn4X\\_r-U\\_mEwQC6aUzTqf6SEdzTvT7tYX7FK62i7HbHfcYrWp-1t04F5W-eSlaLMxuFzvmYgWtm5yiMrVHxSs7sTalxwE0oIDJL6DV2KdnZxF0mtURiQtKJNqMbKZb5nD8kCLWXAqSGoMqzzOaHPQlnsMfabYbdgfFzjZ6zbq74diNEM9so\\_utsfd\\_Rk9SeyH7QnuznNz6ygyPmf5KTomZZ7VDH1J9h8-X1vc1BSfRbicgN3VLLBUUU1yVxWAuE5D7Dc.TaFBhXQjERAc7hHrAK2eymxt8NKatneYeajpkLBd8uw&dib\\_tag=se&keywords=Vitruvian+Man+puzzle&qid=1767931124&sprefix=vitruvian+man+puzzle%2Caps%2C148&sr=8-6](https://www.amazon.com/EuroGraphics-Vitruvian-Leonard-Vinci-Puzzle/dp/B0039ZGA02/ref=sr_1_6?crid=2K04T3Z5YYL0V&dib=eyJ2IjoiMSJ9.Qt6BMWvsIzbI2Yhn9c6FwNHyaATNOkGQ6OG41acHgn4X_r-U_mEwQC6aUzTqf6SEdzTvT7tYX7FK62i7HbHfcYrWp-1t04F5W-eSlaLMxuFzvmYgWtm5yiMrVHxSs7sTalxwE0oIDJL6DV2KdnZxF0mtURiQtKJNqMbKZb5nD8kCLWXAqSGoMqzzOaHPQlnsMfabYbdgfFzjZ6zbq74diNEM9so_utsfd_Rk9SeyH7QnuznNz6ygyPmf5KTomZZ7VDH1J9h8-X1vc1BSfRbicgN3VLLBUUU1yVxWAuE5D7Dc.TaFBhXQjERAc7hHrAK2eymxt8NKatneYeajpkLBd8uw&dib_tag=se&keywords=Vitruvian+Man+puzzle&qid=1767931124&sprefix=vitruvian+man+puzzle%2Caps%2C148&sr=8-6) (last visited Mar. 30, 2026).

a. Jean Paul Gautier couture

In 2022 fashion designer Jean Paul Gautier launched his “Le Musee” collection featuring a range of designs with printed Renaissance paintings, including Botticelli’s *Birth of Venus*.<sup>51</sup>



Figure 2 and 3: Botticelli’s *Birth of Venus* and Gautier’s “Le Musee”<sup>52</sup>

The legal department of Gallerie degu Uffizi, where Botticelli’s work is currently housed, sent a letter demanding payment or withdrawal of the outfit.<sup>53</sup> The French luxury

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<sup>51</sup> The collection also uses images derived from Peter Paul Rubens’ *The Three Graces*, which is a work of Flemish origin, currently located in the collection of the Prado Museum in Spain, and from Michelangelo’s *The Creation of Adam* in the Sistine Chapel, which will be discussed below.

<sup>52</sup> *Birth of Venus*, LE GALLERIE DEGLI UFFIZI <https://www.uffizi.it/en/artworks/birth-of-venus> (last visited Mar. 30, 2026).

<sup>53</sup> Alexandra Tremayne-Pengelly, *Florence’s Uffizi Museum Sues Jean Paul Gautier for Using a Botticelli Image In Clothing*, THE OBSERVER (Oct. 11, 2022, 03:56 PM), <https://observer.com/2022/10/florences-uffizi-museum-sues-jean-paul-gautier-for-using-a-botticelli-image-in-clothing/>.

brand did not respond, so a litigation was commenced, seeking damages in the range of €100,000.<sup>54</sup> The outfit was subsequently withdrawn from the Gautier collection.

b. Michaelangelo's *The David*

Michaelangelo's *The David*, which resides in the Galleria dell'Accademia di Firenze,<sup>55</sup> has been the source of multiple claims which run a spectrum of scenarios.

i. ArmaLite advertisement

ArmaLite, an American company, promoted its AR-501 "Work of Art" assault rifle using an image of the actual sculpture as it appears in the Galleria dell'Accademia.<sup>56</sup>

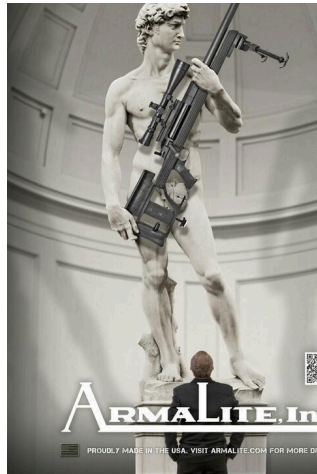


Figure 4: "Work of Art" featuring Michaelangelo's *The David*.<sup>57</sup>

<sup>54</sup>See The Guardian "Uffizi Galleries sue Jean Paul Gaultier over use of Botticelli images" October 10, 2022 at

<https://www.theguardian.com/world/2022/oct/10/uffizi-galleries-sue-jean-paul-gaultier-over-use-of-botticelli-images>; see also "Tales of Public Domain Protection in Italy", Deborah De Angelis & Giuditta Giardini, July 10, 2023 at

<https://communia-association.org/2023/07/10/tales-of-public-domain-protection-in-italy/>.

<sup>55</sup> *David - Michelangelo Buonarroti*, GALLERIA DELL'ACCADEMIA DI FIRENZE.

<https://www.galleriaaccademiafirenze.it/en/artworks/david-michelangelo/> (last visited Mar. 31, 2026).

<sup>56</sup> Time Staff, *Italy Furious At Gun-Toting 'David' Statue in U.S. Rifle Ad*, TIME MAG. (Mar. 9, 2014, 10:55 AM CT),

<https://time.com/17313/italy-furious-at-gun-toting-david-statue-in-u-s-rifle-ad/>.

<sup>57</sup> ArmaLite, "A Work of Art" advertisement (2014),

<https://time.com/17313/italy-furious-at-gun-toting-david-statue-in-u-s-rifle-ad/>.

When ArmaLite issued this advertisement in 2024 the Italian culture minister denounced it as offensive and a violation of the law.<sup>58</sup> An official at the Department of Culture in Florence was reported as having warned ArmaLite not to use the image. While the assault weapon was not available for sale in Italy, the company's website containing the image was accessible. ArmaLite pulled the ad and apologized. The lesson here is that even where a product is not available for sale in Italy and is not being actively marketed there, a claim can still give rise to public relations concerns.

ii. GQ Magazine cover

GQ ran a cover photo of male model Pietro Boselli in the same pose as Michelangelo's *The David*. In spring 2020, GQ had asked the Galleria dell' Accademia for permission to use an image of *The David* on the cover of a then forthcoming issue.<sup>59</sup>



Figure 5 and 6: GQ Cover and Michaelangelo's *The David*<sup>60</sup>

The director of Accademia granted permission to use the image of *The David* but subject to the conditions that no there be no alteration of the image of *The David* and that the same issue of the magazine contain an article about the museum and Michelangelo's

<sup>58</sup> Time Staff, *supra* note 56.

<sup>59</sup> In spring 2020, GQ sought permission from the Galleria dell' Accademia to use an image of Michelangelo's *The David* on the cover of an upcoming issue. See Eleonora Rosati, *Is it a breach of the Italian Cultural Heritage Code to feature on GQ a model posing like Michaelangelo's David? Yes, says Florence Court*, IPKAT (June 6, 2023), <https://ipkitten.blogspot.com/2023/06/is-it-breach-of-italian-cultural.html>.

<sup>60</sup> *Id.*

work. The negotiations proved fruitless and no agreement was concluded. The July-August 2020 issue of GQ Italia was released with the image of Pietro Boselli on its cover. The museum sued, and the court ultimately imposed a fine of €80,000.<sup>61</sup>

This claim is interesting because it does not involve a reproduction of Michelangelo's work. It is a near-exact copy of the pose, but is a pose the same as the work itself? Would this pose be subject to copyright protection when recreated in another work? This conjures up the questions that U.S. courts dealt with in *Leibovitz v. Paramount Pictures Corp.* in which Paramount Pictures created a promotional advertisement with actor Leslie Nielsen in the same pose as a Vanity Fair cover image of actress Demi Moore during her pregnancy taken by photographer Annie Liebovitz.<sup>62</sup>

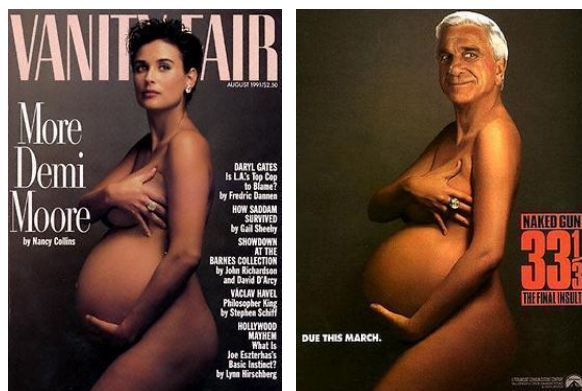


Figure 7 and 8: Original Demi Moore Vanity Fair cover and Leslie Nielsen movie spoof version.<sup>63</sup>

At trial, the Southern District of New York found the use to qualify as fair use,<sup>64</sup> and on appeal, the Court of Appeals for the Second Circuit affirmed.<sup>65</sup> The courts viewed the re-creation of the pose as infringing, so the case hinged on whether there was a fair use defense to the infringement.<sup>66</sup> The lesson here is that even where the original work is not reproduced (unlike with the Ravensburg puzzle, Jean Paul Gautier's Botticelli, and the ArmaLite dispute where the original work was reproduced as part of the new work) there is the potential for a claim to be asserted under the Italian law.

<sup>61</sup> *Id.*

<sup>62</sup> The Leslie Neilson photograph was actually a composite photo of Mr. Neilson's head on the body of a pregnant model hired by Paramount.

<sup>63</sup> Figure 7: *Vanity Fair*, Aug. 1991; Figure 8: Paramount Pictures teaser poster, Paramount Pictures 1994.

<sup>64</sup> 948 F. Supp. 1214 (S.D.N.Y. 1996).

<sup>65</sup> 137 F.3d 109 (2d Cir. 1998).

