I, Lawyer

Innovation Lawyer Project

Art & Law Insights

Global Legal Briefing

Zaglio Orizio e Associati
in collaboration with our
Partners & Friends

2021

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"We must expect great innovations to transform the entire technique of the arts, thereby affecting artistic invention itself and perhaps even bringing about an amazing change in our very notion of art"

(Quoted from Paul Valéry, Aesthetics, "*The Conquest of Ubiquity*", translated by Ralph Manheim, p. 225. Pantheon Books, Bollingen Series, New York, 1964)

INTRODUZIONE

Matteo Piccinali

Il progetto "*I, Lawyer – Innovation Lawyer*", avviato nell'aprile del 2020, ha permesso di raccogliere attorno ad un'idea comune un gruppo di lavoro motivato a indirizzare la propria energia verso nuovi progetti, valorizzando la condivisione della conoscenza e degli intenti, in un momento in cui ogni Paese a livello globale stava iniziando a registrare l'impatto determinato dalla Pandemia da Covid-19.

I, Lawyer - Innovation Lawyer, come già dichiarato, si fonda su un radicato spirito di cooperazione globale e si spinge oltre, verso l'identificazione e l'implementazione di nuovi servizi e modelli operativi. Questi modelli infatti ci permettono di esprimere al meglio il nostro ruolo di promotori dell'innovazione e, quindi, di avvocati di domani.

Anche nei settori più tradizionali dell'economia e del diritto, come ad esempio nel settore dell'arte e della cultura, si creano nuovi spazi per l'introduzione di modelli innovativi e di nuovi prodotti e servizi. Questi dovrebbero quindi essere studiati e compresi, in quanto potenzialmente idonei a rappresentare le trasformazioni in atto nei diversi mercati, in conseguenza della diffusione delle nuove tecnologie: digitalizzazione, Intelligenza Artificiale e robotica, Blockchain e Smart Contracts, e-commerce, AR/VR, etc.

In tal senso, l'arte come strumento di crescita culturale, di conoscenza e di elevazione personale, anche grazie alle nuove tecnologie permetterà una maggiore interconnessione economica, sociale e culturale dei vari sistemi nazionali in un mondo digitalizzato.

Partendo dall'analisi degli istituti tradizionali del diritto, questa nuova edizione del nostro *Global Legal Briefing* cercherà pertanto di sviluppare anche l'indagine relativa alle implicazioni di natura giuridica conseguenti ad alcune delle iniziative più innovative nel mondo dell'arte; detta indagine è intesa ad offrire spunti d'analisi anche in relazione allo sviluppo delle opportunità di business, nazionale ed estero, che andranno via via generandosi nel particolare ambito dell'arte e della cultura.

In particolare, l'edizione 2021 del *Global Legal Briefing* si divide in due parti.

La prima parte raccoglie le analisi di alcuni primari operatori del mondo dell'arte e offre una visione tanto sull'andamento del mercato quanto su alcune delle più importanti e stimolanti novità e tendenze del settore. Si tratta di una sezione che apporta un importante arricchimento ai contenuti del *Briefing* e fornisce un'essenziale lettura del settore esaminato attraverso gli occhi di chi l'arte la vive quotidianamente.

La seconda parte del lavoro è costituita dalle schede di approfondimento giuridico per ciascuna delle giurisdizioni esaminate. In questo caso, come già fatto per l'edizione del 2020 del *Briefing*, da un lato è stata privilegiata l'ampia partecipazione al progetto da parte del maggior numero dei nostri Partners e Amici, in quanto questa partecipazione e condivisione sono alla base del valore creato dalla presente iniziativa; dall'altro lato, pur essendo stata condiviso all'interno del gruppo di lavoro lo stesso elenco di tematiche analizzabili, ciascun contributore è stato incoraggiato ad indirizzare la propria analisi verso le aree tematiche ritenute più rilevanti con riguardo alla propria giurisdizione, o comunque più pertinenti rispetto alla propria esperienza professionale o al proprio interesse personale.

L'impostazione di lavoro condivisa dal gruppo, privilegiando l'apporto creativo anziché il contributo omologato, ha permesso di raggiungere un livello di analisi estremamente diversificato e ricco di contenuti, che di sicuro andrà a beneficio di tutti i partecipanti e rispettivi lettori.

A ciò si accompagna l'aspirazione di lanciare - con il *Briefing* 2021 - la creazione di un gruppo globale di professionisti e operatori specificamente dedicato alle tematiche di arte, cultura e diritto e in grado di esprimere le competenze necessarie per il sostegno e la promozione di questo mercato al di là di qualsiasi barriera geografica.

Con il 2021, *I, Lawyer - Innovation Lawyer Project* inaugura quindi il nuovo corso del gruppo di lavoro su *Art & Law*.

Anche per questo la mia più profonda gratitudine va ai Partners e Amici che pur assorbiti dalle già numerose fatiche quotidiane, con pazienza hanno assecondato i miei inviti a partecipare sostenendo con entusiasmo, ognuno con il proprio prezioso e qualificato contributo, la realizzazione di questo progetto.

Buona lettura a tutti!

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INTRODUCTION

Matteo Piccinali

The project "*I, Lawyer - Innovation Lawyer*", launched in April 2020 has allowed us to set up on common grounds a working team which is keen to devote its energies to new projects with the aim to enhance the sharing of knowledge and goals, at a time when each Country around the world was gauging the impact determined by the Covid-19 Pandemic.

I, Lawyer - Innovation Lawyer, is then founded on a deep-rooted spirit of global cooperation and goes further, aiming to the identification and implementation of new services and operational models. This models in fact allow us to best express our role as promoters of innovation and, therefore, as the lawyers of tomorrow.

Even in the more traditional areas of economics and law, such as in the field of art and culture, it is possible to find room for introducing innovative models and new products and services. These should hence be studied and understood because they are suitable to represent the ongoing transformations of the different markets as a consequence of the spread of new technologies: digitalization, Artificial Intelligence and robotics, Blockchain and Smart Contracts, e-commerce, AR/VR, etc.

In this sense, art as a tool for cultural growth, knowledge and personal elevation, also thanks to new technologies will increasingly foster a greater economic, social and cultural interconnection of the various national systems in a digitalized world.

Starting from the analysis of the traditional legal institutions, this new edition of our *Global Legal Briefing* will therefore *inter alia* try to investigate the legal implications resulting from some of the most innovative initiatives in the world of art; this investigation is intended to offer insights also in relation to the development of business opportunities, both domestic and foreign, that may gradually arise in the niche market of art and culture.

In particular, the 2021 edition of the *Global Legal Briefing* is divided into two parts.

The first part brings together the analyses of some of the leading players in the art world and offers an insight into both market trends and some of the most important and stimulating new developments and trends in the sector. This section is an important addition to the contents of the *Briefing* and provides an essential reading of the sector examined through the eyes of those who live art on a daily basis.

The second part of the work consists of the in-depth legal briefs for each of the examined jurisdictions. In this case, as was the case for the 2020 edition of the *Briefing*, on the one hand the broad participation in the project by the greatest number of our Partners and Friends has been privileged, since this participation and sharing are at the basis of the value created by this initiative; on the other hand, even if a general list of topics constituting the scope of the analysis has been shared within the working group, each contributor was encouraged to direct his or her analysis towards the topics that he or she deemed to be the most relevant in his or her own jurisdiction, or according to the personal professional experience or interest.

The work approach shared by the group, favouring a creative approach rather than standardization of the contents, has made it possible to reach an extremely diversified and rich level of analysis which will certainly benefit all participants and their respective readers.

The launch of the Briefing 2021 represents as well the best opportunity for the creation of a global group of professionals and operators specifically dedicated to the issues of art, culture and law and capable of expressing the skills necessary to support and promote this market beyond any geographical barriers.

With 2021, *I, Lawyer - Innovation Lawyer Project* thus inaugurates the new course of the *Art & Law* working group.

For this reason once again my deepest gratitude goes to the Partners and Friends who, although caught up in their countless daily efforts, have nevertheless patiently accepted my invitations to participate and have enthusiastically supported the realization of this project with their valuable and qualified contributions.

Happy reading to everyone!

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ART & LAW INSIGHTS

Global Legal Briefing

I. PART 1 – GENERAL PAPERS

1 – Virtual Reality Technologies for Art – Celina Yeh (HTC Vive Arts)

Virtual Reality Technologies for Art

Interview with Celina Yeh, Acting Director at HTC VIVE Arts

Q. Could you please present HTC VIVE Arts and explain what you do?

VIVE Arts harnesses cutting-edge technology to transform the way culture is experienced, delivering one of-a-kind projects that can be accessed anywhere in the world. We foster digital innovation, working with leading artists, museums and cultural organisations to create immersive artworks and exhibits using the latest technology.

Covid-19 accelerated the adoption of digital technologies in the cultural sector, in a way that would have been inconceivable before the pandemic. We have good reason to believe that digital engagement and innovation in arts and culture will continue to grow and develop to engage wider communities and meet audience expectations. The pandemic has shown the importance of creating a programme that is not confined to a physical space but that can move fluidly between digital and physical, online and offline, as these boundaries are increasingly blurred across different areas of daily life.

This is an exciting trend, and we are optimistic that it is only the beginning of a historical transformation that will continue in museums, galleries, as well as artists' studios globally. VIVE Arts is well positioned to support our existing and future partners to realise some very innovative approaches as they carry the momentum forward.

Q. Could you please walk us through your collaboration/partnership with galleries, museums, and artists?

Since its launch in 2017, VIVE Arts has established nearly 50 partnerships with leading cultural institutions and organisations including Tate Modern, The V&A in London, The Louvre, Musée d'Orsay and Musée de l'Orangerie in Paris, the American Museum of Natural History in New York, the National Palace Museum in Taipei, the Palace Museum and UCCA in Beijing, the ArtScience Museum in Singapore as well as the Venice Biennale Arte.

Our focus is on allowing leading institutions to use the latest technology and have access to cutting edge virtual reality and other digital technologies to tell their stories and reach new audiences. We are interested in partnerships where our support can lead to new perspectives on culture and creativity. This includes making museum collections and exhibitions more accessible through technology and finding new innovative ways to use technology in art and culture to enhance the ecosystem of digital art. Interactive elements can transport viewers and bring a new dimension to the exhibition experience.

Q. Could you please describe HTC VIVE Arts VR technology and the equipment required to view exhibitions?

Our support of museums and organisations is about building awareness of creativity in technology and providing access to global audiences to art, cultural experiences and museum collections,

both on site and remotely through VIVEPORT. You do need a headset to be able to use VIVEPORT if you want to access content remotely, but this is a key reason why we are working with leading institutions to provide additional opportunities. VR is a powerful medium for creativity and storytelling that can add another dimension to the traditional exhibition and provide educational opportunities that engage new and diverse audiences, for example with historical information.

We believe everyone should have access to the arts and want to support cultural institutions and organizations to engage with new and diverse audiences and create inclusive and accessible programmes, especially now whilst travel remains restricted for many.

Q. Could you tell us about the main projects HTC VIVE Arts has been working on with reference to museums and art galleries around the world? Could you explain the main features implemented with reference to these case studies?

VR can offer audiences a deeply personal, unique experience as they move through an immersive virtual world. For example, the VR experience we have developed with the V&A for *Alice: Curiouser and Curiouser* enables audiences to *be* Alice, seeing Wonderland from a first-person perspective and experiencing the mind-bending elements of the classic story, from falling down the rabbit hole in zero gravity to being physically shrunk or enlarged. VR as a medium perfectly complements this exhibition as you can imagine beyond what is possible in the physical world and really bring the wild imagination and mind-bending concepts of Alice in Wonderland to life – playing with scale and perception.

HTC VIVE Arts is the V&A's official virtual reality partner for *Alice: Curiouser and Curiouser*. We collaborated with the V&A curatorial team and immersive games studio PRELOADED on the creation of **'**A Curious Game of Croquet' / 'Curious Alice', contributing to the concept and development of the VR experience. 'A Curious Game of Croquet' is presented on VIVE Cosmos headsets, enabling visitors to enjoy a set of interactive challenges as they navigate the immersive world. The VR experience features handtracking, so that visitors can pick up objects, such as throwing a hedgehog to defeat the Queen of Hearts at Croquet.

Last autumn, we collaborated with the V&A to present the museum's first ever live VR exhibition preview, which attracted over 2,400 online attendees. The innovative exhibition preview event was free and accessible through ENGAGE with or without a VR headset, allowing global audiences to hear from curator Kate Bailey, take a first look at the long-anticipated exhibition and interact with one another in the magical virtual space.

Recently we collaborated with Cai Quo-Qiang on his first VR artwork, *Sleepwalking in the Forbidden City*, as part of his major retrospective at Palace Museum Beijing, which opened in December 2020.

For our partnership with the Louvre in 2019 we collaborated closely with the museum's team to bring to life the famous Mona Lisa and delve into the story of both Da Vinci and his sitter Lisa del Giocondo.

At the Musée de l'Orangerie in Paris the exhibition's VR element allowed the audience to virtually visit the gardens from which Monet took inspiration, giving a whole new dimension to his paintings, whilst at the American Museum of Natural History in New York, the VR experience of T.Rex takes visitors up close to a scientifically accurate representation of the famous predator.

Q. I understand that HTC VIVE Arts is also exploring opportunities to implement additional services and operations (such as blockchain, in-app purchases, online ticketing, etc.). What can you tell us about these areas of work?

In only a few years there has already been significant change to perceptions about technology in the arts and more openness to its use as a creative medium. The development of 5G, combined with immersive technologies and artificial intelligence, is also completely changing the way we live. This is reflected in artists' practices and increasingly, institutions are responding to this trend, and to audience demand, by programming exhibitions that use technology and developing digital first content, available to wider audiences in the digital realm. Technologies such as XR, 5G and blockchain are within our company's expertise such that we can support artists who want to leverage those technologies.

Q. Do you believe that blockchain technology will impact the art world? How will it impact the art industry and HTC VIVE Arts consequently?

VR and technology are constantly evolving. I believe we have only scratched the surface of what can be achieved creatively in these new mediums. The recent introduction of NFTs into the artworld is a really interesting development that has brought a lot of energy into the art market and drawn new attention to the creativity and innovation in the field of digital art. Blockchain is a technology that HTC has been researching and developing for many years and we are excited to see the introduction of NFTs into the artworld and its impact.

Q. How do you think Millennials will impact the Art Market in respect of VR technology consumption?

Millennials now make up the larger consumer group and are the fastest-growing constituency of art collectors. They are increasingly buying art and transforming the ways art is viewed, consumed and purchased. They are a tech-savvy generation who is interested in video and new media art and is fueling the experience economy. For millennials, art is the experience, not only the object. They are prone to appreciating new immersive experiences, and to use technology and social media to amplify the excitement. They tend to gravitate towards the use of new mediums such as VR and are usually more likely to take risks and buy digital artworks. As a result, VR will become increasingly embedded in the art market.

Q. Could you identify some of the main technical, cultural and legal challenges relating to the introduction and exploitation of VR technologies in the art sector?

The challenge with digital art such as VR is that it can easily be duplicated and pirated, and an original is often difficult to recognize. The authentication process is not well defined, and determining historical provenance is problematic. Blockchain technology proves useful in that it offers a secure solution for recording provenance and ownership of digital art. It allows for digital artworks to be unique and authentic, and thus to be measured with the same parameters as physical or traditional art.

Furthermore, there are issues of obsolescence and conservation. Because the technology evolves at such a fast pace, the software and hardware capabilities of VR improve over time and thus existing VR artworks need to be updated. A different model of collection care is required than for

more traditional mediums. Collecting digital art such as VR requires dialogue with artists, programmers, experts and sometimes lawyers. When acquiring a VR work, the contract will state the collector's rights and obligations. These include how and where the artwork may be presented. It is the collector's responsibility to check the software and hardware regularly, and updates should be made available to them by the artists or dealers. At the same time, the ephemeral nature of new media also means that earlier artworks carry value in that they become markers of history from which the evolution of the new media can be traced.

2 – Paradigm Shift in the Art Market – Anne Laure Bandle (Art Law Foundation)

PARADIGM SHIFT IN THE ART MARKET

BY ANNE LAURE BANDLE[1]

Paradigm shift in the art market

Closing a multi-million-dollar art transaction based on trust and a handshake. What seems inconceivable in other markets has been a long-established rule in the art world, where the actors' reputation built on their reliability was the essential precondition to enter into a sale.

While the culture of confidentiality has characterised the art market for many decades, it is now being criticized for its opacity. The recent decision of the High Court in London[2] allowing a collector to demand that the broker reveal the name of the buyer she sold a work to evidences a paradigm shift.

Slowly but surely, there is a movement towards greater transparency to make the market more accessible and responsible. However, there are commercial and legal imperatives that demand confidentiality. The result is a tension among market actors that is increasingly felt with the development of online sales, and due to distrust of traditional practices and procedures.

It is therefore in the interest of art market players to respect legal obligations, even if they limit the culture of confidentiality.