<sup>66</sup> The trial court stated "The within case is that rare case where there is direct evidence in fact, a frank admission by the defendant that the allegedly infringing work is modelled on the copyrighted work. In the absence of a fair use defense, therefore, the defendant would be liable for infringement." *Leibovitz*, 948 F. Supp. at 1218.

### iii. Joe & the Juice promotion

During 2025, the coffee chain Joe & The Juice ran an in-store promotion featuring a naked male dancing while the words “*Culture Shaked Up*” appeared, advertising a new beverage that is high in fiber and “packed with billions of live cultures.”<sup>67</sup> While the ad does not use a copy of *The David* and is not a reproduction of the original pose, it clearly conjures up Michelangelo’s work. The video version of the promotion begins with the model in stationary statue pose, the model has a similar haircut as *The David*, it lacks human eyeballs, and there is a reference to “culture” which would not make sense if this were simply based on a random male model.



Figure 9 and 10: Advertisement for “Culture Shaked Up”<sup>68</sup>

For the chain’s locations in Dubai & Beirut the model is clad in a toga, which is a further departure from Michelangelo’s work.

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<sup>67</sup>Still image of the Joe & The Juice promotional campaign, 2025.

<sup>68</sup>*Id.*



Figure 11: Toga Version of the Ad<sup>69</sup>

I am not aware of any claim being asserted, and there are currently no Joe & The Juice stores in Italy. Any such hypothetical claim would represent a further expansion of the scope of claims beyond a reproduction of any aspect of the work to include a work which merely conjures up the idea of the original without creating any basis for a claim of copyright infringement.

## 2. Examples of Uses That Would Not Be Subject to Claims

Not every work that could be thought of as a work of Italian cultural heritage falls within the scope of the law

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<sup>69</sup> Joe & The Juice faced criticism in connection with a Dubai advertising campaign that featured imagery inspired by Michelangelo's *The David*, including a stylized depiction of the statue in a toga, raising questions about the commercial use of classical artworks and cultural imagery in global marketing. See discussion of the brand's lifestyle-focused marketing strategy, *Modern Retail* (March 2023), [https://www.modernretail.co/marketing/joe-the-juice-global-brand-director-kasper-garnell-on-how-t he-chain-is-positioning-itself-as-a-lifestyle-brand/](https://www.modernretail.co/marketing/joe-the-juice-global-brand-director-kasper-garnell-on-how-the-chain-is-positioning-itself-as-a-lifestyle-brand/)

a. The *Mona Lisa*

Leonardo DaVinci's *Mona Lisa*, one of the most famous works of Italian art, was painted in Italy by DaVinci in 1518.<sup>70</sup> It is not, however, subject to the Italian law since it is not currently housed in Italy. In 1518 King François the First invited Leonardo da Vinci to visit him in France and Da Vinci brought the painting with him from Italy. François liked the painting so much that he purchased it from DaVinci. After the French Revolution, when François lost his head, the painting was moved to the Louvre, with a brief detour to the bedroom of Napoleon in the Tuileries Palace.<sup>71</sup>



Figure 12: Da Vinci's The *Mona Lisa*

In 1911 the painting was stolen by an employee of the Louvre.<sup>72</sup> The employee was an Italian patriot who believed that da Vinci's painting should be housed in an Italian, not a French, museum. After keeping the painting in his apartment for two years, the thief was eventually caught when he attempted to sell it to the Uffizi Gallery in Florence. It

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<sup>70</sup> Leonardo da Vinci's *Mona Lisa*, one of the most famous works of Italian art, was painted in Italy in the early sixteenth century. *Mona Lisa*, Encyclopaedia Britannica (last visited Mar. 31, 2026), <https://www.britannica.com/topic/Mona-Lisa-painting>

<sup>71</sup> After the French Revolution, when Louis XVI was executed, the painting was transferred to the Louvre, with a brief detour to Napoleon's bedroom in the Tuileries Palace. *Mona Lisa*, Encyclopaedia Britannica (last visited Mar. 31, 2026), <https://www.britannica.com/topic/Mona-Lisa-painting>.

<sup>72</sup> In 1911, the painting was stolen by a former Louvre employee in one of the most famous art heists in history. Evan Andrews, *The Heist that Made the Mona Lisa Famous*, History.com (Aug. 19, 2016), <https://www.history.com/articles/the-heist-that-made-the-mona-lisa-famous>

was exhibited in the Uffizi Gallery for two weeks in 1913 before being returned to the Louvre in January of 1914.<sup>73</sup>

Since the work is not currently located in Italy, it is not subject to the Italian cultural heritage law. If the Uffizi had instead retained possession of the painting in 1914, it would now be covered by the law. The current location of the work is a deciding factor of whether the Italian law applies.

b. Jean Paul Gautier’s Couture Featuring Michelangelo’s “*The Creation of Adam*”

As part of the same “Le Musée” couture collection which contained an outfit using the image of Botticelli’s *Birth of Venus*, Jean Paul Gautier included a dress using a portion of Michelangelo’s *The Creation of Adam* (*Creazione di Adamo*).<sup>74</sup> Michelangelo created that fresco over a period of four years from 1508-1512.<sup>75</sup> While Michelangelo’s work can be visited on a trip to Italy, it is located in the Sistine Chapel in Vatican City.

The Kingdom of Italy annexed the Papal States in 1870.<sup>76</sup> In 1929 the Lateran Treaties were signed. Those treaties were between the Holy See under Pope Pius XI and the state Italy under King Victor Emmanuel III and Prime Minister Benito Mussolini.<sup>77</sup> The treaties recognized Vatican City as an independent state under the sovereignty of the Holy See.<sup>78</sup> While the treaty was significantly revised in 1984, ending the status of Catholicism as the sole state religion of Italy, the Vatican remains a distinct sovereign entity.<sup>79</sup> As a result, similar to the *Mona Lisa*, there would be no basis for a claim under

<sup>73</sup> Uffizi Gallery is a major art museum in Florence, Italy, housing one of the world’s most significant collections of Renaissance art, including works by Botticelli, Michelangelo, and Leonardo da Vinci. *Uffizi Gallery*, Encyclopaedia Britannica (last visited Mar. 31, 2026), <https://www.britannica.com/topic/Uffizi-Gallery>

<sup>74</sup> As part of the same “Le Musée” couture collection—which included an outfit featuring Botticelli’s *The Birth of Venus*—Jean Paul Gautier also presented a dress incorporating a portion of Michelangelo’s *The Creation of Adam* (*Creazione di Adamo*). *The Birth of Venus*, Encyclopaedia Britannica (last visited Mar. 31, 2026), <https://www.britannica.com/topic/The-Birth-of-Venus-painting-by-Botticelli>; *Creation of Adam*, Encyclopaedia Britannica (last visited Mar. 31, 2026), <https://www.britannica.com/topic/Creation-of-Adam>

<sup>75</sup> Michelangelo created the fresco over a period of approximately four years, from 1508 to 1512. *Michelangelo’s Sistine Chapel Ceiling*, World History Encyclopedia (Sept. 16, 2020), <https://www.worldhistory.org/article/1607/michelangelos-sistine-chapel-ceiling/>

<sup>76</sup> The Papal States were ultimately annexed by the Kingdom of Italy in 1870 during the final stages of Italian unification, marking the end of the Pope’s temporal rule over central Italy. *The Papal States Were Annexed by the Kingdom of Italy*, HistorySnacks (last visited Mar. 31, 2026), <https://historysnacks.io/event/pKsHOHly/the-papal-states-were-annexed-by-the-kingdom-of-italy-completing-the/>.

<sup>77</sup> In 1929, the Lateran Treaties were signed between the Holy See under Pope Pius XI and the Italian state under King Victor Emmanuel III and Prime Minister Benito Mussolini. *Lateran Treaty*, Encyclopaedia Britannica (last visited Mar. 31, 2026), <https://www.britannica.com/event/Lateran-Treaty>.

<sup>78</sup> Treaty of the Lateran. Feb. 11, 1929, Italy-Vatican City, O.V.T.S. 161, Europ. T.S. No. 590019,

<sup>79</sup> Agreement to Amend the 1929 Lateran Concordat, Holy See-It., Feb. 18, 1984, 24 I.L.M. 1589.

the Italian cultural heritage law against this fashion design since the painting is not located in the Italian state because Vatican City is not subject to Italian laws.

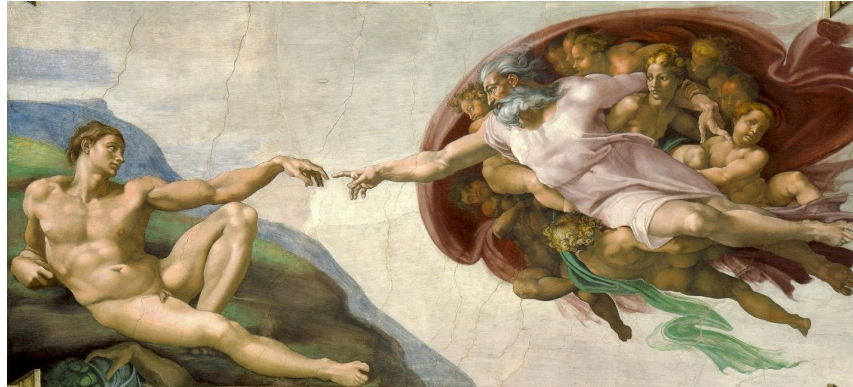


Figure 13, 14 and 15: Michelangelo's *The Creation of Adam* and Jean Paul Gautier's 1995 couture fashion using a portion of that image.<sup>80</sup>

#### *F. Similar Laws Elsewhere in Europe and Conflicts with the E.U. law*

Elsewhere in Europe, Greece has a similar law, adopted in 2021, which requires government permission to use images of historic sites or artifacts for commercial use, and

<sup>80</sup> Michelangelo's *Creation of Adam* depicts the biblical moment in which God creates human life, illustrating the Genesis narrative through the near-touching hands of God and Adam, symbolizing the transmission of life and intellect. *Michelangelo's Creation of Adam: Meaning*, The Collector (Mar. 7, 2022), <https://www.thecollector.com/michelangelo-creation-of-adam-meaning/>.

forbids the use of images that "alter" or "offend" the monuments in any way.<sup>81</sup> Unlike with the Italian law, I am not aware of any legal claims having been asserted under the Greek law.

As noted above, the E.U. Copyright Term Directive of 2006 provides harmonization of the duration of copyright protection at 70 years from the death of the author.<sup>82</sup> The subsequent Copyright in the Digital Single Market Directive in 2019 provides that

when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.<sup>83</sup>

The Directive clearly provides that when the term of protection has expired the work is no longer subject to protection.<sup>84</sup> The granting of perpetual statutory protection for certain Italian works of visual art is in clear conflict with the Directive. The German court in the Ravensburger puzzle case noted that the Italian code is in conflict with European law standardizing the term of protection for works of visual art.<sup>85</sup> Intriguing issues arise because E.U. Directives are not self-executing (unlike E.U. Regulations),<sup>86</sup> but they must be implemented via domestic legislation.<sup>87</sup> There is a range of approaches taken by the member states when implementing the terms of the Directive.<sup>88</sup>

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<sup>81</sup>Kodikas Nomothesias gia tin Prostatia ton Archaioiton kai en Genei tis Politistikis Klironomias [KNPPK] [Code of Legislation for the Protection of Antiquities and Cultural Heritage in General], Nomos [N.] 4858/2021, FEK A' 220 (Nov. 19, 2021) (Greece).

<sup>82</sup> Council Directive 2006/116/EC, 2006 O.J. (L 372) 12.

<sup>83</sup> Council Directive 2019/790, art. 14, 2019 O.J. (L. 130) 118

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup>An E.U. "regulation" is a binding legislative act. It must be applied in its entirety across the EU. For example, when the EU's regulation on ending roaming charges while travelling within the EU expired in 2022, the Parliament and the Council adopted a new regulation both to improve the clarity of the previous regulation and make sure a [common approach on roaming charges](#) is applied for another ten years. An E.U. "directive" is a legislative act that sets out a goal that EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals. One example is the [EU single-use plastics directive](#), which reduces the impact of certain single-use plastics on the environment, for example by reducing or even banning the use of single-use plastics such as plates, straws and cups for beverages.

[https://european-union.europa.eu/institutions-law-budget/law/types-legislation\\_en](https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en)

<sup>87</sup> *Types of Legislation*, EUROPEAN UNION,

[https://european-union.europa.eu/institutions-law-budget/law/types-legislation\\_en](https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en) (last visited Mar. 31, 2026).

<sup>88</sup> Some member states have taken the position that implementing legislation is not necessary because their existing domestic laws were already fully compliant with the Directive (including Belgium, France, Hungary, Luxembourg, the Netherlands, Poland, Slovakia). Others enacted domestic legislation transporting Article 14 verbatim or nearly verbatim (including Austria, Croatia, Denmark, Estonia, Latvia, Portugal, Romania, and Spain). At least two member states expanded the scope of Article 14 in their implementation. Sweden's revised provision on related rights excludes new protections for photographs of all 'works of art' for which copyright no longer

The Italian approach to implementation acknowledges the conflict created by the Italian cultural heritage law.<sup>89</sup> When implementing Article 14 of the CDSM in November 2023, the Italian government provided in its implementing legislation that: “The provisions on the reproduction of cultural heritage contained in Legislative Decree 2004 remain unaffected.”<sup>90</sup> This is a reference to the provision of the Italian Code which requires the payment of a licensing fee for reproduction of images of state-owned cultural heritage in the public domain if the reproduction is for-profit.<sup>91</sup>

A member state cannot implement a Directive in a manner that is inconsistent with the provisions of the Directive. But it would be up to the European Court of Justice (ECJ) to make that determination.<sup>92</sup> To date this issue has not been referred to the ECJ seeking clarification of the relationship between Article 14 of the Directive and the CDSM.

There is, however, a potential added twist. The Directive applies “when the term of protection of a work of visual art *has expired*.”<sup>93</sup> Michelangelo’s, Da Vinci’s, and Botticelli’s works predate the concept of copyright law.<sup>94</sup> As a result, they were never protected by copyright. And therefore, the term of protection for those works never began and never expired. Does this mean that the Directive does not apply to *The David*, to the *Birth of Venus*, to *Vitruvian Man*? Again there is no answer to this question until it is referred to the EJC for interpretation.

It is possible that the EJC could take the position that the goal of the Directive was to protect the public domain status of all works regardless of the era in which the work was created, so the Court might interpret this provision as meaning “has expired or would have expired,” which would mean that the Italian carve-out for the cultural heritage law is invalid.

Previously in this discussion I raised the question of whether the toga-clad image inspired by *The David* in the Dubai and Beirut versions of the Joe & The Juice promotion would be a copyright infringement and concluded it would not. If, hypothetically, the

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applies, rather than only works of visual art. The German Copyright Act (Section 68) excludes ‘reproductions of visual artworks in the public domain’ from being protected by the related rights recognized for photographic works and products manufactured in a similar manner to photographs (such as 3D scans and other reproduction media).

<sup>89</sup> Legge 22 aprile 1941, n. 633 (with amendment up to 21 settembre 2022, n. 142), G.U. Nov. 7, 2021, n. 283 (It.).

<sup>90</sup> Deborah De Angelis and Giuditta Giardini, *Tales of public domain protection in Italy*, COMMUNIA (July 10, 2023), <https://communia-association.org/2023/07/10/tales-of-public-domain-protection-in-italy/#:~:text=At%20the%20session%20of%20June.in%20charge%20of%20the%20property.%E2%80%9D>.

<sup>91</sup> D.lgs. 42/2004, art. 108 (It.).

<sup>92</sup> The Court’s mission is to ensure that EU law is interpreted and applied in the same way across the EU. It does this by hearing cases where the parties have differing views on what the law means, how it should be applied, or how it has been implemented by member states. Most of its cases are referred to the Court of Justice by national courts (referred to as references for preliminary rulings). However, some cases come directly to the Court (referred to as direct actions).

[https://curia.europa.eu/site/jcms/d2\\_5093/en/the-court-of-justice](https://curia.europa.eu/site/jcms/d2_5093/en/the-court-of-justice)

<sup>93</sup> Council Directive (EU) 2019/790, art. 14, 2019 O.J. (L. 130) 118.

<sup>94</sup> *Copyright History*, IPRO, [https://intellectualpropertyrightsoffice.org/copyright\\_history/](https://intellectualpropertyrightsoffice.org/copyright_history/) (last visited Mar. 31, 2026).

Galleria dell'Accademia di Firenze decided to pursue a claim against the Dubai/Beirut versions such a claim would not be in conflict with the Directive since the claim would not be akin to a claim of copyright infringement.

Before moving on to benchmarking the Italian law, it is worth briefly mentioning the question of whether the UNESCO<sup>95</sup> and UNIDROIT<sup>96</sup> treaties conflict with the EU Directive. They do not. Both treaties apply only to protection of physical works, not to copyrights, neighboring rights, or other intangible rights associated with the work, while the EU Directive applies solely to intangible rights and not to the physical object

### *G. Comparison to Bedrock Principles*

How does the Italian law stack up against the pragmatic benchmarks that we discussed earlier?

- 1) Does it apply to clearly defined works? *YES*
- 2) Is it consistent with a limited term of protection and a robust public domain? *NO*
- 3) Are there clearly defined owners of the rights? *YES*
- 4) Does it include appropriate exceptions and limitations? *NO*

So a mixed report card, but ultimately the Italian law fails the pragmatic benchmark test. The result is that when clearing rights for use in a film or episodic production, as well for publications and merchandise, attention must be paid to the strong likelihood of a claim being asserted under the Italian law whenever use is made, even fleetingly, of a work of Italian art or culture which is currently located in Italy.

## *III. FRANCE: MONUMENTS OF THE NATIONAL ESTATE*

### *A. An Introduction to French Law Protecting Structures*

Works of architecture are protected by copyright law in France for 70 years following the death of the architect.<sup>97</sup> During that period, prior consent must be sought prior to any use.<sup>98</sup> After that term of protection, the structure is considered to be in the public domain for all purposes.<sup>99</sup> Film productions have been obligated to pay licensing fees for onscreen portrayals of copyright-protected works of French architecture, many of whom are represented by the French visual artists' rights management organization ADAGP.<sup>100</sup>

<sup>95</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* note 31.

<sup>96</sup> Unidroit Convention On Stolen or Illegally Exported Cultural Objects, *supra* note 34.

<sup>97</sup> Code de la propriété intellectuelle [IPC] art. L. 123-1 (fr.).

<sup>98</sup>C. prop. Intell. [IPC] art. L. 122- 4 (fr.).

<sup>99</sup>C. prop. Intell., *supra* note 97, art. L. 123-1 (fr.).

<sup>100</sup> The Society of Authors in the Graphic and Plastic Arts (ADAGP) is a French [copyright management society](#) representing authors of works of visual arts. It was founded in 1953 and has

However in addition to the limited-term copyright protection, Article L. 621-42 of the French Heritage Code requires prior authorization and financial compensation when an image is used of a structure which is on the list of Monuments of the National Estate without time limitations on this statutory protection.<sup>101</sup>

The initial version of the list included six structures.<sup>102</sup> That list was subsequently expanded. These are the currently protected structures:

- Domaine du Louvre et des Tuileries (Paris) / Louvre + Tuileries
- Palais de l'Elysée (Paris) / The Elysée
- Palais de la Cité (Paris) / Palace of The Cité
- Domaine du Palais-Royal (Paris) / Palais Royal
- Château de Vincennes (Paris) / Vincennes Castle
- Domaine de Chambord (Loir-et-Cher) / Chambord Castle
- Domaine de Pau (Pyrénées-Atlantiques) / Pau Domain
- Château d'Angers (Maine-et-Loire) / Angers Castle
- Domaine du château de Malmaison (Hauts-de-Seine) / Malmaison Castle
- Domaine de Saint-Cloud (Hauts-de-Seine) / Saint Cloud Domain
- Domaine de Meudon (Hauts-de-Seine) / Meudon Domain
- Château de Coucy (Aisne) / Courcy Castle
- Château de Pierrefonds (Oise) / Pierrefonds Castle
- Domaine du château de Villers-Cotterêts (Aisne) / Villers-Cotterêts Castle
- Domaine du château de Compiègne (Oise) / Compiègne Castle
- Palais du Rhin (Bas-Rhin) / Palace of Rhin

The law includes an exception which provides that the prior authorization of the national domain administrator is not required when the image is used for a commercial purpose where the commercial use is for a cultural, artistic, teaching, education, research, information, news illustration purpose.