Source of funds

Anti-money laundering legislation is becoming increasingly stringent at European and Swiss levels. In Switzerland, it requires the art dealer, who collects payments on his own account for a principal, to carry out certain checks before transferring the said sums to a beneficiary according to his instructions. For example, if the art dealer transfers the amount of the sale price to the seller on behalf of the buyer, the dealer may be engaged in financial intermediation or trading activity. Consequently, the dealer must comply with stringent due diligence, such as verifying the identity of the co-contractor, including the beneficial owner, as well as the purpose of the transaction, keeping the relevant documents for 10 years, clarifying any unusual behaviour or facts and reporting any suspicions of money laundering.

Origin of the work

In addition, the due diligence requirements for buyers of works of art have been continuously tightened. The Federal Court demands from *bona fide* purchasers increased due diligence in

[1] Anne Laure Bandle, PhD in law, director of the Art Law Foundation (https://artlawfoundation.com), attorney-at-law at Borel & Barbey (http://www.borel-barbey.com).

[2] *Hickox v. Dickinson & Anor* [2020] EWHC 2520 (Ch).

industries that are particularly vulnerable to the supply of goods of dubious origin, including the art and antiques trade. The Federal Court has determined that this increased duty of care applies not only to art dealers, but also to purchasers with special knowledge of art, regardless of whether there are grounds for suspicion. Good faith may be compromised when suspicious circumstances in the provenance of cultural property arise. It is not possible to define clearly which suspicious circumstances may call good faith into question. Caution should be exercised in particular when a cultural object is to be sold at a very low price or when the transfer is made under unusual circumstances, for example, the requirement of cash payment despite the high price. If there are doubts about the origin of the work, the dealer should take further information.
The level of due diligence is measured by taking into account the dealer's industry knowledge.

Since the entry into force of the Swiss Cultural Property Transfer Act (CPTA) in 2005, anyone selling a work of art must check that it has not been stolen or taken from its owner without his or her consent. Moreover, every art dealer, regardless of whether they are acting on their own behalf or on behalf of third parties, must establish the identity of the seller and the intermediary, if any, i.e. the seller and the person representing the seller. CPTA does not require the identification of the economic holder of the property, as is systematically the case in financial intermediation. However, the dealer must obtain a written and signed declaration by the seller or consignor of the work confirming their right to dispose of it and keep a register of acquisitions.

The collector who buys a work of art must also verify the identity of the seller and the origin of the object in order to be able to claim a *bona fide* acquisition. Typically, the collector will seek to obtain from the seller information on provenance, customs documents regarding the export and import of the work and recent extracts from registers of stolen art.

Disclosure versus confidentiality

It follows from these requirements that only the parties involved in a transaction – depending on the role they assume, which should be clarified before any commitment is made – should seek information about provenance and source of funds. Nothing will allow the general public to have access to this information, and confidentiality takes on its full meaning here.

To return to the London High Court decision, it was prompted by a collector who had entrusted a painting by Paul Signac, *Calanque de Canoubier*, to a broker, who had offered it for sale to an intermediary acting on behalf of a final buyer, who remained anonymous. The buyer had paid the purchase price to his intermediary, who transferred the amount, after deducting his commission, to the collector's broker. However, the collector never received the money, and the broker was convicted of fraud. The High Court in London accepted her claim, which was based on the theft of a work, not the theft of the proceeds of the sale. It held that it was arguable that her broker had stolen the painting and that the collector had not expressly authorised him to sell it. The validity of the acquisition by the ultimate buyer remains to be established, in a new trial, now that the collector knows who the buyer is.

This case only illustrates the complexity of art transactions, especially when several people are involved, which is frequently the case, and the importance of tracing the entire chain of participants,

clarifying their roles and structuring contractual relationships before committing to buying or selling a work of art.

The due diligence process, when done properly, can be elaborate, time-consuming, and expensive. Yet it can also reveal important information adding to an artwork's value and is a necessary pre-requisite to a well-planned transaction. It helps to ensure that the art will retain its value and provides collectors, museums and art businesses with confidence in their appreciation of the work. The Responsible Art Market (RAM) initiative, a non-profit, cross market initiative formed in Geneva aims to raise awareness amongst art businesses of the risks the art industry faces and to provide practical guidance and a platform for the sharing of responsible practices to address those risks[3]. Among others, RAM has elaborated a due diligence checklist (Toolkit), as an *aide-memoire* of various checks which it can be helpful to consider and carry out when undertaking due diligence in art transactions. Ultimately, collectors, art businesses and other market players all need to adapt and adjust to the new paradigm.

[3] RAM's website is available at: www.reponsibleartmarket.org.

3 - NFTs: Rising and Shining of an Art Market Trend

— Frulloni, Canevazzi, Bignotti

NFTS: RISING AND SHINING OF AN ART MARKET TREND

BY CATERINA FRULLONI, VERA CANEVAZZI AND ILARIA BIGNOTTI

ART FOR CONSULTING[4]

Since the beginning of the pandemic, we have been wondering about the impact of this situation on the art market sector. As predictable, at a time when galleries, art fairs and auctions have been closed, there has been a huge implementation of new technologies and e-commerce platforms, in order to keep the relationship between artworks and collectors alive.

In fact, as emerged in the recent Art Basel report, in 2020 the 80% of the expenses made by the various operators in the artistic sector concerned technological and digital implementation. And just as the galleries got used with the online selling, so the public learned to enjoy the virtual version of artworks as well. However, eighteen months after the first lockdown, we must admit the development has exceeded all the expectations: forms of expression, languages and customs have radically changed, in particular taking in consideration the sector of NFTs and crypto art.

After days when you can't help, but hear about the keystrokes of NFTs in auctions, just a question comes to mind: what is exactly an NFT? Acronym for Non Fungible Token characterize a special kind of token, different from the ones we got used to, where a finite or infinite supply is displayed depending on the case, and all the tokens and the cryptos are the same without distinction. On the contrary, each NFT has its own peculiar ID, containing a certain information that cannot be the same as another. Theoretically, not only every information can be turned into a NFT, but it possible to bound a physical asset (like an artwork), to a digital one, creating for example the digital version of a painting that I own. As a result of this, the NFT ownership is marked with a property document, accessible from a link and protected by the access credentials; while in case of the digitalization of a physical asset, a transaction hash or the NFT ID can be applied directly on the good.

Taking a step back, it can be interesting to resume the most significant stages of the NFTs rising presence on the art market. March 11th, 2020, was undoubtedly a historic day for the art sector: a Crypto artwork by Beeple was sold for the first time at the record price of $ 60,250,000, "Everydays - The First 5000 days" (21,069 pixels x 21,069 pixels), composed of five thousand images that the artist created and collected from May 1st 2007 to January 7th 2021, and which authenticity is guaranteed by encrypted codes, was bought by Metakovan, founder and financier of Metapurse, the largest NFTs

[4] https://www.artfor-consulting.com.

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fund in the world. Then, a crucial turning point was dispatched by the blockchain company Injective Protocol, which after the purchasing of a Bansky's artwork and the conversion of it into an NFT, burned the physical object live streaming. Injective Protocol bought Banksy's work for about $ 95,000 last winter. After the reconversion in NFT, the digital asset reached a value of 382,000$ in the week of March 15th 2021.

However, a Multi-Generational NFT - Mad Dog Jones's 'REPLICATOR' - has been sold for $ 4,144,000 by the British auction house Phillip's on April 23rd, 2021. This new kind of NFT includes seven unique generations of digital artworks. The first generation, sold at auction, is 'Genesis', a video of an office's copy machine. As first NFT generation, it will produce six NFTs, at the rate of one per month, and each generation will obviously be unique from the previous and subsequent ones. In turn, further generations will produce other NFTs, but in smaller quantities (one work less each generation turn), until generation 7 will no longer produce any NFTs. Despite the initial investment to purchase the first generation, the owner is still not certain of possessing the future ones: in fact, each piece can be subjective to the generative errors of the previous generation. As it has been shown, NFTs artwork seems to be a more appealing solution for digital committed investors rather than a fresh interest for a classical art collector.

Are there any proven advantages for a NFT artwork? For sure, an essential point is strongly related to the authenticity: normally to attest the proven authenticity of a physical artwork, a certificate from the archive or foundation is required, upon payment of fees; on the contrary, the NFT authenticity is already given through the NFT generating account or address, providing a certainty for the provenance and the origin of the digital asset. Indeed, that information becomes part of the digital heritage of the asset and it cannot be omitted, deleted or modified, since it is inextricably linked to the NFT, without the need to advance procedures request to any associations. Another positive side is the aspect of circulation and storage of NFTs: as a special token it can be stored in a personal address and, in case of ownership's passages, someone could simply enter the address of the recipient's wallet, without losing any information through the transfer since they are linked to the blockchain. In addition, the multi-level disintermediation makes the method of selling NFT completely new: for an artist there is no longer any need to involve a gallery that retains a percentage on the artwork's price, but anyone, in a totally independent way, can create and sell NFTs. The methods for sale can be direct, through auction houses or specialized platforms, such as SuperRare, Nifty Gateway, Rarible, OpenSea or Makersplace.

The other end of the spectrum is characterized by cons, which are not intrinsic to the very nature of the asset, but concern merely its management methods: blockchain and crypto technologies generally have a significant impact in terms of energy use and carbon emissions. New solutions are however moving in the direction of environmental sustainability. For example, the Palm ecosystem has been designed to achieve fast transaction and extra energy efficiency, to create a new NFTs ecosystem which can take advantages from Ethereum's user base, but in a more scalable and sustainable way.

The initial NFT will be named "$ PALM" and is expected to be up to 99% more energy efficient than proof-of-work based blockchain networks, providing artists with a more sustainable solution through proof-of-stake. Damian Hirst will be one of the first top artist committed, launching a series of ten thousand paintings, which will be sold accompanied by the artist's signature in NFT.

In addition to the above, the issue of copyright in connection with NFTs is quite thorny, and subverts the laws of the traditional artistic system: when someone buys an NFT, he holds the right to claim ownership of the NFT itself and the right to exclude others from claiming ownership of the same NFT. Beyond that, it will depend on whatever terms govern the NFT, depending on the platform's system where the NFT has been sold. So, every selling platform behave as a microcosm answering to a proper inner regulation system, and the commercial right of reselling an artwork once acquired, in most cases, is held by the involved platform; while the collector preserves his right to exhibit the artwork.

Recently, the turning point which foreshadows new horizons, certainly comes from the Uffizi Gallery in Florence, where the first digitalized masterpiece in NFT version, the *Tondo Doni* by Michelangelo, has been created, thanks to the contribution of the company Cinello. Made through an exclusive patent, this DAW® (Digital Art Work) is the first of its kind in the world, made unique thanks to a patented cryptographic system that prevents tampering and copying, and attests its ownership through NFT. For each DAW®, in fact, an NFT token is also created on the Blockchain which certifies the ownership of the reproduction at very high resolution, and a certification of authenticity is also attached from the director of the institution.

Still, what if turning the images of the Italian artistic heritage into digital reproduction and padlocking it with Blockchain and NFT could be one of the best ways for museums to raise funds after the pandemic situation? And who knows, maybe the future of the art market will be also ruled by these unique digital copies.
From the perspective of art history and archival conservation, the subject certainly raises epoch-making questions, to which experts in the field will have to respond: just by way of initial thoughts, how will the dissemination of all times masterpieces be influenced if this trend continues, and what consequences will it have on the knowledge of the general public? How will it affect the historicization of artworks and their critical reception?
Let us think of the impact that Pop Art has had on the transmission of images, especially with regard to the historical perspective; and let us think, therefore, of the weight already played by digitization and by the virtual at the beginning of the new Millennium on the subject of archives and on the practice of archiving works of art in private and public collections.

4 - The New Artistic Cultures of the Web and the Evolution of Kitsch – Mario Gerosa

THE NEW ARTISTIC CULTURES OF THE WEB AND THE EVOLUTION OF KITSCH

BY MARIO GEROSA[5]

Behind many forms of expression developed on the Internet, there is the influence of kitsch, which over the decades has recorded a progressive evolution of the species.

With the complicity of the Internet, which today is not a simple tool but increasingly plays a role of catalyst and stimulus for creativity, the art system has significantly changed its parameters: the networks inside the web have given birth to a multitude of new eclecticisms and virtuosities that often denounce the influence of kitsch poetics in its noblest guise. This phenomenon is intrinsic to the nature of the Internet, which favors stylistic choices that focus on reworking, such as parody, mash-up, makeover and crossover, artistic attitudes contiguous to the expressive forms of kitsch, understood as a cultural form.
The art of the web is often kitsch out of necessity, as it must be filled with evocative elements to be noticed in a vast territory, where, with browser zapping or with the very rapid succession of smartphone pages, people stop for a moment before moving on to something else. The extreme and provocative connotations of the work of art exhibited online are in a sense the equivalent of the tags, links and other devices that make a comment posted on Instagram or Twitter more visible.
And just like the Internet, which is an ever-changing creature, kitsch also evolves.
Kitsch is no longer what it used to be. Until thirty years ago, kitsch was easy to define. It was called kitsch and those three or four classic examples came to mind: the pepper grinder in the shape of the Eiffel Tower, the golden gondola with intermittent electric lights, close relatives of the Christmas tree decorations, the garden gnome that imitated in an approximate way the dwarfs of Snow White, and the nostalgic operettas of provincial Central Europe in the style of "Al cavallino bianco".
It was a vintage kitsch, which seemed like it could not and should never be renewed. It was (and for many still is) the favorite style of those who wanted to present themselves as a cultured person and well educated to the dictates of taste. It was and is a superficial patina of false culture spread on a layer of bad taste or absence of taste. There was nothing under the kitsch. The important thing was to give an outward sign of belonging to the elite of beauty, and it was wrapped by fishing in the safe references, in the safes of taste, in the unanimously accredited territories: the Mona Lisa, the Tower of Pisa, the Eiffel Tower, the singers of light music with a tenor approach, labels clearly visible on the sleeves of designer clothes. All this was the kitsch of the day before yesterday. A kitsch which in turn provided for its hierarchies. The elite of kitsch always tries to make a leap forward, avoiding primary icons and looking for second-rate references, without straying too far from the great classics: instead of the reproduction of the Mona Lisa, de Chirico's lithography is chosen; instead of the gondola in miniature, reproductions of chairs by famous architects are preferred. It is an attempt to elevate oneself, moving from first-rate kitsch to higher-level kitsch, but it always remains in the same area.

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Indeed, all in all, classic kitsch was more likeable, the one without too many pretensions, which began to be ousted in the Eighties, with the widespread appearance, first abroad and then in Italy, of shops selling high-tech gadgets.
Before, kitsch was just kitsch. You said kitsch and you thought of something crystallized, of the "boule de neige" with the Milan Cathedral, of the tearful songs, of the bullfighting posters personalized with your name, of the candy tin boxes of the 70s, which imitated malachite or ceramics, and which today are disputed by collectors. All hyperdated objects, which made and make bad taste seem like a museum exhibit, harmless because it is always the same as itself.
Until yesterday, showing off the word kitsch to brand products of various kinds with the sign of aesthetic infamy also meant giving oneself the demeanor of a somewhat snobbish connaisseur. You boiled an object with the mark of bad taste and you fell into the part of an English country gentleman, you could magically see splendid virtual boiseries materialize around you, complete with paintings of thoroughbred horses and a Chippendale barometer on the wall. Or at least it felt like that, you could pass yourself off as connoisseurs, at least when you were in your own habitat, in a living room overflowing with art encyclopedias purchased in weekly installments. We lived with bad taste, which in one way or another was present in almost every home, and we distanced ourselves from it depending on the situation.
Knowing that a certain thing is in bad taste meant giving yourself an expert tone, qualifying immediately like who knows which side of taste you have to be on. The kitsch object was a touchstone, but it was never metabolized. It was inadmissible to think of transmuting it by virtue of some strange alchemy.
And so that term was often used inappropriately, inflated by those who felt the need to hand down the infamous label, confidently tracing the boundaries of beauty and ugliness. Roughly the dividing line was that of bon ton: you were either on one side or the other. Excess, originality and transgression come close to kitsch; order and presumed pleasantness to good taste. A real stretch, which today would lead to the questionable axiom according to which, for example, minimalism cannot be kitsch.