#### 1. Chambord Châteaux

In 2018 the Kronenbourg brewery filed a lawsuit challenging a claim that it owed compensation for the use of a photograph of the Chambord châteaux in an advertisement for its beer.<sup>103</sup> The court upheld the law, rejecting the argument that use in a commercial

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more than 22,000 member authors. For a list of architects represented by ADAGP, see <https://www.adagp.fr/en/repertoire-des-artistes?title=architect>

<sup>101</sup> C. prop. Intell. [IPC] art. L. 621- 42 (fr.).

<sup>102</sup> Aurelia Marie, France: Law on National Domain Images Changes, *MANAGING IP*, (August 29, 2018)

<https://www.managingip.com/article/2a5bqo2drurt0bww4pmcj/france-law-on-national-domain-images-changes#:~:text=Previously%2C%20commercial%20exploitation%20of%20a.an%20image%20of%20such%20buildings> (last viewed Apr. 1, 2026).

<sup>103</sup> Beau de Lomenie, *Can The Image Belonging to the French State be Freely Used?*, *BEAU DE LOMENIE*, (Jun. 21, 2018)

<https://www.bdl-ip.com/en/2018-06-can-the-image-of-a-building-belonging-to-the-french-state-be-freely-used/#:~:text=This%20question%20has%20just%20been%20decided%20by.one%20of%20the%20beers%20in%20the%202010's> (last visited Mar. 31).

work could be considered as private use of the public domain.<sup>104</sup> Based solely on the drafting of the law, it is not clear whether a feature film or episodic production would qualify as an “artistic” work even though it is clearly commercial. The Kronenbourg case does not provide guidance, since that case involved a work of commercial advertising. At least one of the Monuments takes the position that permission is required for use in a motion picture. Even if a feature film is exempt, it is possible that marketing materials, including promos & trailers might still be subject to the law. Let’s examine several examples.

## 2. The Louvre: Two Examples



Figure 16: I.M. Pei's pyramid<sup>105</sup>

I.M. Pei's pyramid in the courtyard of the Louvre was built in 1989.<sup>106</sup> Pei died in 2019, so the pyramid will continue to be protected by French copyright law until 2089, 70 years after his death, consistent with the harmonized duration of copyright under the E.U. term directive.<sup>107</sup> As a result, use of images of the pyramid will trigger rights issues based on the copyright in the architecture.

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<sup>104</sup> *Id.*

<sup>105</sup> The glass pyramid at the Louvre, designed by architect I.M. Pei in the 1980s, was introduced as part of a broader modernization effort to improve access to the museum, despite initially sparking significant public controversy. *The Great Pyramid of Pei*, Library of Congress Blog (Oct. 1, 2024), <https://blogs.loc.gov/loc/2024/10/the-great-pyramid-of-pe/>.

<sup>106</sup> Louvre, *A Pyramid for a Symbol*, LOUVRE, <https://www.louvre.fr/en/explore/the-palace/a-pyramid-for-a-symbol> (last visited Mar. 31, 2026).

<sup>107</sup> Directive 2006/116/EC, *supra* note 82.



*Figure 17: The original Louvre Building*

The original Louvre, built in 1793, is included in the list of Monuments of the National Estate, so, while not protected by copyright law, it is protected by the French cultural heritage law, and use of images may trigger claims – not under copyright law but instead under the Monuments law.

### 3. Notre-Dame de Paris

Notre-Dame de Paris was constructed in the 1300s and therefore long in the public domain. It was rebuilt true to its original design following the 2019 fire (re-opening in 2024). It is not included in the list of Monuments of the National Estate, so it is not subject to either copyright or quasi-copyright protections. The post-fire exterior reconstruction is an exact re-creation of the pre-fire structure, so no new copyright protection attaches to the reconstruction. As a result, productions do not need to be concerned about clearing use of images of the cathedral under either copyright law or the Monuments law.



Figure 18: Notre-Dame de Paris

There were proposals for a new roof structure which would have been subject to a new term of copyright protection. For example, architect Norman Foster proposed a glass and steel roof with a needle-shaped spire.<sup>108</sup>

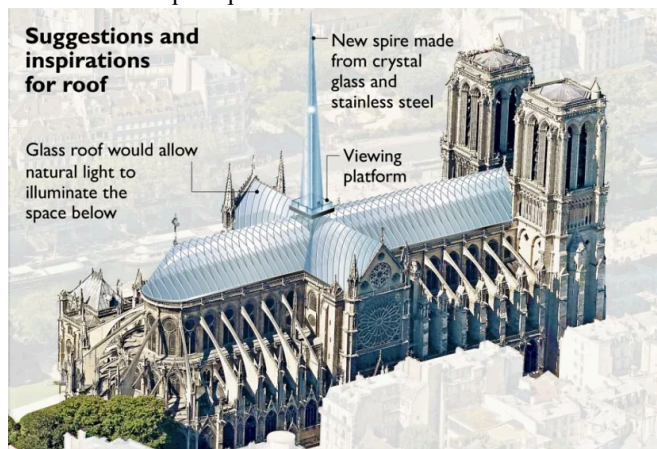


Figure 19: Proposal by Norman Foster for New Architectural Roof<sup>109</sup>

<sup>108</sup> Notre-Dame de Paris is a medieval Gothic cathedral in Paris, widely regarded as one of the most significant examples of Gothic architecture due to its size, antiquity, and architectural innovation. *Notre-Dame de Paris*, Encyclopaedia Britannica (last visited Mar. 31, 2026), <https://www.britannica.com/topic/Notre-Dame-de-Paris>.

<sup>109</sup> *Id.*

French architect Mathieu Lehanneur went even further, proposing replacing the fallen spire with a golden sculpture of a massive burning flame.



Figure 20: Proposal by Mathieu Lehanneur<sup>110</sup>

Had an approach of those types been adopted, the exterior of the cathedral would be protected by French copyright law for many decades to come since copyright protection would attach to the newly created architectural elements.

#### 4. Eiffel Tower

The Eiffel Tower was constructed in 1889 and architect Gustave Eiffel died in 1923.<sup>111</sup> The Tower entered the public domain 70 years later in 1993.<sup>112</sup> And it is not included in the list of Monuments of the National Estate, so it is not subject to copyright or quasi-copyright protections. However, the nighttime illumination was installed in 1985 by Pierre Bideau. Bideau passed away in 2021. Since the light show is considered to be an artistic work, it is protected by French copyright law until 2094 (70 years following Bideau's death). Claims of protection to the nighttime illumination are frequently asserted by the organization that manages the Tower, [La Société d'Exploitation](https://www.toureffel.paris/en/the-monument/gustave-eiffel)

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<sup>110</sup> *Id.*

<sup>111</sup> *Gustave Eiffel*, LA TOUR EIFFEL, <https://www.toureffel.paris/en/the-monument/gustave-eiffel> (last visited Mar. 31, 2026).

<sup>112</sup> *Id.*

[de la Tour Eiffel \(SETE\)](#).<sup>113</sup> As a result, the use of a daytime image of the Eiffel Tower in poster art for the film *Mission: Impossible Fallout* did not trigger any rights claim.



Figure 21, 22 and 23: Eiffel Tower in the daytime (no copyright), Eiffel Tower at night (copyright) and Mission Impossible poster using the daytime version of the Eiffel Tower<sup>114</sup>

But the use in the film of a 1.5 second shot of the tower at night, visible in the background as a character parachutes onto the roof of the Grand Palais, did trigger a copyright claim.



Figure 24: Mission Impossible Fallout image with Eiffel Tower in the background<sup>115</sup>

<sup>113</sup> The SETE states that “The various illuminations of the Eiffel Tower (golden illumination, twinkling, beacon and events lighting) are protected. The use of the image of the Eiffel Tower at night is therefore subject to prior authorisation by the SETE. This use is subject to payment of rights, the amount of which is determined by the intended use, the media plan, etc.” See *The Eiffel Tower Image*, SOCIÉTÉ D’EXPLOITATION DE LA TOUR EIFFEL, <https://www.toureffel.paris/en/business/use-image-of-eiffel-tower>.

<sup>114</sup> MISSION: IMPOSSIBLE FALLOUT (Paramount Pictures 2018).

<sup>115</sup> *Id.*

Note that the Grand Palais, where the scene takes place and which is prominently featured in the film, was constructed in 1897 and is not included in the list of Monuments of the National Estate.<sup>116</sup> Nor does it have a nighttime lighting scheme that could be newly protected as an artistic work. As a result, there is no basis for claim based on the portrayals of the Grand Palais.

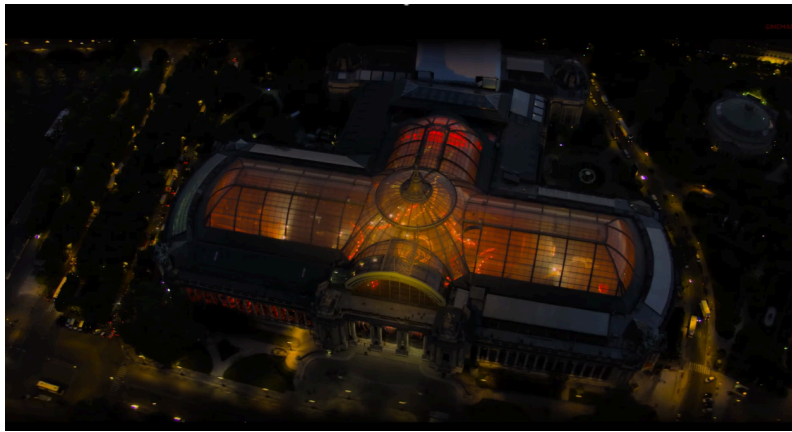


Figure 25: Grand Palais as seen in Mission Impossible Fallout<sup>117</sup>

### B. Conflicts with the Right of Panorama

In 2021 a “freedom of panorama” was enacted in French, creating a new legal exception to copyright law.<sup>118</sup> This exception to copyright protection applies to “reproductions and representations of architectural works and sculptures, located permanently in public places, carried out by physical persons, excluding any commercial use.”<sup>119</sup> This is an expansion of the exemptions already applicable to works located in

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<sup>116</sup> *The history of the Grand Palais*, GRANDPALAIS, <https://www.grandpalais.fr/en/grand-palais> (last visited Apr. 1, 2026).