Many still confuse kitsch and bad taste, but they are two absolutely independent categories. Bad taste is immediate, it is almost primordial. Kitsch is an intellectual construction, more or less successful. The problem is that the kitsch object is sometimes read only for what it appears to be and its nature is not explored. Its transgressive charge is not grasped.
In the Thirties there was talk of kitsch and bad taste as something morally bad: the Austrian writer Hermann Broch said that kitsch is evil in the art system. Regardless of a judgment of merit, it is interesting to note that for better or for worse kitsch has its own value, its own ethical significance. Bad taste tout court, on the other hand, implies nothing.
Among other things, kitsch has an absolute value that changes depending on the observer. Bad taste subsists on its own, kitsch instead implies a relationship with the beholder. This is also why today there is a strong recovery of kitsch culture: in the age of the Internet and social networks, a stylistic culture that implies the involvement of the viewer, an involvement that turns into participation in all respects, easily takes hold.
It took a long time for such a revaluation to come about. In the Seventies a snobbish attitude prevailed, in the Eighties kitsch was derided, in the Nineties it began to be re-evaluated, on the wave of the recovery of trash culture. Today, if kitsch is defined as a trivial matter of bad taste, we risk being considered superficial.
Bad taste in the strict sense is that of ringtones with parodies of the theme songs of the TV series, that of the belated emulators of the pop stars of the day before yesterday who appear on the trams when

approaching the suburbs, it is the total lack of aesthetic references and it is always existed, always equal to itself. Kitsch is another thing.
Paraphrasing a slightly kitsch advertisement from the Sixties, kitsch is a serious matter. Bad taste doesn't need instructions, it's intuitive. Kitsch, on the other hand, is difficult, it must be conquered, courted, understood, it is very intellectual, complicated. And then there is not only one. There is no one-way kitsch, there are many kitsch, which do not end with installations outside fast food restaurants or with beer mugs adorned with elaborate Bavarian landscapes, with super Pop sculptures, with sad clowns in glass of Murano or with glasses for Chinese grappa in which you can see women in risqué postures that induce to delay the moment of the short drink.
We have been through years of great confusion. There are countless victims of classic kitsch: for a long time characters and objects of value and undoubted interest have gone to keep company with low-level craftsmanship and artistic creations with a near-zero appeal.
There have been many trials in the name of good or bad taste, corroborated by easy and coarse ironies. It was enough to depart from the imaginary line of well-mannered taste, artistic balance, aesthetic rationality, to find oneself catapulted into the world of kitsch. In the series of judicial errors of the kitsch of yesteryear (which often was nothing but camp, an exaggerated style, full of references, but still aware of what it is) there is the ending of Visconti's Death in Venice, with the trio composed of Tadzio, Aschenbach dying and Mahler's adagetto, certain films by Terence Young, the director of the Christmas Tree (the very sad story of a child who dies of leukemia following an atomic explosion), the saga of La Boum. But how is it possible to do such groupage? How can you even remotely think of putting all these and many other examples under the big hat (preferably imagined as a sombrero) of kitsch? So far, we have thought of a "pan-kitsch", understood as a pantheism of bad taste, a syncretism of art that indulges a little too much on the emotional side.
It is useful to clarify this minefield of taste, whether good or bad, being careful not to cross over into the contiguous areas of camp and trash.
First of all, a chronological framework must be defined, because kitsch is a mobile creature, which never remains the same as itself. Kitsch changes, it is chameleonic, it is changeable, it adapts to the times and fashions, it is not a fixed and granite concept, it is never fashionable and for this reason it is a classic in its own way. However, kitsch is not the same as bad taste. Not necessarily.
Let's start with the late 19th-early 20th century: in that era protokitsch develops: bad taste seeks its own identity, has no self-awareness yet and constantly oscillates between high culture and low culture. So much so that for the kitsch of that period we find juxtapositions between important examples and products of craftsmanship or current art: the Kiss by Klimt, a languid masterpiece where two lovers swim and get lost in an ocean of gold and precious gems and the great heritage of illustrated postcards, which certainly had a monopoly on kitsch of those years, whether it be the drawn ones or the photographic ones, perhaps depicting a curious inhalation session in a spa town in the Hautes Pyrenees.
The Belle Epoque loved kitsch and never missed an opportunity to court it, to encourage its production. Suffice it to say that those years saw the birth of Art Nouveau, with its funerary allure, a connotation that curiously returns, cyclically, a century later, in the kitsch of the early 21st century. At that time, art and artifacts indulged in sentiment stressed to excess, or at least, they did so according to the filtered vision that has been given to us by art and costume historians, the reflection of which is seen today in antiques markets, which enucleate all the evidence of a period that was probably much more complex.
The protokitsch of the early 1900s was above all sweaty and honeyed, with Mucha's little women, the glass paste lamps, the novels of D'Annunzio's emulators, the Art Nouveau.

The protokitsch, which by its nature is a bit modest, loves understatement and is pleased with its status: it is a phenomenon that starts at the end of the 19th century and finds some of its most successful incarnations in Art Nouveau poetics, which however, it does not remain frozen but offers its legitimacy to many phenomena that will arrive later, in a complex game of reincarnations, so that the protokitsch was born roughly a century ago but then follows its own line that allows it to survive until today, between thick and thin. Not only that: protokitsch has an ecstatic attitude, of presumed veneration, it is the dubious taste that is always open-mouthed, that loves to convince itself that it is amazed, it is the kitsch that is moved and that has a somewhat sad attitude towards life.
The protokitsch, which lives perpetually with wide eyes and wide open mouth, has a lot in common with the act of veneration and in this sense also explains its pseudo-sacral nature. The first kitsch is sacred and lives on the shoulders of giants: he lives by paying homage, drawing inspiration, even copying a little.
This primordial kitsch is also felt as a veiled attitude of noir irony towards life, which is found, for example, in many urban situations in Brussels, where there is a place called "La mort subite" and where it is felt at every turn by the reassuring presence of the "Manneken Pis", the fountain with the appearance of a boy peeing, an unparalleled emblem of planetary kitsch, which even boasts a small museum with a series of costumes, one more kitsch than the other.
For many years kitsch has been identified with this type of meaning, which still enjoys some success today. But there were other glorious moments, in which kitsch lavished on other suggestive metamorphoses. For example, in the Sixties, when the Shangri-Las, "the myrmidons of melodrama", famous for Remember, a very melancholy song in which a girl weeps for her man amidst the chirping of the seagulls, while the noise of the motorbike is heard while it crashes (another classic example is The Ballad of Bonnie and Clyde, not in the version sung by Georgie Fame, but in that of Rinaldo Ebasta with lots of gunshots and sirens).
It is therefore a melancholy kitsch, a kitsch contiguous to the veristic vein of many Italian songs of the Sixties and Seventies (among the examples, Piange il telefono by Modugno, Lampada Osram by Baglioni, Pronto, buongiorno è la sveglia by the Pooh).
In classic kitsch there is a retreat on oneself, whether it is the dark stories with which the Gozzanian Commissioner Maigret must be measured, a fake Tiffany lamp or a collection of souvenirs of the great sanctuaries, but also more simply of boxes of electric trains or Star Wars action figures, all icons of personal museums of memory. Classic kitsch needs a sense of memory, of languor for the past days, it focuses heavily on souvenirs, perhaps even on regret, it is a kitsch of lost time, of vanished occasions.
The kitsch that emerges from the 1960s is more decisive, albeit still unconscious. He is moved but manages to mourn, he looks ahead. The Shangri-Las sing dramas and misfortunes but present themselves as strong-willed and emancipated girls, with the attitude of those who love both the past and the future, they are able to tell a tearful story moving gracefully to the rhythm of the music. Here is the big difference between these two types of kitsch: protokitsch is unique, true to itself, has only one word, while kitsch born in the Sixties is more versatile, it is like a two-faced Janus, who on the one hand is moved and on the other he laughs. For this we will call it "quiche", softening the term kitsch and turning it into a Frenchism, referring to the tasty French pie, which can be sweet or salty, like this middle-aged kitsch with salt and pepper hair.
But be careful, this does not mean that the "quiche" was self-deprecating and was aware of its bad taste. No, that's the camp and it's a whole other thing. The "quiche", that is the kitsch that was born in the Sixties (but which still survives today, as indeed the protokitsch) is the kitsch of Doris Day clones, girl groups, Happy Days boys, an "almost good gusto "which becomes similar to bad taste or vice versa.

The Sixties are overflowing with "quiche": examples of quiche are songs like "A Lover's Concerto" by The Toys, a pop song that unfolds on a rearranged Bach fugue, as well as melodies that echo similar medieval themes or some compositions by Burt Bacharach, as well as the Pop pseudo tenors.
The quiche thus manifests itself in double-sided works, including some memorable inventions of progressive rock bands, which amazed their fans - at least those fasting in classical music - with songs taken from Mussorgski or by Tchaikovsky, doing his best in virtuosity which longtime spectators of classical music concerts are accustomed to. In itself the speech is also interesting, but the problem is that there is no integration, the two things remain quite impermeable: on the one hand there is the classical melody, the virtuosity (a fundamental concept) and on the other there is the original part. The novelty is that the quiche is not in bad taste, or at least, it has lost much of the tacky patina of protokitsch.
The protokitsch was guided by instinct and feeling. Quiche, on the other hand, focuses on the education of taste, whether it is true or presumed, and sometimes feels the need to show their references, as if they were medals. So you try to look like Veronica Lake or slip a piece by Bach or Vivaldi into a pop tune.
The quiche acts wide-ranging, has a broad spectrum of action and is found in many fields, even in the false kindness of professionals who attend international conferences, who feel compelled to laugh at anything when they talk in English with their foreign colleagues. There is a widespread kitsch attitude in the way of behaving and relating to others. It is the kitsch of the forced smile that is found in the conference rooms of large hotels or in the smiles of the waiters of starred restaurants.
This typical quiche behavior can be defined as "international bon ton". It is one of the tastiest incarnations of second level kitsch. In those cases a whole kitsch theater takes shape, based on affected gestures, unmotivated giggles, fake courtesies, fake attention, food adapted to current trends, regimental ties, and above all expressions homologated to the purest kitsch style. Characters who make us suspect that somewhere in the world there is an international school of bad good taste where the rules of a standardized bon ton are imparted that includes affected gestures, almost over the top gallantry, jokes and a sense of proportion. Yes, because curiously the “kitschy behavior”, the behavior of homo kitschensis, is based on a judicious attitude, which avoids any kind of transgression and excess. It is a kitsch etiquette based on a misunderstanding of true bon ton.
Quiche is a good facade taste, which feels the need to flaunt culture, without perhaps having metabolized its own models. The protokitsch had a reverential attitude, even of amazement towards the models to which he referred and often pays even naive homages to the high culture he prefers. And when that kitsch coincides with high culture, the attitude of ecstasy and amazement still remains. In the quiche, on the other hand, there is an attempt to put oneself on the same level as the model, or at least to make it one's own. Or, if you really can't do any of this, you try not to show your deference. In any case, a social elevation is sought and does not confess to belonging to a lower rank: the people of rock take possession of classical music, and even a very banal classical melody makes the audience cry out to the virtuoso; the television dramas re-read the great novels of world literature by simplifying them, the Reader's Digest offers the synthesis of articles and short stories, creating journalistic and literary notebooks. It is a fast food culture, a culture of quiche, of intermediate kitsch, which often coincides with an attempt to become cultured and show off what has been hastily learned.
Even today the quiche hides where you least expect it, for example in the bon ton of the window mannequins of medium-high level department stores, which are splendid examples of intermediate kitsch, which is cunningly anonymous and preferably assumes an attitude and a pleasant physiognomy.

Here, the reassuring pleasantness is one of the characteristics of middle kitsch, which has induced a notable reversal in the ways of being and judging.
Classic kitsch was excessive and perhaps a little mundane. Of the protokitsch in the intermediate kitsch only the banality remains. For the rest, the new "good bad taste" has been given a sprinkling of pleasantness. The quiche still today is made up of politically correct ethnic objects, of judicious minimalisms, of obvious design, of books by pseudo gurus who for 20 euros offer you recipes for happiness, of pizzerias furnished in series in pastel tones that are “so fabulous Eighties style”.
This is one of the many incarnations of kitsch. We could define it as that of anonymous and widespread kitsch, a kitsch that takes root where there is a desire for flattening on a reassuring medium-level threshold that gives satisfaction and does not create too many thoughts.
Appreciating the quiche means living in return, leaving the task of making the first move to others, sending others to explore and privileging summaries and surrogates to first-hand culture, a protective and reassuring attitude. The protokitsch held out his hand towards something unattainable for which he expressed amazement. The quiche, on the other hand, feels that it is able to reach and grab its model, albeit with help and using some expedient.
Then, in the 21st century, we arrived at the third chapter of this evolution: today kitsch has undergone a further transformation, especially thanks to the Internet and the development group of cultures generated from below.
The latest generation kitsch, which can be defined as Superkitsch, has become clever, is no longer surprised by anything and plays with its models (in the quiche, despite everything, there was a certain deference, respect for authority). Superkitsch is not bad taste, it is a pop phenomenon, it is a response to many other trends in progress. All around there are minimalisms, fusion, neo-traditionalisms, eclecticisms, technotrends of various kinds. The superkitsch is beyond, it moves freer, it is a brother of the classic without being truly classic. Superkitsch is beyond fashion because it is perpetually out of fashion. Superkitsch is playful and ironic and is open to experimentation.
Today's kitsch is more complex than yesterday's. It is no longer the obvious kitsch of St. Mark's Square rebuilt in Las Vegas, of the Lilliputian metropolises, of romantic castles with ostentatious bad taste. On the contrary, there is a reversal: it is a different taste, which perhaps has something of bad taste in it, but which has been refined and has given life to a new taste, accepted as a trend.
It is a phenomenon built in part by default, which aspires to be seen as a cult. In the last twenty years there has been a continuous, progressive re-evaluation of phenomena considered marginal. In this new “anything goes” culture, everything is fine, and it is very difficult to find a dividing line between beautiful and ugly, between excessive and elegant, especially when low culture and high culture are mixed with art. The thousand streams of new trends allow every expression to find refuge and shelter somewhere, in neo-baroque rather than in sitcom style or synthetic rococo, avoiding the risk of being trapped in classic kitsch.
Meanwhile kitsch takes on its own dignity, a raison d'etre, loses its negative connotations and becomes a stylistic figure to rightly boast about. Indeed, kitsch is often more refined than cult and undoubtedly more intriguing than trash. In fact, the cult can be such as it contains in itself an intuition, a joke, a gimmick, a provocation; trash is ugly and that's it, it follows a dynamic similar to that of splatter. Kitsch is more complex, at least that of today.
The Superkitsch is more intimate, it only focuses on a series of rather discreet signals.
In the most interesting cases the Superkitsch is a cultured reinterpretation, rather far from the similar schemes of postmodern, which was more immediate and delighted in showing itself and being seen.
Today kitsch is proactive, it no longer just looks. We now speak of “Sophisticated kitsch”, of a refined and elegant kitsch, or at least, which wants to be such, but also of “radical kitsch” and “progressive kitsch”.

Kitsch works like an art non-profit organization. Kitsch, which was born with a sacred vocation, of great reverence, now serves to desacralize, has a function of social utility. At first, kitsch was secretly fascinated by luxury, it was as if he spied on luxury through a keyhole and tried to pay homage to it as best he could. Now kitsch becomes a tool to cancel sacredness: it is a great achievement, which is mainly due to the acquisition of a certain irony that allows it to move across the board. Kitsch is like the court jester: no one controls him that much and he moves undisturbed, allowing himself to gain good visibility thanks to the means offered by the Internet.

But does the good old kitsch of yesteryear still exist? Has it finally been understood or do you keep looking at it from top to bottom? Someone collects it, has it assumed the status of a cult phenomenon? Looking at the social media profiles it seems that especially lately many icons of this genre have been re-evaluated. But often they ended up in the cauldron, with other icons of the period they refer to. On the wave of amarcord there is the risk of confusing the sacred with the profane, kitsch and ordinary objects and products covered by the patina of nostalgia, the little dogs that peeked from the floors of cars in the sixties, the guitar-shaped table clocks and living room gadgets that simulated the motion of the sea waves.

Kitsch is still with us, in our homes, but it risks disappearing, becoming an invisible object, confused in the jumble of new maximalisms. And thwarting its charge of protagonism is the worst affront that can be made to a kitsch object, it is like decreeing its condemnation.

5 - Code as Law. Contemporary Art and NFTs – Domenico Quaranta

CODE AS LAW. CONTEMPORARY ART AND NFTS

BY DOMENICO QUARANTA[6]

"*NFTs, be they artworks or a digital artifact like this, are the latest playful creations in this realm, and the most appropriate means of ownership that exists. They are the ideal way to package the origins behind the web.*" Sir Tim Berners-Lee, 2021 (1)

In mid June 2021, Sotheby's London announced that it would be auctioning off an NFT of the original source code for the World Wide Web, written by Sir Tim Berners-Lee between 3 October 1990 and 24 August 1991, when he was a researcher at CERN, Geneve, and later released as open source software. Appropriately labeled "This Changed Everything", the auction offers a time-stamped archive of the World Wide Web source code accompanied by an animated visualization of the code being written, a graphic representation of the full code and a "Readme" file written by Berners-Lee in 2021 in the form of a letter. All these contents are provided with a cryptographic hash, uploaded to the internet and associated to a unique NFT, a "non fungible token" recorded on the Ethereum blockchain and regulated by a smart contract. The uniqueness of the NFT guarantees for the uniqueness and authenticity of the associated files, while the smart contract controls and regulates the transfer of the property rights to a new owner (and to all future owners as well). When the auction will close on June 30, 2021, this text will be on its way to publishing, so I'm forced to make a bold prediction: a bunch of wealthy collectors – most likely, crypto collectors – will participate in the auction, excited to engage in a transaction with the father of the Web, and to become the owners of the code that "changed everything", and that ultimately shaped the online, distributed environment that made blockchains and cryptocurrencies possible. With bidding starting at $1,000, the auction will be a success whatever the final bid, probably scored in the very last, convulsive seconds. The sale will benefit initiatives that Sir Tim and Lady Berners-Lee support, while the original code of the World Wide Web will start a new life as something that can be privately owned, yet open and publicly accessible at the same time.