<sup>117</sup> MISSION: IMPOSSIBLE FALLOUT (Paramount Pictures 1996).

<sup>118</sup> On January 21, 2016, the National Assembly adopted, at first reading, the bill for which introduced the new legal exception to copyright law known as “freedom of panorama.” The exception was subsequently adopted by the Senate after several amendments and was incorporated into the French Intellectual Property Code. See *Projet de loi pour une République numérique*, LA GALAXIE SÉNAT,

<https://www.senat.fr/salle-de-presse/201603/projet-de-loi-pour-une-republique-numerique.html> (last visited Apr. 1, 2026); Code de la propriété intellectuelle [IPC] art. L. 122-5 (fr.)<sup>5</sup>

<sup>119</sup> *Id.*; See Dreyfus, *Copyright: adoption of the controversial “Panorama exception”*, DREYFUS (June 12, 2016), <https://www.dreyfus.fr/en/2016/12/06/copyright-adoption-of-the-controversial-panorama-exception/> for translated quote.

public places. The French Intellectual Property Code permits some uses of works located in public places without prior authorization from the author.

The pre-existing exception for works located in public places, as codified in Article L122-5, stipulates that the author cannot prohibit the reproduction of a graphic, plastic or architectural work if this is done through the press and made exclusively for information purposes.<sup>120</sup> French case law previously established under the “theory of the accessory” (*théorie de l’accessoire*), that a work located in a public place may be reproduced where it does not constitute the main subject of the reproduction.<sup>121</sup> In 2005, the Cour de Cassation authorized the reproduction of a memorial located at Place des Terreaux in Lyon.<sup>122</sup> The court considered that it was part of the location’s overall architecture and therefore in a photograph, it was only an accessory.

Those pre-existing exemptions applied only to uses in reporting or for informational purposes, and to uses where the protected work is merely incidental. The concept of a broader exemption for works of architecture was opposed by the French visual artists’ rights management organization ADAGP (Société des Auteurs dans les Arts Graphiques et Plastiques<sup>123</sup>), which denounced the fact that architects and sculptors would be deprived of their copyright.<sup>124</sup> Eventually the freedom of panorama as enacted was limited to situations that meet three cumulative conditions, which ADAGP endorsed:

- First, the legislation provides that the exception applies to architectural works and sculptures “located permanently in public places.” Thus, the exception does not include temporary structures located in a public place.
- Second, the exception is limited to individuals and therefore excludes companies.
- Third, the reproduction of an architectural work must not be for commercial use or done not for profit.<sup>125</sup>

This creates uncertainty regarding what exactly constitutes “commercial use.” Unfortunately, we cannot turn to European Union law for guidance on what constitutes commercial use. Indeed, Article 5.3(h) of the 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 (the “InfoSoc Directive”<sup>126</sup>) gives Member States latitude to have or not have a freedom of panorama exception for “use of works, such as works of architecture or sculpture, made to be located permanently in

<sup>120</sup> Code de la propriété intellectuelle [IPC] art. L. 122-5 (fr.).

<sup>121</sup> Cour de cassation [Cass.][supreme court for judicial matters], Lyon, civ., Mar. 15, 2005, 03-14.820.

<sup>122</sup> *Id.*

<sup>123</sup> ADAGP, *United Against the Extension of the Panorama Exception*, ADAGP FOR ARTIST RIGHTS, (May 2, 2016)

<https://www.adagp.fr/en/actuality/united-against-extension-panorama-exception> (last visited Mar. 31, 2026).

<sup>124</sup> *Id.*

<sup>125</sup> ADAGP “All you have ever wanted to know about panorama exception”, July 4, 2016 at <https://www.adagp.fr/en/actuality/all-you-have-ever-wanted-know-about-panorama-exception>.

<sup>126</sup> Council Directive (EU) 2001/29, 2001 O.J. (L. 167) 10.

public places,” but does not mention nor define commercial use.<sup>127</sup> As a result, the right of panorama will seemingly not be a defense to the use in a film or television production of a protected work under either copyright law or the cultural heritage law.

### C. Conflict with E.U. law

As noted in the discussion of the Italian cultural heritage law, the E.U. Copyright Term Directive of 2006 harmonizes the duration of copyright protection at 70 years from the death of the author.<sup>128</sup> The subsequent Copyright in the Digital Single Market Directive in 2019 provides that

when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.<sup>129</sup>

The Directive clearly provides that when the term of protection has expired the work is no longer subject to protection.<sup>130</sup> French copyright law provisions which protect works of architecture do not, regardless of the scope of the panorama right exception, run afoul of the E.U. harmonization directives because those provisions do not extend the term of protection beyond the scope of harmonized duration. However the law granting perpetual copyright (or copyright equivalent) protection for specific works of architecture is in clear conflict with the Directive.

Unlike Italy, when France implemented the Directive it did not attempt to carve-out a safe haven for the protection of perpetual protection for images of Monuments of the National Estate. As with the Italian law, a challenge to the French law has not yet been referred to the ECJ seeking a clarification of the relationship between Article 14 of the Directive and the CDSM.

The same intriguing twist that applies to the Italian law also applies to the French law: the Directive applies “when the term of protection of a work of visual art has expired.” The structures protected as Monuments of the National Estate predate the concept of copyright law. As a result, they were never protected by copyright. And therefore, the term of protection for those works never began and never expired. Does this mean that the Directive does not apply to perpetual copyright (or copyright-like) protection for the images of the Louvre? Again there is no answer to this question until a dispute is referred to the EJC for interpretation.

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<sup>127</sup>Wikimedia France has expressed the view that [this exception is unenforceable](#) because the terms of Wikimedia websites permit commercial use of images that appear on the site. No photography of work located permanently in public places could, therefore, be included in a Wikimedia site without the author's prior authorization.

<sup>128</sup> Council Directive 2006/116/EC, *supra* note 82.

<sup>129</sup> Council Directive (EU) 2019/790, art. 14, 2019 O.J. (L. 130) 118.

<sup>130</sup> *Id.*

#### *D. Comparison to the Bedrock Principles*

Turning to the benchmarks: How does the French law stack up against the pragmatic benchmarks that we discussed earlier?

- 1) Does it apply to clearly defined works? *YES*
- 2) Is it consistent with a limited term of protection and a robust public domain? *YES*
- 3) Are there clearly defined owners of the rights? *YES*
- 4) Does it include appropriate exceptions and limitations? *NO*

So a better score on the pragmatic benchmark test than the Italian law, but still not perfect because it imposes on productions and other new creative works the obligation to clear and pay licensing fees for works that are clearly in the public domain. Where the use is purely incidental background use, the production may attempt to push back against demands for a licensing payment even though the law does not contain a de minimis use exception.

#### *IV. PROTECTION OF TRADITIONAL CULTURAL EXPRESSION (TCES)*

##### *A. Defining TCES and Interplay with Copyright Law*

Legal protections for works of traditional cultural expression have fundamental differences from protection accorded by copyright law and by the Italian and French cultural heritage laws. WIPO defines “traditional cultural expressions” (TCES) as expressions of folklore which may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.<sup>131</sup> TCES include the forms in which traditional culture is expressed; they form part of the identity and heritage of a traditional or indigenous community; and they are passed down from generation to generation.<sup>132</sup> TCES are integral to the cultural and social identities of indigenous and local communities, embody know-how and skills, and transmit core values and beliefs. Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage.<sup>133</sup>

While certain TCES can be protected by copyright, most subject matter for TCE protections fall outside the scope of copyright because the goal of protection is to protect the source and nature of the traditional culture, rather than to protect a specific work. For example, a specific hula dance can be protected by copyright but the concept of hula dancing would not be protected by copyright. While there may be other types of

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<sup>131</sup> *Traditional Folk Expression*, WIPO, <https://www.wipo.int/en/web/traditional-knowledge/traditional-cultural-expressions/index> (last visited Apr. 1, 2026).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

protections applicable to TCEs, such as geographical indications,<sup>134</sup> appellations of origin,<sup>135</sup> trademarks,<sup>136</sup> and consumer protection laws,<sup>137</sup> the potential for legal conflict with copyright law is less significant than with the Italian and French cultural heritage laws which are focused on expanded protection for specific copyrightable works. Despite this diminished likelihood of conflict with principles of copyright law, TCE laws do have a direct impact on the public domain and the ability to create new works.

Let's take a brief look at the legal regimes – including international accords and domestic legislation – that protect TCEs, and the ways in which those protections can impact the clearance process for film and episodic productions, music, and print publishing.

## B. Legal Regimes

### 1. World Intellectual Property Organization

The World Intellectual Property Organization (WIPO) in Geneva has been working for years on an effort to create an international instrument on TCEs. A core stumbling block is whether the goal should be a rights-based treaty or some form of soft law instrument such as best practices guidelines. Beyond disagreements over that issue, there continues to be a lack of consensus regarding the nature of protected works, the scope of protection, possible higher level of protections for secret and sacred TCEs,<sup>138</sup> ownership

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<sup>134</sup> *Geographical Indications*, WIPO, <https://www.wipo.int/en/web/geographical-indications> (last visited Apr. 1, 2026).

<sup>135</sup> *Lisbon - The International System of Appellations of Origin and Geographical Indications*, WIPO, <https://www.wipo.int/en/web/lisbon-system> (last visited Apr. 1, 2026).

<sup>136</sup> *Trademarks*, WIPO, <https://www.wipo.int/en/web/trademarks> (last visited Apr. 1, 2026).

<sup>137</sup> See discussion of the applicability of consumer protection laws at page 48.

<sup>138</sup> The WIPO IGC Glossary defines “sacred,” in part, as “any expression of traditional knowledge that symbolizes or pertains to religious and spiritual beliefs, practices or customs. It is used as the opposite of profane or secular, the extreme forms of which are commercially exploited forms of traditional knowledge.” See *Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, Annex, at 40, WIPO/GRTKF/IC/40/INF/7 (2019). One point of contention is the tendency of some indigenous groups to reject a narrow definition of “sacred.” They argue that all of their cultural heritage is sacred in the sense that it is extremely important, whether explicitly connected to religion or spirituality or not. See, e.g., IGC, Report of the Twenty-Eighth Session, ¶ 59, WIPO Doc. WIPO/GRTKF/IC/28/11 (Feb. 15, 2016), <https://perma.cc/L3LV-EE2G>; IGC, Report of the Thirty-Second Session, ¶¶ 39, 221, WIPO Doc. WIPO/GRTKF/IC/31/11 (Feb. 27, 2017), <https://perma.cc/ZJ3E-FQJY>; Daniel J. Gervais, *Spiritual But Not Intellectual – The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZA J. INT'L. & COMP. L. 467, 472 (2003).

of rights, conflicts between various points of origin,<sup>139</sup> exceptions and limitations. And more.

The Governing Bodies of WIPO last summer (2025) renewed the mandate of committee which is leading the discussions<sup>140</sup> and scheduled three rounds of negotiation for March 2026, the autumn of 2026, and the spring of 2027.<sup>141</sup> At the moment it is not clear what a successful path will be to achieve the level of consensus necessary to convene a Diplomatic Conference to finalize and enact an international TCE instrument.

## 2. Other international instruments

There are existing international instruments dealing with TCEs, including the 1969 European Convention on the Protection of Archaeological Heritage,<sup>142</sup> the 1954 European Cultural Convention,<sup>143</sup> and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>144</sup> Those instruments focus on the protection of physical objects, rather than on reproduction or adaptation rights. As a result, they do not give rise to conflicts with copyright laws or with the creation of new works based on the protected TCE.

An effort was made in the 1960s to expand the scope of the Berne Convention to provide copyright protection for folklore. During the 1967 Stockholm revision of the Berne Convention the Indian delegation proposed including folklore in Article 2(1) of the

<sup>139</sup> During the 2024 WIPO negotiations the United States delegation offered an example of the questions raised by publicly available and widely diffused TCEs that, it was argued, do not “lend themselves to protection by exclusive right” partly because their origins “might be difficult to trace,” using as an example the history of blue jeans. Italian sailors used to wear heavy blue pants. French manufacturers then produced those pants using local production techniques and materials. U.S. manufacturers then improved upon that fabric to make what eventually became the blue jeans used by gold miners in California. It was pointed out that granting exclusive rights to blue jeans might have a devastating impact on many current blue jeans manufacturers. Even setting this aside, if the method of making denim and blue jeans was a TCE, to which community did it belong? IGC, Report of the Twenty-Seventh Session, ¶ 62, WIPO Doc. WIPO/GRTFK/IC/27/10 (July 2, 2014), <https://perma.cc/U24X-TCWM>.

<sup>140</sup> Assemblies of the Member States of WIPO, Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), Report of the Sixty-Sixth Series of Meetings, U.N. Doc. A/66/10, <https://www.wipo.int/documents/d/igc/docs-en-igc-mandate-2026-2027.pdf>.

<sup>141</sup> *Id.*

<sup>142</sup> 1969 European Convention on the Protection of Archaeological Heritage, May 6, 1969, 788 U.N.T.S. 227.

<sup>143</sup> European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 139, E.T.S. No. 18.

<sup>144</sup> Now widely referred as the 1954 Hague Convention, this was the first and the most comprehensive multilateral treaty dedicated exclusively to the protection of cultural heritage in times of peace as well as during an armed conflict. The 1954 Hague Convention aims to protect cultural property, such as monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections of any kind regardless of their origin or ownership. See <https://www.unesco.org/en/heritage-armed-conflicts/1954-convention#:~:text=The%201954%20Hague%20Convention%20aims,regardless%20of%20their%20origin%20or>

Berne Convention as a protected work.<sup>145</sup> The proposal was rejected due to the challenges inherent in defining folklore. Instead the Conference drafted Article 15(4) as an optional provision stating:

In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.<sup>146</sup>

Very few countries have accepted this invitation to provide an extension of copyright coverage – perhaps in part because the limited duration of protection under the Berne Convention would result in folklore being viewed as now in the public domain.

### 3. National laws

In the absence of progress on the international front, individual countries across all regions of the globe have enacted TCE laws. Just a few examples:

- Mexico has the Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican People and communities.<sup>147</sup>
- Peru has the General Law of Cultural Heritage.<sup>148</sup>
- Kenya has the Protection of Traditional Knowledge and Cultural Expression Act.<sup>149</sup>
- South Africa has the Protection, Promotion, Development and Management of Indigenous Knowledge Act.<sup>150</sup>
- Australia has the Aboriginal and Torres Strait Islander Heritage Protection Act, in addition to various codes and protocols.<sup>151</sup>

#### *C. Examples of claims based on TCE laws*

I will share several examples of claims and objections that have been asserted against unauthorized uses of TCEs, some of which reach beyond the actual scope of legal protections accorded by law.

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<sup>145</sup> Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, art. 2(1), 828 U.N.T.S. 221.

<sup>146</sup> *Id.* at art. 15(4).

<sup>147</sup> Ley Federal de Protección del Patrimonio Cultural de los Pueblos y Comunidades Indígenas y Afromexicanas, [LFPPCPCIA], Diario Oficial de la Federación [DOF], Jan. 17, 2022 (Mex.).

<sup>148</sup> General Law of the Cultural Heritage of the Nation, Law No. 28296, July 22, 2004, [https://media.unesco.org/sites/default/files/webform/mhm001/per\\_law28296\\_engtof.pdf](https://media.unesco.org/sites/default/files/webform/mhm001/per_law28296_engtof.pdf).

<sup>149</sup> Protection of Traditional Knowledge and Cultural Expression Act (2016), Cap. 218A (Kenya).

<sup>150</sup> Protection, Promotion, Development and Management of Indigenous Knowledge Act, Act 6 of 2019 (S. Afr.)

<sup>151</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Cth. (Austl.).

## 1. Junya Watanabe apparel

Japanese designer Junya Watanabe, whose label is owned by Comme des Garçon, faced accusations of cultural appropriation related to his Fall/Winter 2022 men's collection.<sup>152</sup> The line featured several pieces featuring the vibrantly striped woven blankets made famous by indigenous communities in Mexico.<sup>153</sup>



Figure 26: Junya Watanabe 2022 collection<sup>154</sup>

Though the brand stated that it “invited participation from the Secretariat of Culture of Mexico” to incorporate the indigenous design in its presentation, the Mexican government issued a statement describing its efforts as unethical.<sup>155</sup> As part of the negotiation, the ministry requested that Watanabe include garment labels recognizing the communities’ rights to the designs, as well as payment for use of the designs and funding for materials and equipment.<sup>156</sup> The brand was also asked to jointly organize an international seminar on collective rights and to consider a future collaboration with artisans of the communities.<sup>157</sup>

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<sup>152</sup> Liz Warren, *Mexican Ministry Slams Junya Watanabe for Using Traditional Mexican Serapes*, WOMEN’S WEAR DAILY (Feb. 1, 2022), <https://wwd.com/sourcing-journal/sj-denim/mexican-ministry-culture-junya-watanabe-fw-22-cultural-appropriation-serape-1238789968/>.

<sup>153</sup> *Id.*

<sup>154</sup> @junyawatanabe/Instagram

<sup>155</sup> Warren, *supra* note 152.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

## 2. Ralph Lauren shawls

In 2022 the U.S. fashion chain Ralph Lauren was accused of "plagiarism" by the wife of Mexico's president, Beatriz Gutiérrez, who also served as a culture minister.

Gutiérrez asserted that the brand used designs inspired by indigenous textile traditions, adding that copying these patterns was a matter of plagiarism, which she described as "illegal and immoral".<sup>158</sup>



Figure 27: Ralph Loren shawls, as posted online by the President of Mexico<sup>159</sup>

The long garment which featured stripes and patterns was alleged to appropriate the design of garments worn by the Contla and Saltillo people, and Gutiérrez called for compensation for indigenous communities.<sup>160</sup> Culture Minister Alejandra Frausto added her own criticism, describing it as a case of cultural appropriation.<sup>161</sup> Ralph Lauren issued a corporate announcement promising greater credit and collaboration for new garments using indigenous motifs.<sup>162</sup> It added that the company was deepening its cultural awareness training and broadening its work with indigenous communities.

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<sup>158</sup> James FitzGerald, *Ralph Lauren apologizes after Mexico indigenous 'plagiarism' claim*, BBC NEWS, (Oct. 21, 2022), <https://www.bbc.com/news/world-latin-america-63342715>.

<sup>159</sup> Image posted on Instagram by President Beatriz Gutierrez, see <https://www.bbc.com/news/world-latin-america-63342715>

<sup>160</sup> FitzGerald, *supra* note 158.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

### 3. Adidas slip-on shoes

Willy Chavarria is a Mexican-American fashion designer whose work explores Mexican American culture, sexuality, and immigration.<sup>163</sup> His works draw on his experience growing up in a farming community in California where his father was an immigrant migrant worker. Mr. Chavarria's created a slip-on shoe design for Adidas. He took inspiration for the design from traditional Indigenous footwear known as huaraches from the Oaxaca region.



Figure 28, 29 and 30:  
Chavarria's shoes and similar designs for sale in a market in the Oaxaca region<sup>164</sup>

<sup>163</sup> Aída Hurtado, The Magical Willy Chavarria - Making Beauty, Making Soul, REVISTA: HARVARD REV. OF LATIN AMERICA (Nov. 19, 2024),

<https://revista.drclas.harvard.edu/the-magical-willy-chavarria/>.

<sup>164</sup> Figure 28: Photograph from SneakerNews, see

<https://sneakernews.com/2025/08/05/willy-chavarria-adidas-oaxaca-slip-on-moccasin-js2117/>.

Figure 30: Luis Alberto Cruz/Associate Press.