The World Wide Web was a landmark, game changing technology, that caused a paradigm shift providing easy, worldwide access to an already existing infrastructure (the internet) and connecting increasing amounts of information and data. It's hard to say, at the moment, whether this auction will "change everything" as well; if it will go unnoticed or it will be perceived as just another communication stunt. Personally, I can't but look at it as a relevant event, a new step in the NFT craze of this early 2021, at least on a symbolic level. The craze – started when Christie's set on auction *Everydays. The First 5000 Days* by American illustrator Beeple, and sold it for more than 69 million dollars in March 2021 (2) – has been mostly guided, so far, by interests: the interested investment of wealthy crypto owners who wanted to demonstrate how certified digital scarcity can be crafted on the blockchain, and wanted to attract new crowds of creators and investors in the field; and the interested investment of auction houses, who wanted to open up a new market and attract huge amounts of cryptocurrency that could only be invested, so far, in other cryptocurrency and that can

[6] http://domenicoquaranta.com.

now be used to buy art and promote oneself as a visionary patron. (3) Both investments paid off, and turned NFTs into a legitimate market attracting many kinds of players: artists, curators, collectors, even art galleries, which – although worried by the main online marketplaces' promise to remove any intermediation between creators and buyers, believe in NFTs as a system of certification, and are setting up their own channels and marketplaces, trying to restore their role in the chain.
Whatever one may think about NFTs as a speculative bubble and a technological hype – even if one believes that the bubble already burst and that we ended up in the Trough of Disillusionment of the hype cycle (4) – we have to admit that artists are keeping entering the crypto space, that online marketplaces are growing, that auction houses are launching new initiatives, and that an increasing number of people believes that NFTs are here to stay; that they are rapidly changing the art world and, more broadly, the very concept of digital ownership. In this context, Tim Berners-Lee's gesture – entrusting his beloved and open source invention to the blockchain – as well as his words – defining NFTs "the most appropriate means of ownership that exists" – take on the symbolic meaning of a blessing from the Pope. They mean, literally: "don't be scared by this innovation, dudes. It might not be perfect yet, but it can get better, and it's anyway the best continuation of the work I started in the early Nineties, in terms of community, collaboration, decentralization. Get on board! It's playful, secure, and it's the future anyhow."

Definitely, this innovation is far from perfect. It would be impossible, in this little piece of writing, to illustrate the technical structure of this system in all its complexity and bring to evidence all the problems it raises, in terms of economic and social barriers, challenges to the existing regulations, ways in which identity, authenticity and property are administered. But let's try, in brief, to explain what happens when you – a creator of some kind – decide to mint your first NFT and enter this market.
First, you have to set up a crypto wallet and buy some Ether, or another cryptocurrency in case you decide to record (mint) your NFT on one of the many other blockchains that are currently offering the same service. Two things have to be stressed here: first, that in this space your identity is administered through something called a "wallet"; it's up to you to decide the level of transparency or opacity you want to keep, but besides the profile picture and nickname you choose, on the blockchain any of us becomes a financial entity, represented by possessions and transactions; an opaque entity, that can't really be distinguished from automated bots, if you want so. Second, in order to participate you need money: which can be easy if you entered this space early on, and invested in crypto when they were very cheap, but can be prohibitively expensive to do today. You might be free to do whatever you want with your work, but this freedom has a price.
Once you have a crypto wallet, you need to decide where to mint your NFT. If you aren't invited by an auction house, you will probably choose among the many platforms available. The first NFT marketplaces showed up in 2017, and many others entered this space very recently. Some of them, like OpenSea, (5) are open to anybody; some other can be accessed by invitation, or by application. Open platforms are of course easier to access, yet they are overcrowded. Furthermore, as any kind of digital asset can be associated with an NFT, you have to accept to be set aside to many things that can be framed as "art", even if they are not, as well as to many things that are explicitly not art: virtual property, in game assets, sports memorabilia. So called "curated" art platforms are more difficult to enter, especially now that they get many requests. And this is where making a kind of art that is more likely to please the gatekeepers, or having a strong social network and good connections inside the platform, may start to count.
Either you go for an open or curated platform, in order to get in you have to log in. Log in is usually done via wallet, and by verifying your identity by posting on an existing social network account (usually Twitter). In most cases, this is enough to start minting; other platforms, such as Foundation,

(6) require you to access a "creator" status (which basically means more social networking labor, influential friends, etc.)
When you are finally ready to mint, you have to upload your digital content somewhere on the internet, and to link it to a "non fungible token" permanently stored on a blockchain. Platforms usually upload contents on IPFS (Inter Planetary File System), a peer to peer network where a file is not identified through a location (ie. http://site.com/folder/picture.jpg) but via a cryptographic hash, a unique alphanumeric string such as QmUX7pCVzmnC6fBThdTFujLokSj4r38ZDtATcvWi77FFoz, uniquely associated with the file. (7) Then, you have to add metadata, some basic information about the piece (usually the name of the artist, the title of the work, and a few technical information, such as file format and size). Among the main platforms, SuperRare seems to be the only one adding the wallet address of the creator (the only verifiable reference to an identity, although opaque) to the metadata file. The metadata file is associated with a hash, too, and recorded on IPFS. Everybody can freely access and download your content when they know its hash, that is usually available publicly.
So, how the hell can one claim ownership of a unique work of art?
Enter NFT and minting. Minting means registering a token on a blockchain. A token is like a coin, but being "non fungible", it can't be exchanged with another token with the same value. It's unique by design, and its ownership and exchange is regulated by a smart contract, that is a contract in the form of code (or, if you like, a software that executes a contract), also running on the blockchain. Minting has a cost (also known as gas fee), that you may afford or not. But when your NFT is minted on the blockchain, you can finally claim ownership of the file you uploaded. This happens because the NFT, which is unique and sits in your wallet, contains the hash of the metadata file, and the metadata file contains the hash of your artwork. When you transfer the NFT to another wallet, you transfer your ownership rights to another owner. Everybody can still download your piece, but only one subject can claim ownership – that who owns the NFT that links to the metadata that links to the file.
As it's easy to see, nothing in this process forces you to prove that you is actually you. Nothing in this process forces you to prove that you own and have author's rights on what you are uploading. Nothing in this process forces you to upload the best version of the work (quite the contrary, most platforms impose limitations of file format and size). Nothing in this process forces you to prove that the content that you are claiming unique is not uploaded onto another platform, associated with another NFT. Technically, as the hash is algorithmically generated by processing the file and is unique to the file itself, uploading the same content twice should be impossible (as it would generate the same hash); but a little, imperceptible variation of the file is enough to generate another hash. Finally, if the smart contract can allow you to automatically transfer ownership, and maybe to set some other author's rights (ie. a percentage for the creator on secondary sales, the so-called *droit de suit*), most author's rights and collector's duties are not clarified along this process.
Of course, not all NFTs are minted like this. Auction houses use their usual tools to identify the creator / owner and to certify the authenticity of the piece. If you either have or can buy the technical abilities to program a custom smart contract, or to bypass the platforms, you can embed more rules and rights in the code, or find other ways to associate them to an NFT. On June 10, 2021 Sotheby's New York sold *Quantum* (2014 – 2021), a tiny .gif file by US based artist Kevin McCoy, for 1.472.000 dollars. *Quantum* is known as the first NFT ever minted, when even the word NFT didn't exist yet. McCoy minted it on the Namecoin blockchain as part of an experimental initiative meant to generate artificial scarcity through the blockchain. At the time, just a few cared about it. In order to put it on sale as an Ethereum NFT, the piece was restored and uploaded to IPFS together with an archive including documentation of the Namecoin wallet, all the single frames of the .gif for future restorations, and a Rights Agreement. All the archive is governed by a single smart contract. (8) In the same auction, pseudonymous artist Pak (she / they) sold *Fade* (2021), a vector file that changes along time, and

would finally disappear after a year. *Fade*'s behavior is controlled by a complex smart contract, developed in collaboration with Manifold, which actually combines 12 different programs. (9)
While McCoy's Rights Agreement integrates what a smart contract can do in legal terms, Pak's sophisticated use of coding allows him to escape the simplified version of digital native art that most NFT platforms allow, which usually includes static images, small animated loops, short videos and sounds, sometimes rotating 3D objects. But the main point here is that the vast majority of the NFTs filling up blockchains nowadays are actually disenfranchised digital assets controlled by oversimplified smart contracts, and that (despite their promises) can offer little guarantee in terms of authorship, authenticity, scarcity, implementation of artist's rights, and duration over time.

Once everything is set, your NFT is minted and you added a price tag to it, you may be wanting to sell it. Platforms rarely help you to do it, unless you fit in their agenda. Crypto collectors may surprise you, but surprises are called like this for a reason. You added a tiny bit of information to an ocean, now you have to bring it to the surface. Your gallery might help you, if you have a gallery and if it's open to support you without a revenue. But in most of the cases, you have to rely on your own forces, on your own PR abilities. It turns out that most artists, even some of the best ones, are very bad at self promotion. That's one of the reasons why an art system is ultimately useful: it might have many limits and biases, but when it works fairly, it may help good art to emerge despite the artist's ineptitude at social relationships. That's also why many NFTs don't sell, or sell very badly. Actual data about unsold NFT sales are hard to find, but some data analysis conducted by Kimberley Parker over information scraped from the public APIs of OpenSea gives you an idea. Although, according to Parker, most NFTs sold at least once, (10) 67.6% of sales have not had a secondary sale. In primary sales, 33.6% were $100 or less, and 20.0% were $100-$200 – figures that sometimes may not even cover the gas fees.
With a few exceptions, the lucky ones who can set up a successful NFT market for their own work are those who have been part of the crypto community for quite a while, who bought Ether when it was cheaper, who have connections in the field that are open to support them, bidding to launch the auction or to raise their quotations.

Back in 2008, pseudonymous cryptographer Satoshi Nakamoto conceptualized, and later implemented, the Bitcoin blockchain in order to remove any form of human intermediation from financial transactions, and any need for trust. The abstract of the Bitcoin's white paper starts with these words: "A purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without going through a financial institution." (11) As Primavera De Filippi and Aaron Wright explain in their book *Blockchain and the Law. The Rule of Code* (2018), blockchains "blend together several existing technologies, including peer-to-peer networks, public-private key cryptography, and consensus mechanisms, to create what can be thought of as a highly resilient and tamper-resistant database where people can store data in a transparent and nonrepudiable manner and engage in a variety of economic transactions pseudonymously." (12) As the database is distributed on each and every node of the network, and tamper would be technically and economically prohibitive, blockchains allow to run a financial system without the need of institutions, banks and bankers to generate value and safeguard exchanges. Introduced a few years later with the Ethereum blockchain, smart contracts further extend this fight against middlemen and trusted third parties to other categories such as notaries, accountants, lawyers, tribunals, governments and policy makers. Based on the idea that code is law – what De Filippi and Wright call "lex cryptographica" – blockchains generate an order without law, and often don't comply with existing laws and regulations.

The idea of the end of the middleman was – and still is – at play along the NFT craze as well. NFTs have been described as a technology capable to turn useless any kind of third party usually involved in the process of selection, authentication, display, construction and validation of cultural and economic value in art: galleries, art critics, curators, institutions. Who needs a gallery when you can set up your store, decide your reserve price, and sell? Who needs curators and critics when collectors can bid on the art they like, and decide how much they are open to spend? Who needs an art world when outsiders with no museum shows, no reviews on magazines, no art pedigree can sell for millions to anybody who simply likes their work?
At all these levels, the promise of disintermediation is more a threat, or a mirage, than a reality. Cryptocurrencies didn't destroy banks, finance and fiat currencies – they became high risk investment goods instead. Smart contracts may be a challenge for the law, but they are also opening up a space of intervention that might need to be both regulated from the outside and shaped from the inside. Working side by side with programmers, lawyers and experts could help translating the existing regulations to code, and work to make the law of code to better adapt to the code of law. As many noticed, developing smart contracts that could automatically implement artist's rights on every sale could potentially solve long term problems that national and international regulations weren't able to solve for decades. (13)
In the NFT market, middlemen and gatekeepers don't disappear either: they are simply replaced by other gatekeepers, in a social structure that may be more horizontal, decentralized and informal than the elitist contemporary art world, but it's not necessarily better. Where your power, authority and ability to act meaningfully depend not on the books you wrote, exhibition you curated, studies you made, institutions you worked for, but on how popular you are on social networks and how much money you have in your crypto wallet. Where gatekeeping is transferred in the hands of those who evaluate applications, who can invite you in or vote you out, and of those who can collect artworks and build galleries and museums on virtual land.
Meanwhile, thousands of artists are entrusting their works to start-ups that didn't exist last year and that there's no guarantee they will last for long; companies that don't verify their identity and authorship, and that rarely promote their work. Some of these artists are at least making some bucks, most are just paying the gas fees and working for such companies.

In conclusion: blockchains and NFTs are opening up a whole new environment for contemporary, digital native art and for any kind of digital, and eventually physical, artifact. Their promises, in terms of disintermediation, community, control of ownership, freedom to exist in an open field with no limitations of gender, race, class and country of origin, are gorgeous; their reality, far from perfect. Refusing to engage would probably be a bad choice, also considering the fact that this environment is very likely to be a test ground or a first prototype of the internet that would be, like it or not. Choosing the right mode to engage is key.

Notes and references

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Inflated Expectations, an hyped technology usually goes through the Trough of Disillusionment before eventually slowly establishing itself and reaching mainstream adoption. See *Wikipedia*, https://en.wikipedia.org/wiki/Hype_cycle.
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6 – Art Galleries in the post-pandemic market – Nicola Maggi (Collezione da Tiffany)

ART GALLERIES IN THE POST-PANDEMIC MARKET

BY NICOLA MAGGI[7]

Sales collapsed by -36% and the workforce was greatly reduced. The economic shock caused by the pandemic has impacted on a sector, that of art galleries, already weakened by a series of structural fragilities that have been dragging on for some time. Suffice it to say that already in "peacetime" 30% of the galleries had accounts in the red and that, in the last 10-15 years, there has been a vertical collapse in the birth of new realities, due to an outdated business model and a certain widespread backwardness in the technological field.

All this has meant that the economic crisis triggered by the Pandemic has caught the sector practically unprepared, largely entrenched in *business as usual* - just think that, still in 2017, about 40% of galleries, interviewed by the *Art Market Report: Online Focus by TEFAF*, claimed to operate exclusively offline -, placing it, once and for all, in front of a crossroad because, as Marc Spiegler, global director of *Art Basel*, well explained, speaking to *The Art Newspaper*, «in a situation like this you have two choices: one is to close down completely, the other is to think about what the future could look like and start planning for it».

Actually, the galleries had already begun to make this imaginative effort. For years now, international forums such as the *Talking Galleries* in Barcelona have been discussing on *best practice*, possible new business models and hypothesizing solutions without, however, reaching a moment of synthesis. In the last edition of *Talking Galleries*, held at the end of January 2020, just a few months after the beginning of Pandemic, the debate at the Spanish convention focused on the need to create new generation interactive experiences, able to complete the "classic" cultural offer of the exhibition, generating curiosity and attracting new collectors within the physical space of the gallery. This need has been felt for some time by a world, that of galleries, which has seen fewer and fewer people visit its spaces outside of the time of the inaugurations.

Already in 2019, moreover, always at *Talking Galleries*, the *Online Viewing Rooms of Swirner and Gagosian*, inaugurated on the occasion of the major international fairs, had been the object of analysis. The same ones that, in the darkest months of 2020 and the gradual cancellation of all "in-person" art fairs, would then become the digital alter ego of those events so important for the very business of art galleries.

Just think that before the stop imposed by Covid-19, as revealed by Art Basel & UBS's report, *The Art Market 2020*, edited by Clare McAndrew, founder of *Arts Economics*, fairs represented an increasingly important sales channel for gallerists. So much so that by 2019 their sales had reached $16.6 billion, the highest ever.

In fact, according to the Basel Fair report, it is around the fair event that much of the galleries' business takes place, with 15% of sales occurring before the fair ($2.5 million); 64% during ($10.6 million); and 21% after (3.5%). So much so that in 2019 the percentage of sales that gallery owners make from art fairs is 45%. 10 years ago it stood at 30%.

With Pandemic, this suddenly came to a halt, and of the 365 art fairs scheduled for 2020, only 37% took place normally, while 2% of them opted for a hybrid or alternative event. For 61%, however, the only solution was to cancel the 2020 edition.