The Mexico's government objected and sought compensation from Adidas, accusing it of cultural appropriation. Mexico's President Claudia Sheinbaum stated: "It's collective intellectual property. There must be compensation. The heritage law must be complied with."<sup>165</sup>

#### 4. Chanel boomerang

Chanel offered for sale several sports accessories offered as part of its 2017 spring collection, including tennis rackets, a stand-up paddle, beach rackets & balls. The inclusion of a \$3,000 boomerang resulted in Chanel being denounced for appropriating indigenous Australian culture.<sup>166</sup> This criticism arose despite the fact that retail outlets in Australia – including tourist souvenir shops – sell boomerangs as toys and merchandising use of TCEs may not violate Australian law. Nevertheless, Chanel removed the boomerangs from sale and issued an apology, stating: "Chanel is extremely committed to respecting all cultures, and deeply regrets that some may have been offended. It was not our intention to disrespect the Aboriginal and Torres Strait Islander community and the significance of the boomerang as a cultural object."<sup>167</sup>



Figure 31: Chanel boomerang<sup>168</sup>

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<sup>165</sup> *Adidas accused of cultural appropriation by Mexico over new footwear design*, ALJAZEERA (Aug. 9, 2025), <https://www.aljazeera.com/news/2025/8/9/adidas-accused-of-cultural-appropriation-by-mexico-over-new-footwear-design>.

<sup>166</sup> Joseph Hincks, *Chanel Has Been Accused of Cultural Appropriation Over a \$1500 Boomerang*, TIME MAG. (May 16, 2017), <https://time.com/4780194/chanel-boomerang-aboriginal-heritage/>.

<sup>167</sup> Vanessa Friedman, *Chanel's Boomerang Comes Back to Hit It*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/fashion/chanel-boomerang-cultural-appropriation.html>.

<sup>168</sup> Photo by Chanel. See <https://www.theguardian.com/fashion/2017/may/16/channels-2000-boomerang-criticised-for-humiliating-indigenous-australian-culture>

### 5. A Lacrosse stick

Would a hypothetical Chanel lacrosse stick suffer the same fate as the Chanel boomerang? The origins of lacrosse can be traced back as early as the 12<sup>th</sup> century to indigenous tribes in North America, including the Senaca & Mohawk tribes, where the game was played for centuries before European contact.<sup>169</sup> But since the U.S. has no form of TCE laws, claims have not been asserted against the sale of either sporting or decorative lacrosse sticks. While lacrosse was also played by the First Nations people of Canada, there are no laws in Canada that would give rise to a claim of this type.



Figure 32: Modern wooden lacrosse stick<sup>170</sup>

### D. Cultural Protection or Censorship

Concerns have been raised about the risks that TCEs laws, which have no exemption for film or television productions or literary works, can be used as leverage for censorship unrelated to protection and preservation of traditional cultural heritage. Bertrand Mullier has written an excellent article in the British Film Institute's *Sight & Sound* about the role of TCE claims in efforts to suppress distribution of the South African film, *The Wound*.<sup>171</sup>

<sup>169</sup> History, WORLD LACROSSE, <https://worldlacrosse.sport/origin-history/> (last visited Apr. 1, 2026).

<sup>170</sup> Traditional wooden lacrosse stick. See <https://www.bardownlacrosse.com/product/wooden-senior-box-lacrosse-traditional-lacrosse-stick/>

<sup>171</sup> Bertrand Moullier, *The unkindest out of all: gay expression, indigenous cultural rights and the fight over The Wound (Inxeba)*, BRITISH FILM INSTITUTE (Jun. 18, 2018), <https://www.bfi.org.uk/sight-and-sound/features/unkindest-cut-all-gay-expression-indigenous-cultural-rights-fight-over-wound-inxeba>.

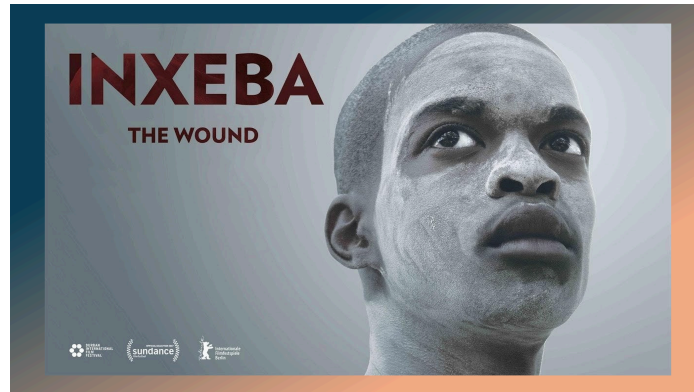


Figure 33: Poster for *The Wound (Inxeba)*<sup>172</sup>

*The Wound* is a deeply moving South African film that tells the story of two men struggling to make sense of their sexuality in a social context of secrecy and shame. The film centers on two grown men and one young teenage boy who is being ushered into manhood through traditional rituals of the eight million-strong Xhosa population, the majority of whom live in South Africa's Western Cape. In the course of this secretive, month-long ceremonial, boys are taken to the mountain to be initiated. The process begins with group circumcision performed by a traditional doctor. While the wounds heal, groups of initiates are assigned traditional caregivers. It all ends with the ritual burning of makeshift huts inhabited by the participants – a symbolic bonfire of the sheltering maternal cocoon. As he does every year, the film's lead character returns to the mountain to perform his caregiver duties with a new batch of young men. He is confronted with Kwanda, a petulant and rebellious teen from a rich urban family, who is openly gay.

The film was accused of portraying secretive initiation rituals and therefore violative of protections for traditional cultural expression – particularly secretive religious rituals.<sup>173</sup> However, other media have written about and portrayed the same rituals. For example, in Nelson Mandela's autobiography *Long Walk to Freedom* he recounts his experience with the same coming-of age ritual.<sup>174</sup> Other portrayals of the rituals have not received similar criticism, leading to accusations that complaints about the film were actually motivated by homophobia. The film was initially classified as “16” by South Africa's Film and Publication Board (FPB), but was later reclassified as “X18” by the

<sup>172</sup> Urucu Media, 2018.

<sup>173</sup> *Placing the film “Inxeba - The Wound” in Historical Review*, SOUTH AFRICAN HISTORY ONLINE (Sept. 21, 2017), <https://sahistory.org.za/article/placing-film-inxeba-wound-historical-review#:~:text=The%20criticism%20C%20anger%20and%20disrespect,of%20homophobia%20underpinning%20the%20responses> (last visited Apr. 1, 2026).

<sup>174</sup> Gatete Ruhumuliza Nyiringabo, *Mwa ndangamirwa mwe! The Long Walk to Success*, GATETEVIEWS (Apr. 26, 2017), <https://gateteviews.rw/mwa-ndangamirwa-mwe/> (last visited Apr. 1, 2026).

FPB's Appeal Tribunal following complaints by the Congress of Traditional Leaders of South Africa.<sup>175</sup> “X18” is the rating reserved for hardcore pornography, although the film contains none.<sup>176</sup> This meant that distribution was limited to premises licensed to show pornography, resulting in the film's removal from all South African cinemas. The Democratic Alliance criticized the decision of the Appeal Tribunal, characterizing it as “nothing short of censorship” by “patriarchs and homophobes.”<sup>177</sup> The FPB classifiers themselves stated that the Appeal Tribunal's rating amounted to unlawful censorship based on homophobia.<sup>178</sup>

The producers of film and the South African Screen Federation challenged the “X18” rating in court, on the basis that the Appeal Tribunal's decision was incompatible with the principles of the Constitution of the Republic of South Africa. In March 2018 the High Court allowed the film to be shown in cinemas with a standard “18” rating while the court action was pending. In June 2018 the court overturned the Appeal Tribunal's decision and restored the original rating of “16.” This dispute demonstrates the tension between protection of cultural heritage, including sacred rituals, and the freedom to create new creative works that explore historical practices. That tension is particularly acute where it appears that claims of protection may be used to suppress certain perspectives.

The Willie Chavarria dispute raises similar questions, in the area of merchandise rather than filmed content, about the ability of an artist to use their own cultural heritage and experiences as the basis for new works.<sup>179</sup> These examples underscore the core challenge with TCE laws. How can legal regimes protect and respect cultural heritage without improperly restricting storytelling and the celebration of traditional culture? And how best to devise a pragmatic system for protection when the objects of protection may not be fixed in any tangible form, when the objects may be claimed by multiple indigenous groups, and where it is not clear who exactly is empowered to make decisions regarding use. Is the state? Is it a representative of an indigenous group?

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<sup>175</sup> South Africa Human Rights Commission, *Inxeba reclassified to X18, banned from mainstream cinemas*, SOUTH AFRICA HUMAN RIGHTS COMMISSION (Feb. 15, 2018), <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1205-inxeba-reclassified-to-x18-banned-from-mainstream-cinemas> (last visited Apr. 1, 2026).

<sup>176</sup> Pierre de Vos, *Inxeba (The Wound): The Appeal Tribunal's homophobic reclassification of dramatic art as pornography*, DAILY MAVERICK (Feb. 27, 2018), <https://www.dailymaverick.co.za/opinionista/2018-02-27-inxeba-the-wound-the-appeal-tribunals-homophobic-reclassification-of-dramatic-art-as-pornography/#:~:text=An%20X18%20classification%20means%20that,on%20any%20valid%20legal%20considerations>. (last visited Apr. 1, 2026).

<sup>177</sup> Phumzile Van Damme, *DA exploring options against Inxeba censorship*, DEMOCRATIC ALLIANCE (Feb. 28, 2018) <https://www.da.org.za/2018/02/da-exploring-options-inxeba-censorship> (last accessed Apr. 1 2026).

<sup>178</sup> See, e.g., Channel24 “*The Wound filmmakers to fight film's X-18 reclassification*” February 17, 2008, <https://uk.news.yahoo.com/wound-filmmakers-fight-films-x18-reclassification-055825884.html>.

<sup>179</sup> *Indigenous Film Distribution (Pty) Ltd. v. Film & Publication Appeal Tribunal* (High Ct. S. Afr. 2018).

### *E. Comparison to Bedrock Principles*

While I have expressed the view that TCEs, given that the objects of protection such as folklore and culture rather than single fixed works, are not equivalents of copyright protection, the bedrock principles are still valid touchpoints because they measure the extent to which compliance can be pragmatically achieved.

- 1) Do TCEs apply to clearly defined works? *NO*
- 2) Are they consistent with a limited term of protection and a robust public domain? *NO*
- 3) Are there clearly defined owners of the rights? *NO*
- 4) Does it include appropriate exceptions and limitations? *NO*

So of these three types of culture heritage laws, TCEs score the worst on the pragmatic compliance with the bedrock principles. Advocates for protection of TCEs would argue that is inherent in and appropriate for the protection of indigenous culture, but that is little consolation for creators of new creative works that incorporate aspects of the TCEs. As the WIPO negotiations continue to progress it will be interesting to watch how they grapple with this tension between the need to respect and protect cultural heritage and the importance of creative freedoms for the creation of new artistic works.

## *V. OTHER WAYS OF LOOKING AT CULTURAL HERITAGE REGULATIONS*

### *A. Applicability of moral rights laws*

It is worth briefly concerning whether the Italian and French cultural heritage laws could be viewed as something other than copyright or neighboring rights laws – specifically whether they could be viewed as moral rights laws. As a starting point, Article 14 of the DSM applies both to “copyrights” and to “related rights;” but it does not apply to moral rights laws.<sup>180</sup> So even where moral rights are perpetual, as they are under French law, there is no conflict with the term harmonization limitations of the Directive.

It seems unlikely, however, that moral rights could attach where the rights are exercised by and for the benefit of the state, not the creator or the heirs of the creator. The Berne Convention, for example, provides that “the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”<sup>181</sup>

The Berne Convention goes on to provide that “The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons *or institutions authorized by the legislation of the country where protection is claimed,*”

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<sup>180</sup> Directive (EU) 2019/790 art. 14, 2019 O.J. (L. 130) 92.

<sup>181</sup> Berne Convention For The Protection Of Literary And Artistic Works (Paris Text 1971), Article 6*bis*(1).

(emphasis added).<sup>182</sup> So perhaps an argument could be made that the state has the right to designate cultural institutions to exercise the rights. But even with that argument, the moral rights are limited to “distortion, mutilation or other modification of, or other derogatory action” in relation to the work, while the cultural heritage laws apply to faithful reproductions of the work.

Returning to the examples cited above, all of the uses of French Monuments of the National Estate were faithful reproductions and none were distortions, mutilations, or other modifications. With the Italian law examples, the Ravensburger Vitruvian Man puzzle and the Jean Paul Gautier couture are faithful reproductions; while the GQ cover and the Joe & The Juice promo are not even reproductions. The ArmaLite reproduction of *The David* holding an automatic weapon is not a distortion, mutilation, or other modification. Even the argument that it is derogatory of the original work seems a bit of a stretch.

As a result, it does not seem that a claim that these cultural heritage laws are actually moral rights laws, rather than expansion of copyright protection, would be unlikely to prevail in a dispute before the ECJ.

### *B. Applicability of consumer protection laws*

Existing laws governing consumer protection and fair trade have been applied to protect against passing off works as falsely based created by indigenous peoples. One example comes from Australia, where a company called Birubi Art Pty Ltd (Birubi) was selling souvenir products made in an Aboriginal “style” without the actual involvement or knowledge of an Aboriginal person.<sup>183</sup> The Australian Competition and Consumer Commission (ACCC) commenced an action in Federal Court against Birubi.<sup>184</sup> The Federal Court found that Birubi misled consumers by making false representations that the souvenirs were made in Australia and hand-painted by Australian Aboriginal people, when they were actually produced in Indonesia by non-Indigenous people.<sup>185</sup>

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<sup>182</sup> Berne Convention for the Protection of Literary And Artistic Works (Paris Text 1971), Article 6bis(2).

<sup>183</sup> Stephanie Parkin, *Australia Clamps Down on the Sale of Fake Aboriginal Souvenirs*, WIPO (Dec. 11, 2019) <https://www.wipo.int/en/web/wipo-magazine/articles/australian-court-clamps-down-on-the-sale-of-fake-aboriginal-souvenirs-41162#:~:text=In%20October%202018%2C%20the%20Federal,down%20by%20the%20Federal%20Court>. (last visited Apr. 1, 2026).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*



Figure 34: Example of the unauthorized boxed boomerang, falsely marketed as created by Austrian Aboriginal peoples<sup>186</sup>

In 2018, the Australian Competition and Consumer Commission (the ACCC)<sup>187</sup> instituted proceedings against Birubi, a wholesaler of Australian style souvenirs based in Queensland, Australia.<sup>188</sup> The ACCC is the independent Commonwealth regulator which governs principles of fair trade and consumer protection through the enforcement of consumer protection laws. The Federal Court considered the impact of the fake Aboriginal souvenirs misleading consumers as to the authenticity of the products as well as the negative impact on the Aboriginal people and communities resulting from the sale of fake Aboriginal souvenirs. The court imposed a penalty of AUD 2.3 million against Birubi for contravention of the Australian Consumer Law.<sup>189</sup>

While the Birubi case demonstrates the potential applicability of existing laws to protected works of traditional cultural expression, the obvious limitation is that the Australian Consumer Law is only concerned with misleading and deceptive conduct. As a result, souvenir products made by non-Aboriginal people incorporating Aboriginal cultural expressions that are clearly labelled with accurate information about where and by whom the souvenirs are made would not constitute a violation of the law.

The U.S. provides similar consumer protection for indigenous works. In 1990, the U.S. enacted the Indian Arts and Crafts Act.<sup>190</sup> This Act is a truth-in-advertising law that prohibits the offer or display for sale of any art or craft product in the U.S. that falsely insinuates a product of an Indian tribe. The Act enables the Indian Arts and Crafts Board, previously established by the Indian Reorganization Act 1935, to mandate the

<sup>186</sup> Image appearing in the judgment in *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595.

<sup>187</sup> Australia Competition and Consumer Commission, *About the ACCC*, AUSTRALIA COMPETITION AND CONSUMER COMMISSION

<https://www.accc.gov.au/about-us/accc-role-and-structure/about-the-accc> (last visited Apr. 1, 2026).

<sup>188</sup> Australia Competition and Consumer Commission, *Action Over Alleged Misleading Indigenous Art Claims*, AUSTRALIA COMPETITION AND CONSUMER COMMISSION (Mar. 22, 2018),

<https://www.accc.gov.au/media-release/action-over-alleged-misleading-indigenous-art-claims> (last visited Apr. 1, 2026).

<sup>189</sup> See Stephanie Parkin, *supra* note 183.

<sup>190</sup> U.S. Department of the Interior, *The Indian Arts and Crafts Act of 1990*,

<https://www.doi.gov/iacb/act>. Indian Arts and Crafts Act of 1990, 25 U.S.C. §§ 305–305e (1990).

implementation of the 1990 Act.<sup>191</sup> Here too the protections do not apply where there is accurate disclosure of the source of the product.

### CONCLUSION

In closing this evening, let's take a moment to consider the implications of these three categories of cultural heritage laws on film & episodic productions, on print publications, and on articles of merchandise. Would it be a solution to take the position "These laws are territorial by nature, so I'll avoid risks by not distributing my content or my product in that territory."? Likely not for several reasons. There could be five potential consequences even where the work is not distributed within the territory: financial penalties, criminal penalties, production realities, public relations concerns, and production-distribution realities.

1. **Financial penalties:** If a company has a business presence in Italy, for example, Italy may seek to impose a financial penalty even if the work is not distributed in Italy. So even if a studio holds back Italian distribution of a film or episodic that contains an unlicensed work of Italian Cultural Heritage, the Italian government and an Italian court may have other paths for financial recourse against the company. If the Ravensburger Da Vinci puzzle case is an indicator, the government will not hesitate to pursue conduct that takes entirely outside the borders of Italy.
2. **Criminal penalties:** Some countries' laws provide for criminal penalties for violation of TCE laws, including Nigeria. Even if a production is not filming in Nigeria, if there are cast or crew members who reside in Nigeria they could be placed in potential legal jeopardy. And if the production or distribution company has sales or representatives in the country, they could possibly be placed in a position of legal jeopardy.
3. **Production realities:** A project may be committed to production in the country, particularly if the location plays a prominent role in the story, and so it may not be possible to simply decide to pull up stakes and relocate to another country to avoid claims based on the use of protected works.
4. **Public Relations realities:** Most of the apparel companies that have faced backlash from Mexico over their use of indigenous designs from Mexico have backed down based on public relations and image concerns – more than from the threat of legal consequences. Similarly, the ArmaLite work-of-art assault rifle appeared to be immune from legal consequences in Italy, but it backed down and apologized apparently for PR reasons.
5. **Distribution realities:** Distribution or output deals may not enable a producer to easily & without financial pain exclude distribution in a specific country.

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<sup>191</sup> *Id.* §§ 305a. See: Paul Kimani, A Consolidated Assessment of the Legal Protection of Folklore, 23, WAKE FOREST J. BUS. & INTELL. PROP. L. 273, 290 (2020).

Those are just some of the pragmatic considerations that should be kept in mind when considering whether the consequences of cultural heritage laws can be avoided by simply avoiding distribution of the uncleared work in that territory.

In conclusion, the challenge of finding the appropriate balance between protections for works of cultural heritage and freedom of expression as embodied in the concepts of fair use remains very much unresolved. Regardless of where you think the line should be drawn on the spectrum in balancing those issues, it seems clear that both the Italian cultural heritage law and the French National Monuments law are inappropriate on two grounds: the laws conflict with E.U. harmonization of the duration of protection for copyrights and related rights, and the laws lack necessary and appropriate fair use equivalent safe harbors. If the French Right of Panorama were amended to provide a safe harbor for film and episodic productions, literary works, and other expressive work, it would resolve the second concern. But an amendment of that type is unlikely to occur.

This area of the law is still evolving, so it will be important to keep an eye on legal and regulatory developments as they continue to unfold. There are several “known restrictions” lists that can provide a starting point for identifying images that could trigger rights issues when used in film and episodic content.<sup>192</sup>

Thank you for your time this evening and thank you again to the Copyright Society and its president, Dan Cooper.

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<sup>192</sup> See, e.g., Adobe’s Known Image Restrictions List (<https://helpx.adobe.com/stock/contributor/help/known-image-restrictions.html>), Eezy’s Known Restrictions: Object and Subjects ([https://eezycontributors.zendesk.com/hc/en-us/articles/360037945351-Known-Restrictions-Object s-and-Subjects](https://eezycontributors.zendesk.com/hc/en-us/articles/360037945351-Known-Restrictions-Object-s-and-Subjects)), Shutterstock’s Known Image Restrictions (<https://submit.shutterstock.com/help/en/articles/10617447-known-restrictions>), Getty Image’s Intellectual Property Wiki (<https://wiki.gettyimages.com/>).