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Moreover, a second report by Art Basel | UBS: The Impact of COVID-19 on the Gallery Sector. A 2020 mid-year survey, gives us a picture of an art gallery market in great difficulty. So much so that a third of them have had to downsize their staff, laying off many of their employees. Particularly among businesses with revenues between $250 and $500,000 where 38% of employees lost their jobs.
A drastic measure, dictated by the need to counter the crisis generated by Covid-19, which, compared to the same period in 2019, led to a drop in sales averaging -36% (with peaks of -43%). A decline partly contained by the growth of online commerce, which went from representing 10% of sales in 2019 to 37% in the first half of 2020. This increase is mainly driven by the large players (with a turnover of more than 10 million $), usually less dedicated to online sales but that in recent months have quintupled their business online.
Among the preferred solutions as alternatives to "in-person" fairs: the aforementioned Online Viewing Rooms (OVR) or the digital edition (62%). These solutions have certainly supported the trade fair brands, a little less so the turnover of the galleries. So much so that last year total gallery sales through the trade fair channel accounted for just 13% versus 45% in 2019.
A minimal percentage, to which, however, must be added a further 9% achieved through OVR. The protagonists of these transitions: the wealthiest collectors (HNW) who purchased either directly at the fair (41%) or through Online Viewing Rooms (45%). That said, across the board, OVRs would have been used by just over a third of collectors to purchase artwork, while 32% preferred to buy directly through *Instagram*.
A loss, that due to the lack of fair events, partially balanced by the savings derived from their cancellation. Expenses for art fairs are, in fact, one of the most important items of expenditure in the budgets of galleries, amounting to an average of 29%. In 2020, as stated in the *Report*, expenses have been halved and those for travel have been reduced by over a third.
As in other sectors, the Pandemic has thus brought to the surface old fragilities and vulnerabilities that have been neglected for too long. On the other hand, it is no coincidence that the current crisis, generated by the same factor - the Covid-19 epidemic - is having different repercussions all over the world, with recovery times that will vary greatly depending on the emergency management policies adopted by individual governments.
On a general level, it can be said that, after an initial phase of somewhat improvised solutions, the gallery sector now seems to be moving decisively towards a model that is increasingly *click-and-brick*, which, if wisely structured, could make it possible to catch up the delay accumulated in recent years and to take full advantage of the opportunities offered by new technologies.
This is done both in terms of new ways of enjoying art and in terms of purchasing it, so as to help galleries intercept the new generations of collectors - much more connected than the baby boomers and Generation X - and, at the same time, put them in a position to respond to the peculiar needs of this sector where the direct relationship with the collector and the "physical" contact with the work still play a leading role (and hopefully will continue to do so for a long time).
As mentioned, this is not a true revolution, since what is being introduced, in fact, already exists and has been used for some time and is often the result of experimentation and investment by the larger players. It is more of an acceleration of the change in mental posture that the galleries should have achieved some time ago and that, instead, the auction sector has achieved well in advance. So much so that today, in terms of online engagement and e-commerce, it is the undisputed leader.
It is therefore necessary to reduce this delay, but the mere hybridization of systems is by no means sufficient. It is fundamental, in fact, that in the various countries work is done to heal the fragility of an art system that, as mentioned, comes from far away. The stakes, in this case, are particularly high. An art gallery, in fact, is something more than a simple store. And this is not so much because of the particular object that is sold, art, but because of the cultural activity that it carries out: the

reorganization of artists' archives, the rediscovery and relaunching of chapters of art history, often ignored by museum institutions, and the collaboration with museums for the realization of important exhibitions.

Suffice it to say that, as gallery owner Massimo Minini pointed out in a beautiful interview given to New Deal Sirmione, there are about 20,000 galleries in the world that organize a total of 200,000 exhibitions every year. It is no coincidence, moreover, that the German government has intervened decisively to support its art system, which is recognized as being of absolute importance at the national level. Already on June 17, 2020, the Federal Government launched the Neustart Kultur program: 1 billion to support the cultural system severely affected by the Pandemic.

Within this measure, there are important resources for art galleries: 16 million euros with the aim of strengthening their cultural work and mediation as essential partners of artists. Exhibitions of works by contemporary artists and innovative digitization processes are thus financed. Also, Germany, on May 18, through its Minister of Culture, put on the agenda of the Council of Europe the proposal to revise the VAT Directive (2006/112/EC), aimed at applying reduced VAT rates also to the trade of works of art, in order to give oxygen to the economic recovery of a sector seriously affected by the pandemic.

This is to say how the art system and, in our specific case, the segment of art galleries, are ineluctably linked to the country's system of which they are a part, and therefore to the cultural and economic policies that it implements.

The Italian case is exemplary in this sense. In our country, every year, 5,000 exhibitions are set up in the spaces of the 500 modern and contemporary art galleries that are active in Italy today. A total effort that employs 10,000 people, including gallery owners, artists, curators, restorers and specialized transporters. All of this adds up to a turnover of several hundred million dollars, to which should be added that deriving from tourism which, for example, revolves around fair events, creating positive effects in the economic fabric of the cities.

Today, data in hand, Italy finds itself in a tragic situation in which, as a result of the Pandemic, 45% of our best galleries risk closing or having to expatriate in order to survive, going in search of a more favorable climate for their business. According to a survey conducted by *Associazione Nazionale Gallerie d'Arte Moderna e Contemporanea (ANGAMC)*, in fact, 40% of Italian galleries have recorded a drop in turnover of over 70%. While for another 25%, the reduction ranged from 50 to 70%. In addition, another 17% reported a decrease in turnover of between 30 and 50%.

The "dematerialization" of the fairs, which has had a negative impact of between 30% and 70% on the turnover of the galleries (60% of the cases), has been of little use. The contribution of the online sector, which all the operators have resorted to in recent months, has also been scarce. This issue has been the subject of a recent reform, but one that has been far not very incisive on the part of the Italian government.

Actually, in Italy, in order to send abroad a work of art that is more than 70 years old, it is necessary to obtain an authorization of free circulation, which today takes 60 days: a very long time that can jeopardize the sale made online. Not to mention when, obviously, the authorization is denied.

Once again, these are problems that come from afar and that the Pandemic has contributed to making even more evident. Therefore, simply making the strategies of the galleries more "modern" is not enough, but it is necessary to work so that in Italy there is a more favorable *business climate* for the galleries, starting with those requests that ANGAMC has been making for some time.

First of all, it would be necessary to align Italian VAT rates with those of other European Union countries, so as to be more competitive on international markets. But it is also necessary an equalization, again for VAT purposes, of sales by artists and operators in the first market; a deferment of taxation for revenues invested in works of art as exists in the United States. In addition to

facilitations for those who lend their works for an exhibition and a "compensation" for those who, instead, have one or more works subject to notification. Up to the extension of the Art Bonus with the possibility of depreciating the works purchased by those liable to VAT, depreciating 65% of the amount invested. It is also hoped for tax advantages for those who support culture and the Italian art system; a revision of the application of resale right.
Then there is the chapter on trade fairs, which, as said, represent a strategic sales channel, but also a considerable cost for the galleries. On this front, as well, after having witnessed a continuous proliferation of fair events and an increase in the cost of participation, perhaps a review would be necessary.
In short, if the Pandemic has accelerated a process of remodeling of the gallery system, in order for this to come to fruition it is necessary for the entire art system to change, as well as the policies of those countries that want to count on a market that, economically, perhaps participates for a minimal percentage in the global economy, but whose cultural weight is increasingly strong.
One thing is for sure, the market that will be find at the end of the tunnel will certainly be a little different from the one we knew. Different in the use of technology, even if many of its rituals will remain unchanged, but also different in numbers and geography, at least in part and for a period of time that is difficult to predict today. The construction of its future, however, will necessarily have to be interdisciplinary and involve both the public and private sectors. Because if a certain level of self-regulation is certainly required, this must also take place within a wider system of rules that gives the art market that level of transparency and certainty that has been called for by many and that the intertwining with finance and with new technologies necessarily requires.

7 – Dalla Fabbrica alla Law Firm, l'impresa "bella" –

Cesare Biasini Selvaggi

DALLA FABBRICA ALLA LAW FIRM, L'IMPRESA "BELLA"

BY CESARE BIASINI SELVAGGI[8]

Ancora oggi quando si parla di artisti, l'immagine che ne risulta richiama immediatamente la vecchia figura del bohémien: di una personalità fuori o al di sopra della realtà, un po' folle, autore di ricerche e ideatore di progetti non funzionali.
Questa figura appena descritta si scontra però con una diversa realtà dei fatti, con l'immagine dell'artista che nella società odierna lavora in fabbrica in team con tecnici e ingegneri, all'interno di dipartimenti scientifici, in aziende del settore tecnologico, oppure nel proprio studio-azienda, in alcuni casi vere e proprie società di capitali. La figura di un artista, pertanto, tutt'altro che fuori dal mondo, ma che al contrario opera all'interno di processi reali di innovazione industriale, tecnologica e scientifica.
Nella maggior parte delle storie delle arti, l'artista viene tradizionalmente tratteggiato come una figura passiva ai processi di sviluppo tecnologico: come a dire, che egli impugna la tecnologia solo dopo che il mercato l'abbia commercializzata, secondo una formula che si potrebbe sintetizzare come segue: *mercato → tecnologia → società → arte*.
Tuttavia, se da una parte gli artisti producono contenuti per il mondo dell'arte con media inediti, dall'altra, la loro ricerca e sperimentazione porta a inventare vere e proprie nuove tecnologie, applicazioni e contenuti spesso, in seguito, addirittura immessi sul mercato. La formula appena sintetizzata, a questo punto, si ribalta: non più *mercato → tecnologia → società → arte*, quanto, *arte → tecnologia → mercato → società*, facendo dell'arte il motore ideativo ed esecutivo dell'innovazione tecnologica. Con questo non vogliamo far vestire all'artista i panni dell'ingegnere. Perché il suo primo obiettivo non è certamente quello di realizzare oggetti da vendere sul mercato, ma quello di sperimentare la tecnologia come strumento che si fa processo per raggiungere la propria visione poetica, come epifania dell'opera.
Tutto ciò risulta evidente guardando ai prodotti artistici "tecnologici" da un diverso punto di vista: soffermandosi cioè non tanto sulle loro caratteristiche estetiche o poetiche, piuttosto sul loro potenziale innovativo.
È il caso dell'artista americano Michael Naimark (Detroit, 1952) ideatore dell'*Aspen Movie Maps* (1978-80). Negli anni Settanta, Naimark iniziò una collaborazione con il MIT (Massachusetts Institute of Technology) di Boston all'interno del dipartimento di ingegneria guidato da Andrew Lippman e finanziato dal DARPA (Defense Advanced Research Projects Agency). Il progetto consisteva in una mappa interattiva di Aspen, in Colorado, costruita fotografandone le strade con la tecnica dello stop-

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Da settembre 2018 è segretario generale della ***Fondazione Selina Azzoaglio | Innovation through Art*** istituita an Ceva (Cuneo) per volontà della sua presidente Selina Azzoaglio con l'obiettivo di promuovere e sostenere la Cultura e le Arti in contesti di vitale importanza per lo sviluppo sostenibile di una società: le imprese, le politiche sociali, i territori. In particolare, sul modello di Olivetti, delle imprese pubbliche del mondo IRI, in cui artisti e intellettuali (Gio Ponti, Ettore Sottsass) integravano la cultura e l'industria, la funzionalità della manifattura e l'estro della creatività, la Fondazione Selina Azzoaglio sostiene e realizza quella metodologia che porta a inserire gli artisti nelle aziende per innescare quell'osmosi di competenze tecniche, artistiche e umanistiche indispensabile all'innovazione di prodotti, processi e relazioni industriali e alla competitività del Sistema Italia nella complessità dei nostri tempi.

motion. È semplice intuire quanto questo progetto fosse prossimo, se non identico, all'attuale Google Street View.
Potremmo continuare con molti altri esempi, come, fra i più noti e pionieristici, il *Paik Abe Synthesizer* (1969-71) inventato dal padre della videoarte Nam June Paik (Seul, 20 luglio 1932-Miami, 29 gennaio 2006) in collaborazione con l'ingegnere Shuya Abe. Che lo si voglia o meno, quella del sintetizzatore (il medium principale per la manipolazione di immagini e suoni) è l'invenzione di un artista spinto dalla necessità di andare oltre la tecnologia offerta dal mercato e dall'industria.
Un esempio più recente, viene dal lavoro di Toshio Iwai (Kira, Giappone, 1962), in particolare dal suo *Tenori On* (2007), dal giapponese "suono nel palmo della mano". Quest'ultimo si struttura come un *sequencer* audio e visuale costituito da una superficie di controllo quadrata sulla quale sono posti 256 tasti-led; attraverso i tasti è possibile attivare le funzioni sonore dell'apparato in sincronia a movimenti luminosi riportati su ambedue i lati della superficie. Ciò che, tuttavia, qui più ci interessa, è che il *Tenori On* rappresenta l'esito della collaborazione tra Iwai e la società giapponese Yamaha, su prototipi precedenti dell'autore. Ancora una volta un "artista inventore", ma qui all'interno di un'azienda di cui orienta la produzione, con l'invenzione di un medium utile alle sue performance e, allo stesso tempo, oggetto di mercato, anticipando di oltre un decennio gli strumenti di composizione digitali. Sottolineiamo che, anche in questo caso, l'artista non aveva l'obiettivo di produrre un oggetto destinato alla produzione industriale e alla vendita, ma quello di concepire un nuovo dispositivo per le propria ricerca musicale, ospitata in prestigiosi contesti, fra i quali, il Sónar di Barcellona, il Futuresonic di Manchester, il MOMA di New York.
A questo proficuo rapporto tra arte e innovazione, già nella seconda degli anni Sessanta, il LACMA (Los Angeles County Museum of Art) dedicava l'*Art and Technology Program* (1967-1971). Si rimane colpiti a leggere oggi il report di questo progetto pluriennale, ideato da quella mente illuminata che risponde al nome di Maurice Tuchman, a quei tempi curatore del museo. Il report presenta una precisa descrizione metodologica delle politiche e delle modalità di interazione fra azienda e artista. Il programma era, infatti, esplicitamente mirato a introdurre gli artisti in residenza all'interno di aziende locali, che andavano dall'industria pesante (Kaiser Steel) alle società di computer (Hewlett-Packard) e soprattutto a quelle del settore aerospaziale. L'intenzione era che queste società tecnologiche rappresentassero un acceleratore nell'ideazione e realizzazione di opere d'arte, poi da esporre in una mostra finale al LACMA. E gli artisti coinvolti nel progetto sono tutti nomi già a quel tempo più che noti. Per esempio, tra i 14 artisti aderenti che hanno esposto al LACMA nel 1971, compaiono Öyvind Fahlström, R.B. Kitaj, Roy Lichtenstein, Claes Oldenburg, Robert Rauschenberg, Richard Serra e Andy Warhol.
In questo ambito, sempre a partire dagli anni Sessanta, si colloca anche l'esperienza dei centri di ricerca e sviluppo *Bell Labs* della società telefonica fondata da Alexander Graham Bell, dove gli artisti, in collaborazione con gli ingegneri informatici dei laboratori, compiono i primi esperimenti di computer art (1962-68).

Il caso Olivetti

Si parla oggi di "imprese 4.0", cioè di quelle aziende che sono sempre più digitali e interconnesse: la quarta rivoluzione industriale è cominciata anche in Italia, secondo Paese manifatturiero d'Europa. Spesso, colpevolmente, tuttavia, si dimentica che c'è stato un uomo in Italia che risponde al nome di Adriano Olivetti (Ivrea, 1901-Aigle, 1960) che aveva già anticipato questa rivoluzione arrivando a teorizzare e, soprattutto, a realizzare già nella prima metà del XX secolo addirittura quella che potremmo definire l'impresa 5.0 che portava il suo nome.
Olivetti ha sempre avuto ben chiaro che in Occidente e, in particolare, in Italia, la partita della competizione si gioca sull'innovazione di prodotto, di contenuti, di processo, sulla capacità di

immaginare scenari alternativi. Una partita che chiama in causa, pertanto, necessariamente gli artisti (visivi, scrittori, etc.) e la loro capacità di cambiare e far cambiare continuamente i punti di vista evitando gli eccessi del tecnicismo.
L'idea che anche nell'industria la cultura tecnico-ingegneristica debba integrarsi con quella umanistica porta e dà spazio in Olivetti per esempio a una colonia di letterati: Giudici, Fortini, Volponi, Sinisgalli, Pampaloni… Dagli anni '40 fino agli anni '80 poeti, letterati e scrittori di rilievo della letteratura contemporanea lavorano nella fabbrica di Ivrea ricoprendo ruoli diversi, anche di grande responsabilità. Negli anni '50 questa visione si traduce in una politica di selezione del personale che, per i livelli più alti, si basa sul "principio delle terne": per ogni nuovo tecnico o ingegnere che entra in azienda si assume anche una persona di formazione economico-legale e una di formazione umanistica. Gli scrittori che operano in Olivetti non sono quindi visti come un lusso o un "ornamento" dell'alta direzione, ma come fattori organici dello sviluppo aziendale, in particolare in settori critici come la pubblicità e comunicazione, le relazioni con il personale, i servizi sociali (Associazione ARCHIVIO STORICO OLIVETTI).

Il caso Italsider

Sempre in Italia, si pensi anche al caso di Eugenio Carmi (Genova, 1920-Lugano, 2016), uno straordinario pittore, eclettico e visionario, chiamato nel 1956 a ripensare prima le tabelle e poi le politiche antinfortunistiche dello stabilimento siderurgico Italsider di Voltri (Genova). I vertici dell'azienda si accorsero presto che Carmi generava *armonia* con i suoi riferimenti pittorici: aveva abbassato drasticamente gli infortuni e aveva coinvolto gli operai in questo processo. Geometrie semplici, colori primari, i cartelli da lui concepiti e disegnati furono considerati un punto di svolta per la storia della grafica applicata in Italia. L'idea fu quella di ribaltare il messaggio, riportando l'attenzione non sul pericolo da evitare, ma sulle parti del corpo da preservare, e così nascono: *Mani!, Testa!, Occhi!* Un cambiamento di prospettiva che, attraverso il trasferimento di senso, arriva a inventare un linguaggio più fresco e quindi più efficace, mettendo in gioco il ruolo del lavoratore nell'adoperarsi per modalità di lavoro più sicure. A Carmi fu quindi affidata la gestione della linee di produzione degli impianti dell'acciaio. Un artista divenne capo degli impianti. E accadde così che, tra gli anni Cinquanta e Sessanta, a Voltri fu prodotto il miglior acciaio del mondo.

Arte e Impresa oggi

Gli esempi appena descritti rappresentano episodi isolati di sinergia fra due mondi solo in apparenza distanti, anzi della medesima matrice: il mondo dell'arte e quello dell'innovazione e della ricerca. Oggi, invece, possiamo parlare di una vera e propria tendenza basata sull'istituzione di centri o programmi per accelerare lo sviluppo di nuove e strutturate relazioni fra arte, aziende e dipartimenti scientifici. Una tendenza che è diventata un vero e proprio modello industriale e di business, ben oltre la sfera dell'arte contemporanea. Per comprendere l'entità di questo fenomeno, ne riporto qualche esempio: il *Research Artist in Residence* di Microsoft *https://www.microsoft.com/artist-in-residence/*: il *The Adobe Creative Residency* https://www.adobe.com/it/about-adobe/creative-residency.html; le residenze d'artista di Planet Labs, la società di imaging della Terra https://www.planet.com/company/art/; la piattaforma di talent-scout *89Plus* di Google, ideata e coordinata da Simon Castets e Hans-Ulrich Obrist dedicata ai nati dopo il 1989 https://www.89plus.com/about/; il *Residency Program* dell'azienda di software Autodesk https://www.autodesk.com/technology-centers/residency; l'*Arts@Cern,* il programma curato da Monica Bello all'interno del Conseil Européen pour la Recherche Nucléaire https://arts.cern/welcome; *S+T+ARTS* (*Science, Technology & the Arts*), iniziativa della Commissione

Europea, con lo scopo di supportare le collaborazioni tra artisti, scienziati, ingegneri e ricercatori per sviluppare tecnologie più creative, inclusive e sostenibili https://www.starts.eu.

Arte e law firm

Dal momento che ci troviamo qui tra le pagine di un collettaneo scritto da avvocati, una domanda sorge a questo punto spontanea: qual è lo stato dell'arte contemporanea negli studi legali, nelle law firm? Ancora abbastanza disastroso, direi. Si va da asettici e noiosi arredamenti con quadrucci insignificanti, spesso proprio cacofonici, sgraziati, antiestetici, a casi nei quali si punta al coordinato con mobili e tappezzeria. Sono ancora scarse, anche se significative, le progettualità che vedono coinvolti Arte e Diritto, artisti in residenza in studi legali: progetti dinamici che vanno ben oltre l'aspergere Bellezza come incenso o la retorica della "beautification". Significa, invece, in questi casi virtuosi creare un ecosistema tra Arte e Diritto (espressioni dell'umanità strettamente connesse l'una all'altra) attraverso legami forti tra gli artisti, le loro opere e gli avvocati e i collaboratori dello studio legale, legami che nell'attività professionale quotidiana consentano di alzare l'asticella del senso del possibile. Perché l'Arte e gli artisti con l'ambivalenza delle loro metafore sono in grado di cogliere la realtà con una dinamica superiore sia alla dialettica della filosofia che alla complessità algebrica della computer science, e di tradurla per tutti – sfruttando molteplici livelli di lettura – in forma di visioni, ora specchio del presente, ora anticipazione del futuro, tra interrogativi e, talvolta, persino soluzioni. Vanno in questa direzione oggi anche le prospettive indicate dalle neuroscienze che rilevano biologicamente l'attività cerebrale, dalla neuro-estetica alle scienze cognitive, nella fruizione dell'arte. Indicazioni emergono pure dalle nuove frontiere della biologia molecolare. Si sente sempre più parlare di epigenetica, ovvero dello studio su quei fattori esterni, come l'arte appunto, che hanno impatto sul comportamento dei geni, sulla loro espressione, sull'alterazione del potenziale delle cellule come processi non ereditari, che non coinvolgono la sequenza del nucleo. Entra in campo la fisiopatologia: la PNEI, psico-neuro-endocrino-immunologia, nata dallo studio degli ormoni, che mira a fornire le basi biologiche della comunicazione tra i sistemi endocrini, immunitari e neuropsicologico. Così, da un recente esperimento con risultati pubblicati su riviste ad alto impatto, è stato evidenziato per esempio, attraverso l'analisi di tamponi salivari, come la visita alla grande cupola ellittica del Santuario di Vicoforte di Mondovì (Cuneo) abbia fatto diminuire drasticamente nei partecipanti la produzione di cortisolo, l'ormone dello stress.

Viene, allora, proprio da concludere con le parole di Bertold Brecht: "Le arti servono a quella più grande, la vita".

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From the factory to the law firm, the "beautiful" enterprise

By Cesare Biasini Selvaggi[9]

Even today, when we talk about artists, the resulting image immediately recalls the old figure of the bohemian: of a personality outside or above reality, a bit crazy, author of researches and creator of non-functional projects.
However, the figure just described clashes with a different reality, with the image of the artist who in today's society works in factories with technicians and engineers, within scientific departments, in companies involved in the technology sector, or in his own studio-company, in some cases real corporations. Therefore, anything but out of the world: the artist on the contrary operates within real processes of industrial, technological and scientific innovation.
In most stories of the arts, the artist is traditionally portrayed as a figure passive to the processes of technological development: as if to say, that he or she wields technology only after the market has commercialized it, according to a formula that could be summarized as follows: *market → technology → society → art*.
However, if on the one hand artists produce content for the art world with new media, on the other hand, their research and experimentation leads to the invention of real new technologies, applications and content which are often, subsequently, even put on the market. The formula just summarized, at this point, is overturned: no longer *market → technology → society → art*, but *art → technology → market → society*, making art the ideational and executive engine of technological innovation. Having said that, we do not want the artist to play the role of engineer. Because his first objective is certainly not to make objects to sell on the market, but to experiment with technology as a tool that becomes a process to achieve his own poetic vision, as an epiphany of the work.
All this is evident when looking at "technological" artistic products from a different point of view: that is, dwelling not so much on their aesthetic or poetic characteristics, but rather on their innovative potential.
This is the case of the American artist Michael Naimark (Detroit, 1952) creator of the *Aspen Movie Maps* (1978-80). In the 1970s, Naimark started a collaboration with MIT (Massachusetts Institute of Technology) in Boston within the engineering department led by Andrew Lippman and funded by DARPA (Defense Advanced Research Projects Agency). The project consisted of an interactive map of Aspen, Colorado, constructed by photographing the streets with the stop-motion technique. It's easy to see how close, if not identical, this project was to the current Google Street View.
We could continue with many other examples, such as, among the most famous and pioneering, the *Paik Abe Synthesizer* (1969-71) invented by the father of video art Nam June Paik (Seoul, July 20, 1932-Miami, January 29, 2006) in collaboration with the engineer Shuya Abe. Whether we like it or not, the synthesizer (the main medium for manipulating images and sounds) is the invention of an artist driven by the need to go beyond the technology offered by the market and industry.

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Since September 2018 he is secretary general of the ***Fondazione Selina Azzoaglio*** | ***Innovation through Art*** established in Ceva (Cuneo) by the will of its president Selina Azzoaglio with the aim of promoting and supporting Culture and the Arts in contexts of vital importance for the sustainable development of a society: businesses, social policies, territories. In particular, following the model of Olivetti, of the public companies of the IRI world, in which artists and intellectuals (Gio Ponti, Ettore Sottsass) integrated culture and industry, the functionality of manufacturing and the inspiration of creativity, the Selina Azzoaglio Foundation supports and implements the methodology that leads to the inclusion of artists in companies in order to trigger that osmosis of technical, artistic and humanistic skills that is essential to the innovation of products, processes and industrial relations and to the competitiveness of the Italian System in the complexity of our times.

A more recent example comes from the work of Toshio Iwai (Kira, Japan, 1962), in particular from his *Tenori On* (2007), from the Japanese "sound in the palm of the hand". The latter is structured as an audio and visual sequencer consisting of a square control surface on which 256 LED buttons are placed; through the buttons it is possible to activate the sound functions of the device in synchrony with luminous movements on both sides of the surface. What interests us most, however, is that the *Tenori On* represents the result of the collaboration between Iwai and the Japanese company Yamaha, on previous prototypes of the author. Once again, an "artist-inventor", but in this case within a company whose production he orients, with the invention of a medium useful for his performances and, at the same time, an object of the market, anticipating digital composition instruments by more than a decade. We underline that, also in this case, the artist did not aim to produce an object destined to industrial production and sale, but to conceive a new device for his own musical research, hosted in prestigious contexts, among which, the Sónar of Barcelona, the Futuresonic of Manchester, the MOMA of New York.
To this fruitful relationship between art and innovation, LACMA (Los Angeles County Museum of Art) dedicated its *Art and Technology Program* (1967-1971) as early as the second half of the 1960s. One is struck today to read the report of this multi-year project, conceived by the enlightened mind that answers to the name of Maurice Tuchman, at that time curator of the museum. The report presents a precise methodological description of the policies and methods of interaction between the company and the artist. The program was, in fact, explicitly aimed at introducing artists-in-residence to local companies, ranging from heavy industry (Kaiser Steel) to computer companies (Hewlett-Packard) and especially aerospace companies. The intention was for these tech companies to be an accelerator in the conception and creation of artwork, then to be displayed in a final exhibition at LACMA. And the artists involved in the project were already more than well-known at the time. For example, among the 14 participating artists who exhibited at LACMA in 1971, we can mention Öyvind Fahlström, R.B. Kitaj, Roy Lichtenstein, Claes Oldenburg, Robert Rauschenberg, Richard Serra and Andy Warhol.
In this context, also starting in the 1960s, is the experience of the Bell Labs research and development centers of the telephone company founded by Alexander Graham Bell, where the artists, in collaboration with the computer engineers of the laboratories, carried out the first experiments in computer art (1962-68).

The Olivetti case

Today we talk about "enterprises 4.0", *i.e.*, those companies that are increasingly digital and interconnected: the fourth industrial revolution has also begun in Italy, the second manufacturing country in Europe. Often, however, we culpably forget that there was a man in Italy named Adriano Olivetti (Ivrea, 1901-Aigle, 1960) who had already anticipated this revolution coming to theorize and, above all, to realize already in the first half of the twentieth century even what we could define the "enterprise 5.0" that bore his name.
Olivetti has always been very clear that in the West, and in Italy in particular, the competitive game is played on product, content and process innovation, on the ability to imagine alternative scenarios. This is a game that necessarily involves artists (visual artists, writers, etc.) and their ability to change and continuously change points of view while avoiding the excesses of technicality.
The idea that, even in industry, the technical-engineering culture should be integrated with the humanities led to and gave space to a colony of literary figures: Giudici, Fortini, Volponi, Sinisgalli, Pampaloni... From the 1940s to the 1980s, poets, literary men and women and important writers of contemporary literature worked in the Ivrea factory, covering different roles, even of great responsibility. In the 1950s, this vision was translated into a personnel selection policy which, for the highest levels, was based on the "principle of the triads": for every new technician or engineer who

joined the company, a person with an economic-legal background and one with a humanistic background was hired. Writers working in Olivetti were therefore not seen as a luxury or an "ornament" of top management, but as organic factors in the company's development, especially in critical sectors such as advertising and communication, personnel relations, and social services (OLIVETTI HISTORICAL ARCHIVE Association).

The Italsider case

Another Italian case is of Eugenio Carmi (Genoa, 1920-Lugano, 2016), an extraordinary painter, eclectic and visionary, called upon in 1956 to rethink first the charts and then the accident prevention policies of the Italsider steel plant in Voltri (Genoa). The company's top management soon realized that Carmi generated *harmony* with his pictorial references: he had drastically reduced accidents and had involved the workers in this process. Simple geometries, primary colors, the signs he conceived and designed were considered a turning point in the history of applied graphics in Italy. The idea was to overturn the message, bringing attention not to the danger to be avoided, but to the parts of the body to be preserved, and thus were born: *Hands!, Head!, Eyes!* A change of perspective that, through the transfer of meaning, came to invent a fresher and therefore more effective language, bringing into play the role of the worker in striving for safer ways of working. Carmi was then entrusted with the management of the production lines of the steel plants. An artist became head of the plants. And so it happened that, between the 1950s and the 1960s, the best steel in the world was produced in Voltri.

Art and Enterprise today

The examples just described represent isolated episodes of synergy between two worlds that are only apparently distant, indeed of the same matrix: the world of art and that of innovation and research. Today, however, we can speak of a real trend based on the establishment of centers or programs to accelerate the development of new and structured relationships between art, companies and scientific departments. A trend that has become a true industrial and business model, well beyond the sphere of contemporary art. To understand the extent of this phenomenon, here are some examples: Microsoft's *Research Artist in Residence* https://www.microsoft.com/artist-in-residence/: *The Adobe Creative Residency* https://www.adobe.com/it/about-adobe/creative-residency.html; the artist residencies of Planet Labs, the Earth imaging company https://www.planet.com/company/art/; Google's 89Plus talent-scouting platform, conceived and coordinated by Simon Castets and Hans-Ulrich Obrist and dedicated to those born after 1989 https://www.89plus.com/about/; the *Residency Program* of the software company Autodesk https://www.autodesk.com/technology-centers/residency; *Arts@Cern*, the program curated by Monica Bello within the Conseil Européen pour la Recherche Nucléaire https://arts.cern/welcome; *S+T+ARTS* (*Science, Technology & the Arts*), an initiative of the European Commission, with the aim of supporting collaborations between artists, scientists, engineers and researchers to develop more creative, inclusive and sustainable technologies https://www.starts.eu.

Art and law firm

Since we are here in the pages of a book written by lawyers, a question arises: what is the state of the art in contemporary law firms? Still quite disastrous, I would say. They range from aseptic and boring furnishings with insignificant squares, often cacophonous, ungainly and unsightly, to cases where the focus is on coordinated furniture and upholstery. There are still few, though significant, projects involving Art and Law, artists in residence in law firms: dynamic projects that go well beyond sprinkling Beauty as incense or the rhetoric of "beautification". It means, instead, in these virtuous

cases, creating an ecosystem between Art and Law (expressions of humanity closely connected to each other) through strong links between the artists, their works and the lawyers and collaborators of the law firm, links that in the daily professional activity allow to raise the bar of the sense of the possible. Because Art and artists, with the ambivalence of their metaphors, are able to grasp reality with a dynamic superior both to the dialectic of philosophy and to the algebraic complexity of computer science, and to translate it for everyone - exploiting multiple levels of reading - in the form of visions, now mirrors of the present, now anticipations of the future, among questions and, sometimes, even solutions.

This is the direction taken today by the perspectives indicated by neuroscience that biologically detect brain activity, from neuro-aesthetics to cognitive science, in the fruition of art. Indications also emerge from the new frontiers of molecular biology. We hear more and more talk about epigenetics, or the study of those external factors, such as art, which have an impact on the behavior of genes, their expression, the alteration of the potential of cells as non-inherited processes, which do not involve the sequence of the nucleus. Pathophysiology enters the field: the PNEI, psycho-neuro-endocrine-immunology, born from the study of hormones, which aims to provide the biological basis of communication between the endocrine, immune and neuropsychological systems. Thus, from a recent experiment with results published in journals with high impact, it was shown, for example, through the analysis of salivary swabs, how the visit to the great elliptical dome of the Sanctuary of Vicoforte di Mondovì (Cuneo) has dramatically decreased the production of cortisol, the stress hormone, in the participants.

It comes, then, just to conclude with the words of Bertold Brecht: "*The arts are useful to the greatest, life*".

II. PART 2 - JURISDICTIONS

1 - AUSTRALIA - Holding Redlich

1. General introduction to Australian law and the arts

Australia's legal system is a common law system. Legislative power is distributed between the Commonwealth government and the State and Territory governments. The allocation of this power between the 2 levels of government is largely determined by the Commonwealth constitution, which reserves certain powers for the Commonwealth.

The Commonwealth government's powers include the power to regulate "postal, telegraphic, telephonic and other like services" which is known as the "communications power" as well as the power to regulate copyright and other intellectual property rights. The communications power is broadly interpreted to cover all different forms of communications including broadcast services. As a consequence of the reservation of these powers, most regulation of the arts and cultural sector has traditionally occurred at the Commonwealth level in Australia. Accordingly, this note focuses on Commonwealth regulation, either specific to the arts and cultural sector or legislation that is of broader application but with specific arts and cultural implications.

2. Key legislation governing the arts in Australia

This section looks at a range of different Commonwealth Acts that have the most direct impact on the arts sector. Some specific issues relating to certain of these Acts are explored in more detail in section 4 below.

2.1 Copyright Act 1968 (Cth)

The Copyright Act 1968 (Cth) (**Copyright Act**) regulates Australian copyright in relation to original artistic works as well as literary, dramatic and musical works and certain other subject matter.

Copyright for the purposes of the Copyright Act as a right belonging to the owner or licensee of a literary, dramatic or artistic work, film or sound recording, to reproduce, perform or otherwise deal with the work. In common with regulation in most other jurisdictions, copyright protects the form of expression of an idea or information, rather than the idea or information itself. In Australia copyright is an automatic right and the Act does not impose any registration requirements. The protection lasts for a different period depending on the nature of the material but will typically last for 70 years after the death of the author.

The Copyright Act provides an owner of material with exclusive economic rights to take certain action in relation to that material, primarily, the right to copy it and communicate the material to the public. The Act also creates "moral rights", which recognises the rights of integrity and attribution as well as the right against false attribution.

2.2 Resale Royalty Right for Visual Artists Act 2009 (Cth)

The Resale Royalty Right for Visual Artists Act 2009 (Cth) establishes an inalienable resale royalty right for visual artists that endures for the life of the artist plus 70 years. It closely links to the concept of copyright. The resale royalty scheme allows visual artists to share in the commercialisation of their work in the secondary art market, providing significant benefit to those who derive their main income from the initial sale of original works.

This is achieved under the Act by providing visual artists with an enforceable legal right to a royalty payment on the commercial resale of their original works of art over a specified amount, currently set at A$1,000. The scheme applies to Australian citizens or permanent residents, with foreign nationals covered on a reciprocal basis (that is, foreign nationals will have this right if Australians have an equivalent right under the laws of that foreign jurisdiction). To date, no reciprocating countries have been prescribed under the Act.

2.3 Protection of artistic works of significance

The primary Acts that regulate the protection of artistic works are described below. The first Act largely protects Australian works, primarily by preventing permanent export from Australia, and the second Act protects foreign works on loan to cultural institutions in Australia.

(a) Protection of Movable Cultural Heritage Act 1986 (Cth)

The Protection of Movable Cultural Heritage Act 1986 (Cth) ensures objects that have cultural significance remain in Australia. It gives effect to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. This Act also provides for the return of foreign cultural property which has been illegally exported from its country of origin and imported into Australia. The operation of this Act is considered in further detail in section 4 below.

(b) Protection of Cultural Objects on Loan Act 2013 (Cth)

The Protection of Cultural Objects on Loan Act 2013 (Cth) establishes a scheme to protect cultural objects on loan. The purpose of the legislation is to encourage foreign lenders to loan objects to Australia's major collecting institutions, recognising the cultural value of such objects being accessible in Australia.

The Act ensures that the objects, while they are in Australia, remain under the ownership and control of the applicable lenders, exhibition facilitators and exhibiting institutions. The Act also protect cultural objects on loan from seizure through legal proceedings in Australian or foreign courts or through the use of government powers.

2.4 Australia Council Act 2013 (Cth)

Although the Australia Council Act 2013 (Cth) does not specifically regulate the arts and cultural sector, it establishes the Australia Council, which exists to support and promote the arts,

primarily through the provision of grants. The Australia Council also provide advice and recommendations to the Commonwealth government on matters specific to the arts sector.

2.5 Arts institutions

Commonwealth legislation provides for the establishment of a range of arts and cultural institutions. Two key institutions are the National Gallery and the National Portrait Gallery, each of which has its own enabling legislation.

(a) National Gallery Act 1975 (Cth)

The National Gallery Act 1975 (Cth) establishes the National Gallery and provides for the national collection to be located in Canberra, Australia's capital. The Act outlines the Gallery's main functions which include the development and maintenance of a national collection of works of art, and the exhibition of these works of art in the Gallery's possession.

(b) National Portrait Gallery of Australia Act 2012 (Cth)

The National Portrait Gallery of Australia Act 2012 (Cth) establishes the National Portrait Gallery as a body corporate which is independent both legally and financially from the Commonwealth. It provides that the Gallery's main functions are to develop, preserve, maintain, promote and provide access to a national collection, and to engage and attract a national audience.

2.6 Classification (Publications, Films and Computer Games) Act 1995 (Cth)

The Classification (Publications, Films and Computer Games) Act 1995 (Cth) establishes a scheme for classifying publications, films and computer games for the Australian Capital Territory. As such, the legislation does not apply to the visual arts. The *content* of visual artworks is therefore largely unregulated in Australia unless the work breaches generally applicable laws such as, for example, those related to pornography.

3. Government support for the arts sector

Australia has a vibrant arts and cultural sector. This sector receives significant support from the Commonwealth government. This support is particularly important for the development and preservation of Australia's rich indigenous arts heritage. Some of the ways the Commonwealth government supports the arts and cultural sector are outlined below. In addition, significant support has been provided during the course of the current COVID-19 pandemic.

(a) **Artbank** is the Commonwealth government's primary initiative to provide support and access to visual arts. Artbank provides support to Australian contemporary artists through the acquisition of their work. Australians (both individuals and corporates) are able to rent those work on strictly controlled conditions. Over more than 40 years Artbank has acquired over 10,000 artworks. In 2020, the rental revenue received by Artbank from these artworks was over A$3 million.

(b) The **Indigenous Visual Arts Industry Support program** funds the operations of around 80 Indigenous-owned art centres, and a number of art fairs, regional hubs and industry service organisations. An example of the type of support provided by this program is funding provided in 2020/21 to the First Hand Solutions Aboriginal Corporation to contribute to the delivery of the National Indigenous Art Fair promoting Indigenous visual art.

(c) The **Visual Arts and Craft Strategy** provides a directed funding commitment for individual artists and arts organisations with the aim of deepening audience engagement and international market expansion. An example of the types of projects the Visual Arts and Craft Strategy supports is Artspace, an artist-run gallery located in Sydney with a particular focus on contemporary and experimental art.

(d) The **Indigenous Languages and Arts (ILA) program** invests approximately A$20 million per annum to support Aboriginal and Torres Strait Islander peoples to express, preserve and maintain their cultures through languages and arts activities around Australia. The ILA program includes annual operational funding support to a network of 20 Indigenous Language Centres across the country working on capturing, preserving and maintaining Aboriginal and Torres Strait Islander languages.

4. Key issues for the arts sector: Copyright, protection and taxation

Copyright

Australia's Copyright Act was first put in place in 1968. Detractors have argued that it requires a significant overhaul to bring it up to date with contemporary technology. Although that may well be the case, there have been important reforms to the legislation in recent years, including in relation to piracy, as discussed below.

4.1 Piracy

In 2015, the Copyright Act was amended to make it harder for Australians to engage in digital piracy by downloading music, films and other digital content for free using online pirate websites. In summary, those amendments to the Act, which were further updated in 2018, enable copyright holders to obtain Federal Court injunctions to block offshore pirate websites. The key provisions of this regime may be summarised as follows:

(c) **Application**: A copyright owner may to apply to the Federal Court for an injunction requiring an internet service provider (**ISP**) to take reasonable steps to block access to an overseas pirate website or websites. Where an injunction is obtained against an ISP, a copyright owner may also apply for an injunction against a search engine provider (such as Google), requiring the search engine provider to take steps to block search results that refer to the location or locations blocked under the corresponding ISP injunction.

(d) **Injunction may be sought if the "primary effect" test is satisfied**: An applicant may seek an injunction in relation to sites operated outside Australia which have the "primary effect" of infringing or facilitating the infringement of copyright. Prior to the 2018 amendments, it had been necessary to establish that the primary *purpose* of the site was to achieve one of these outcomes. The test was revised in 2018 to address concerns that the "primary purpose" test placed too great a burden on applicants, who would be required to prove the intent of the site operator.

(e) **Future domain names**: The copyright owner and the ISP may agree to extend the injunction to domain names, URLs and IP addresses that start to provide access to the blocked location or locations *after* the injunction is granted. This provision is intended to address the concern regarding the ease with which blocked sites may quickly re-emerge under different domain names, URLs or IP addresses, often referred to as the "whack a mole" problem.

4.2 Copyright protection for artworks created by artificial intelligence

Works that are created by humans with the use of any form of technology, including artificial intelligence (AI), may receive copyright protection under Australia's Copyright Act. But a controversy arises where a particular work, whether visual or in another form, is completely created by AI. In other words, where the output is novel but where it has been generated through an algorithm involving a machine learning process based on existing art.

Under the Copyright Act, copyright protection is provided for "works", which must be literary, dramatic, musical or artistic in nature. In addition to falling within one of these categories, a work must be original and must have an author who is human in order to attract protection. Therefore, even if copyright could subsist in AI created works, it would not be attributed to the "machine" so to speak but in an individual.

The "original" threshold must also be met. This has been considered in a few different cases, with a 2010 Federal Court case providing the most relevant analysis.[10] That case involved copyright in telephone directories produced by one of Australia's largest telecommunications companies, Telstra. The telephone directories contained names, addresses and telephone numbers for customers in a particular geographic area and had been created by an automated computerised process from information that Telstra employees had uploaded to the Telstra database. The Court held that the telephone directories were not "original" since the concept of an "original" work required an element of "independent intellectual effort" or some level of human authorship. The Court held that labour and hard work – such as the role of Telstra employees uploading information to the Telstra database – of itself is not enough. This case, and others that are similar, demonstrate that artworks created solely through AI will not at the current time obtain copyright protection in Australia as the "original" requirement will not be satisfied.

Although other jurisdictions may have adopted a different approach, the Copyright Act position has at least a small degree of support from the World Intellectual Property Organisation (**WIPO**). In 2019, WIPO undertook public consultation on AI and intellectual property policy as part of its ongoing conversation on intellectual property and AI. The WIPO's consultation paper canvassed various issues which unsurprisingly included whether AI created works should receive copyright protection. The paper noted that AI created works put a sharp focus on the underlying rationale for the protection of copyright – to reward human creativity. The same rationale clearly underlies the Court's reasoning in the Telstra case. The WIPO paper raises the question that, if the basis for protecting copyright is to reward human creativity, why should AI created works receive such protection?

The paper also asked whether providing this protection would be seen as effectively saying that an equal value should be assigned to both human and machine "creativity" (if there is such a thing in the case of machines). The Australian government made a short submission to WIPO on this point, not indicating a policy position one way or the other. In fact, the Australian submission largely suggested that further questions should be asked, including what behaviours the copyright system should incentivise and considering the general impact that providing copyright protection to AI created works may have. This response, and a general lack of conversation on this topic in Australia indicates that, while the topic may continue to be

[10] Telstra Corporation v Phone Directories Company (2010) 194 FCR 142

canvassed in WIPO and other international fora, there does not seem to be much appetite for moving to a position like that adopted in the UK of allowing copyright to subsist in computer generated works with the author of the work being the person by whom the arrangements necessary for the creation of the work are undertaken.

The Protection of Movable Cultural Heritage Act 1986 (Cth) (PMCH Act)

4.3 Overview of the PMCH Act

As briefly mentioned in section 2 above, the primary purpose of the PMCH Act is to seek to safeguard objects that are culturally significant to Australia by preventing them from being exported unless permission is obtained from the Arts Minister. The PMCH Act also provides a regime for cultural objects that have been brought to Australia illegally to be returned to their country of origin.

The PMCH Act applies to a variety of objects including objects of fine art, objects recovered from the coastal sea of Australia, objects relating to Indigenous Australians and military objects.

When considering an application for a permit to export an object to which the PMCH Act applies, the Arts Minister must refer the matter to the National Cultural Heritage Committee, which then commissions a report from a designated expert examiner in relation to the ethnological, archaeological, historical, literary, artistic, scientific or technological bases for which the object may be of importance to Australia (or a particular part of Australia). If the expert considers that the loss of the object to Australia would significantly diminish the cultural heritage of Australia, she must not recommend the grant of a permit to export the object permanently. The Minister must consider the report and either grant or refuse to grant a permit for exportation of the object. The Minister is not bound to follow the expert's recommendation but is required to satisfy herself that the loss of the object to Australia would not significantly diminish Australia's cultural heritage. The Minister may impose conditions on any permit to export a protected object. For example, certain institutions – such as a public art gallery, museum or library – may receive a permit to export an object provided it is exported on loan for research or public exhibition purposes.

The PMCH Act also provides that certain objects cannot be exported from Australia at all. These types of objects include items of Aboriginal and Torres Strait Islander heritage, such as rock art and sacred and secret ritual objects, and Victoria Crosses awarded to Australian recipients. Interestingly, the export of any part of the suit of armour worn by arguably Australia's most infamous criminal, bushranger Ned Kelly, is also prohibited.

4.4 Application of the PMCH Act

There have been few disputes under the PMCH Act, however the case of Drew and Minister for Communications and the Arts [2016] AATA 601, which was heard by the Administrative Appeals Tribunal (AAT), is instructive.

That case involved the painting "Snack Bar", an artwork by little-known Australian artist, Herbert Badham. Snack Bar, painted in World War II, depicted American armed forces personnel socialising with Australian civilians in a Sydney café. A London-based collector of Australian art purchased Snack Bar at a Sydney auction in 2015. The collector then applied to the Arts Minister

for a permit to export the artwork to London for display with the rest of the collector's Australian art. The Minister refused the application on the basis that the loss of Snack Bar would significantly diminish Australia's cultural heritage. The report prepared by the expert examiners under the PMCH Act, which informed the Arts Minister's decision, concluded that Badham was an important Australian painter and Snack Bar had both aesthetic value and depicted scenes of historical significance.

The collector sought a review of that decision before the AAT, which found that the decision to keep the artwork in Australia was justified having regard to the historic and artistic value of the painting. From an artistic perspective, the AAT's decision has been criticised, with some suggesting that the artwork was not sufficiently significant to justify this restriction on export.

Income tax offsets

4.5 Offsets under Australia's tax legislation

Australia's income taxation legislation does not provide specific incentives for visual artists. Within the arts and cultural sector, there are however three main tax incentives, which relate to screen production rather than visual arts:

(a) the Producer Offset, which provides a tax offset for qualifying Australian production expenditure on eligible Australian film and television projects;

(b) the Location Offset, which provides a tax offset for qualifying Australian expenditure on producing large-budget projects that are filmed in Australia; and

(c) the Post, Digital and Visual Effects (PDV) Offset, which provides a tax offset for qualifying Australian expenditure associated with a project's post, digital and visual effects production in Australia, even if the project was filmed overseas.

Each of the three offsets is a refundable tax offset which entitles an eligible applicant to receive a tax refund where the amount of the offset claimed exceeds the applicant's tax liabilities. A project is only entitled to one of the offsets – they cannot be combined.

5. Other interesting legislative developments in the arts and cultural sector in Australia

This section looks at a number of other recent and proposed legislative changes in Australia that have had (or will have) a broader impact on the arts and cultural sector.

5.1 The Competition and Consumer Act 2010 (Cth) (CCA) and intellectual property rights

The CCA is Australia's primary legislation dealing with competition and antitrust regulation. Historically, the CCA provided an exemption from a number of antitrust restrictions in relation to the licensing or assignment of intellectual property rights which are protected by statute: namely patents, registered designs, copyrights, circuit layout rights and trade marks. This exemption reflected the monopoly nature of intellectual property rights.

This exemption was repealed in 2019, as a result of a recommendation from the so called "Harper Review" of the CCA. That Review concluded, while most intellectual property licences and assignments will not have anti-competitive implications, there are some circumstances in

which such arrangements should be subject to competition law. In certain sectors – for example, the pharmaceutical and communications industries – cross-licensing arrangements are used to settle disputes concerning competing intellectual property rights. Where this is the case, those cross-licensing arrangements may impose anti-competitive restrictions on licensees. The Harper Review also noted that no equivalent exemption existed in any comparable international jurisdiction.

Although the repeal of this exemption has caused concern, particularly for lawyers advising in relation to licensing and assignment of artistic works, it is expected that it will be unlikely to have significant practical impact. This is because, in most cases (other than the most egregious, such as cartel conduct), for conduct to breach the restrictive trade practices provisions of the CCA, it must be demonstrated that it has the purpose or effect of substantially lessening competition in a market. A substantially lessening of competition outcome is most likely to occur where there are few substitutes for particular intellectual property rights, or where the concentration of intellectual property rights creates market power, which will not be common.

5.2 Scrutiny of digital platforms leading to reform of regulation more broadly in the arts and cultural sector

In 2019, the Australian Competition and Consumer Commission (**ACCC**) finalised its Digital Platforms Inquiry (**DPI**). The DPI considered the effect of digital platforms on competition within the media and advertising services markets, examining in particular the impact of digital platforms on the supply of news and journalistic content.

Responding to recommendations from the DPI Final Report, the Australian government has:

(f) Passed legislation to implement the Mandatory News Media Bargaining Code which provides a model for negotiation and arbitration between news media businesses and digital platforms to address bargaining imbalances between those parties. This legislation provided the catalyst for both Google and Facebook to enter into agreements with Australian publishers to, for the first time, pay those publishers for the use by the platforms of news content.

(g) Commenced a process of regulatory reform to implement a harmonised media regulatory framework. This is being undertaken as a staged process, with the final end state to be a platform-neutral regulatory framework covering both online and offline delivery of media content to Australian consumers.

(h) Tasked the Australian Communications and Media Authority (**ACMA**), Australia's communications sector specific regulator, with overseeing the development of a voluntary digital platforms code to counter disinformation. This code, the Australian Code of Practice on Disinformation and Misinformation, was released by the Digital Industry Group (a digital platforms lobby group) in early 2021. The implementation and impact of that Code is now being monitored by the ACMA.

No doubt that increasing move to consumption of content online will result in further regulatory reform in the arts and cultural sector.

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2 - BELARUS - Stepanovski, Papakul and Partners Attorneys at Law

I. INTRODUCTION

Belarusian legislation on artworks and art & culture heritage is comprised of a number of legal acts, each covering specific aspects.

Constitution of the Republic of Belarus proclaims (Article 51) that everyone has the right to take part in cultural life. This right is ensured by the general availability of the values of national and world culture in state and public funds, by the development of a network of cultural and educational institutions. Freedom of artistic, scientific, technical creativity and teaching is guaranteed. Intellectual property is protected by law. The state promotes the development of culture, scientific and technical research for the benefit of common interests.

Artworks are considered as copyrightable objects, thus, their use is regulated by the general rules of the Civil Code and Belarusian Law on Author's rights and neighboring rights (Copyright law).

Relations in the area of cultural heritage protection are regulated by the Culture Code (2006). This Code is aimed at regulating public relations in the field of culture, as well as at establishing the legal, organizational, economic and social foundations of cultural activities in order to preserve and use cultural values, develop cultural organizations and ensure public access to cultural goods. It covers activities of museums, works of creative artists, etc. The Culture Code repealed a variety of legal acts in the field of culture (on libraries, on creative unions and creative workers, on arts and crafts, on film-making, on museums, and on protection of the Belarusian historical and cultural legacy), thus at the moment all relevant norms are in a single act.

II. CONTRACTS

There are a number of contracts that can be concluded within art sector.

In case all rights to the artwork are transferred for all duration of copyright, an assignments agreement is concluded, which has as its effect the sale of all rights (moral rights are of course excluded). In any case, creators maintain their resale right (more details on it will be provided in section 3).

Various licensing agreements cover the situation when an artwork is meant to be used with any limitation of user's rights (that is to say, on territory, period, scope of actions allowed, etc.).

Assignment and license agreements are involved when an object is already created.

In case there is no artwork, but parties want to have it, it is possible to conclude a specific agreement: "a contract on the creation and use of an object of copyright".

Under this agreement, the author undertakes the obligation to create, within the time period stipulated by the agreement, a work that meets the customer's and to transfer to the customer the exclusive right to this work (that is, to assign the rights) or to grant the customer his right use within the limits established by the contract (that is, to license the work).

An agreement on creation and use of an object of copyright must be in written form.

Specific rules are in place for art works that are created in the course of public competition: under Article 930 of the Civil Code, as a general rule the person who announced the public competition acquires the preemptive right to enter into a contract with the author of the work that won the competition. A public competition is any event where any person (public or private entity) publicly announces that he will pay a monetary remuneration or issue another award (payment of an award) for the best performance of work or the achievement of other results (that is, to the person that is recognized by him as the winner).

It should be noted that Belarusian legislation clearly divides rights to the material object on which the artwork is fixed (canvas, paper, etc.) and intellectual property rights to it. It is clearly stated in law that copyright in a work is not related to the ownership of the material object in which the work is expressed. The transfer of ownership of a material object or the right to own and (or) use a material object does not in itself entail the transfer of any copyright to the work expressed in this object, except for the cases provided for by this Law

State plays active role in the development of the art sector. As a reflection of it, a notion of "social and creative order" exists in Belarusian legislation. Belarusian Ministry of Culture takes special interest in stimulation of the creative activity, support of creative workers. Thus, this Ministry (as well as other state bodies) have a right to place so called "social and creative orders", with a view to promote the creation of new works of fiction and art, performances, the organization of cultural events, and promotion of other creative and cultural activities. The placement of this order is done by the conclusion of the contract between the state body and the entity that will be engage in the said "cultural activity"

III. COPYRIGHT

As a general rule, copyright protects the works of art that are the result of creative activity, regardless of the purpose and dignity of the works, as well as the way they are expressed.

The law specifically provides that the work is regarded as resulting from creative activity when author's efforts were creative. Thus, the result might be not perceived as creative at all. But in order to gain protection the author is to show evidence that he was really performing something more than trivial in order to create a piece of art.

It is worth mentioning that the Culture Code defines creative activity as a direction of cultural activity, including artistic creativity and other intellectual activity, which ends with the emergence of a new, previously non-existent result of intellectual activity in the field of culture.

As Belarus is a party to the Berne convention for the Protection of Literary and Artistic Works, no registration or any other formalities are required to get protection. Copyright in a work arises by virtue of the fact of its creation.

In the absence of evidence to the contrary, the author of the work is the person indicated as the author on the copy of the work (presumption of authorship).

Copyrights violation is defined as any action that is committed in contradiction with copyright legislation. The following actions are also prohibited and recognized as violation of copyright:

- any actions that circumvent of any technical means intended to protect copyright;

- unauthorized removal or modification of information on management of rights from the works and any actions with the works so modified.

In the Republic of Belarus, civil, administrative and criminal liability for copyright infringement is possible.

Moral rights are protected in Belarus, they include inter alia:

the right of authorship (attribution right), that is, the right to be recognized as the author of a work;

the right to a name, that is, the right to use or authorize the use of a work under the original name of the author, a fictitious name (pseudonym) or without a name (anonymously);

the right to integrity, that is, the right meaning that without the consent of the author, it is not allowed to make any changes, abbreviations and additions to his work;

the right of disclosure, that is, the right to publish or authorize the disclosure thereof in any form;

the right of withdrawal, that is, the right of the author to demand that your work is to be returned to its author (all possible losses are to be compensated by the author.

The right to integrity, of disclosure and withdrawal are limited with regard to works made for hire.

Copyright protection terms is 50 years from authors' death (in case of anonymous or pseudonymous work 50 years from the moment of the first lawful publication of such a work, or fifty years from the moment of its creation, if within fifty years from the moment of its creation it has not been lawfully made public with the consent of the author).

It is specially stipulated that the exclusive right to a work created in co-authorship is valid during the life and fifty years after the death of the author who has outlived other co-authors.

It is important to note that droit de suite is provided for art works. In each case of public resale of originals of works of fine art, originals of manuscripts of works of writers, composers and scientists (through an auction, a gallery of fine art, an art salon, a store, etc.), the author and his heirs have the right to receive royalties from the seller in the amount of 5 percent of the resale price (right of succession).

The procedure for the payment of these deductions is determined by the Council of Ministers of the Republic of Belarus. The resale right is inalienable and passes only to the heirs of the author for the duration of the exclusive right.

Authorship of AI is not possible in Belarus, as the law clearly stipulated that copyrighted work is a work created by an individual (human being). This excludes all other subjects from the scope of copyright protections (e.g. monkeys, dolphins, other animals, and AI artwork too). The issue is discussed by academia, but the common perception is that protection of AI work is not necessary as AI itself does not need it; so, in case we are to pay AI any monies, we need to know that he is able to spend them. Otherwise, if money will anyway go to the person who own the AI, it's no need to use artificial scheme and we can direct money to this person directly.

IV. LITIGATION

To begin with, it is worth mentioning that court system of the Republic of Belarus is quite specific as to the protection of intellectual property rights.

All civil cases involving intellectual property issues are decided exclusively by the judicial board on intellectual property cases of the Supreme Court.

The information on court proceedings is not publicly available. Only a limited number of cases is published on the web-site of the Supreme Court of the Republic of Belarus.

However, some cases exist.

For example, a dispute on a design of inner part of the building took place. The plaintiff was initially asked to make sketches of the wall reliefs and other interior elements. They did not enter into a formal contract. So she produced the sketches and gave them to the defendant, but was never paid for her job. However she soon discovered that the design in the rooms was made in accordance with her sketches, with alterations. So, she initiated a lawsuit, claiming that both moral and economic rights were violated. The defendant opposed to these claim, saying that her work was not creative, and so another person was employed to do the work independently.

The court ordered the expertise (by a commission of experts in the art domain) to be carried out. The experts agreed that plaintiff's sketches were not works of fine art, but represent a type of specified, normative and craft drawing necessary at the working stages of the implementation of the future object. The sketches lack creative novelty, creative originality, creative uniqueness and creative originality. The experts specifically brought attention of the court to the fact, that, despite the low level of quality of the objects of research, their conclusions were drawn without regard to the merit of these drawings, but were based on the absence of signs of creative activity during their creation. The court agreed with the experts, and denied all claims.

Under Belarusian legislation, administrative and criminal sanctions are possible in case copyrights violation takes place (only upon request from the rights holder or his representative).

V. INTERNATIONAL TRADE

In should be noted that Belarus became a member of a Customs Union with Kazakhstan and Russia in 2010. Since January 1, 2015, the Eurasian Economic Union has been operating, to which, in addition to Belarus, Kazakhstan and Russia, Armenia and Kyrgyzstan have also joined. Thus, at the moment, customs and tariff regulation in the Republic of Belarus is carried out in accordance with the law of the Eurasian Economic Union (EAEU). In the Eurasian Economic Union, uniform measures of customs and tariff regulation are applied in the customs territory of the EAEU member states.

All art works are generally divided into two groups: cultural values that have limitations as to their cross-border movement, and those that are not subject to such limitations.

The division is outlined in a unified list of goods to which non-tariff regulation measures are applied - an appendix to the decision of the Board of the Eurasian Economic Commission dated April 21, 2015 No. 30.

In principle, any artwork (painting, sculptural and graphic works, objects of decorative and applied art and religious cults of various denominations, design projects, installations of souvenirs, items of children's creativity) has cultural value, because it has an aesthetic, artistic or other meaning. The limitation on movement of the said objects is based on their age, and the milestone is set at 50 years: that is, a work of art over 50 years old automatically becomes a cultural property that is limited to movement.

In order for it to be transferred out of the territory of the Republic of Belarus, an application (with a photo of an art work) needs to be filed in the Ministry of Culture. In case any restrictions apply, the decision can be made that the work can anyway be exported; in this case permit is issued (so called “conclusion” - a stamped form with a certain degree of protection); the applicant is then to provides the customs officers with the copies of the said paper.

The procedure for issuing a “conclusion” is specified in the Resolution of the Council of Ministers of the Republic of Belarus of 23.09.2008 N 1397 (as revised on 10/27/2020) "On some issues of the order of movement of certain types of goods across the State border of the Republic of Belarus" specifies the procedure and conditions of issuance by the Ministry of Culture of “conclusion” (permission documents) for the export of cultural properties limited for export from the territory of the Republic of Belarus for non-economic reasons. Such a permit is necessary in the following cases:

- temporary export of cultural property for the organization of exhibitions, presentations in third countries;
- temporary export of cultural property for the restoration work and scientific research in third countries;
- temporary export of cultural property for touring and concert activities and cultural and entertainment events in third countries;
- temporary export of cultural property for use in litigation in third countries;
- export of cultural property temporarily imported into the territory of the Eurasian Economic Union;
- export of cultural property by individuals for personal use (for non-commercial purposes).

The permit is drawn up in the form approved by the Decision of the Board of the Eurasian Economic Commission dated May 16, 2012 N 45 "On the unified form of the conclusion (permitting document) for the import, export and transit of certain goods included in the Unified list of goods to which prohibitions or restrictions on import or export by the member states of the Customs Union within the framework of the Eurasian Economic Community in trade with third countries are applied, and on guidelines for filling it out."

The permit can be issued both for a separate movable historical and cultural value, and for a collection (set). The permit is issued within 10 days after appropriate documentation is filed (a fee is to be paid too), and it is valid for one year. The conclusion is the basis for the passage of the cultural values indicated in it through the State border of the Republic of Belarus.

Export of cultural property in violation of the procedure provided for by the Resolution N 1397 is prohibited.

If the item is not restricted for movement, the stamp "Allowed for export" is place by the Ministry of Culture on the back of the photo of the artwork (the photos are to be provided with application), and written notice is issued that says that the work's export is not limited. However it should be noted that decision that the item does not belong to cultural values, the movement of which across the State border of the Republic of Belarus is limited, is valid for one year from the date of its adoption.

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3 - BRAZIL - Ariboni, Fabbri & Schmidt

Considerations on Current Use of Copyrights in Industrial Products

1. The system of protection of creativity in industry and commerce has always been protected by Industrial Property Rights (IPR) since 1883 with the PARIS Union Convention - CUP, and in all successive international conventions about competitive relations. On the other hand, since the Universal Copyright Convention (1952), artistic works in general have been protected by Intellectual Property rights granted to the Author of said works. Said rights have always been clearly distinguished by characterizing each of them, as follows:

a) For the existence of IPRs, the creating Companies apply to the competent authorities for Patent of Invention, Patent of Utility Models and Patents or Registration of Industrial Designs. The objective of such applications is its enjoyment as private properties, as assets and with the instrumental function of stimulating and protecting creations used in industry and commerce through careful examination and technical national and international searches, which ensure the novelty and the exclusive enjoyment of use of said patent for a limited period of time, which is essential to promote continuous technological, functional and aesthetic innovation, and,

b) through natural recognition and without any verification of the Novelty and Artistic or Scientific Merit of the Works, they receive copyrights legal protection serving as a stimulus for artistic activities so that, in all current legislations, even if considered works of applied art, they do not enjoy, in principle, exclusivity extended to the industrial field, where protection is obtained as ornamental components through the granting of protection as Industrial Design that exists independently of the product so decorated.

2. Nevertheless, in Brazil, a legal-judicial phenomenon is being verified, stimulated by Court decisions that recognize counterfeiting of copyrighted decorative elements as art applied to industrial products. Such a situation is by now restricted to the Fashion marketing niche whereby judges are not limited to determining the cessation of reproduction or counterfeiting of copyrights, but extend the hand of justice to determine the destruction of the products themselves, that may have a market value far greater than that of the creation of the copyrighted work, which should also be indemnified as far as the products already traded are concerned.

3. In view of what was commented above, it seems to me that there is a need for a deep analysis of the current trend to seek relief for creative activities in the fashion world, through the extended use of copyrights, with functional invasion in the field of Industrial Property, generating a situation of harm to the loyal competition currently guaranteed by the granting of IPR and by the undue and undeserved granting of copyrights to the authors of artistic works. To such an end it is convenient to take into consideration the following legal aspects:

I - Copyrights are governed by Law 9610/98, whose text reflects the specific nature of the protected works limited to artistic creativity, according to the exhaustive list in Article 7 of said law, complemented by item 8.7 which makes an exception: "the industrial or commercial use of the ideas contained in the works."

II - Article 18 provides for the existence of copyrights as a natural right, exempt from any mandatory public registration, therefore, copyrights are recognized without submission to any examination of merit or novelty. Said natural right makes copyright existence precarious, since they can be challenged at any time by someone proving the previous existence of some identical or plagiarized work;

III - Article 19 provides for the possibility of public registration (School of Fine Arts, National School of Music, National Library and Regional Councils of Engineering and Architecture), In this case also the registrations are automatic without any examination. The applicants declare themselves as the creators and are responsible for said declaration;

IV - In its Article 41, this legal norm foresees a long copyright existence of up to 70 years after the author's death, a fact that collides with the legal system that has existed since 1883 of IPR protection based on the existence of the exclusivity of economic use, being furthermore inappropriate the centennial protection assured to the Author and his heirs, since the concept of Applied Art today, consolidated in the seasonal launching of entire clothing and accessory lines designed by famous stylists, is based on the continuous substitution of product series.

4. In Brazil, the protection of industrial creations is provided for in law 9279/96, which addresses the administrative processes to be filed with the National Institute of Industrial Property – INPI. Applications undergo rigorous examination of merits and novelty before the granting of the Patents and Registration of Trademarks and Industrial Designs, as indispensable instruments to ensure fair competition, as expressly determined by Art. 2, item V;

I. The ornamental aspects that may be applied to stimulate the consumer's aesthetic taste, and which are no more than decorative elements that can be removed or eliminated without prejudice to the continuous technological efficiency of the industrial product, whose technical content can represent high values for the consumer. Therefore, it is inadmissible that the occurrence of some form of reproduction or imitation of elements created only as an artistic design work may justify the destruction of the product. The law provides for the granting of industrial design registrations exactly for the protection of said ornamental elements whose existence is not to be confused with the technical efficiency of the product which, in view of this, may be the object of invention or utility model;

II. The Industrial Design Registration (DI) is also submitted, at the discretion of the applicant or third parties, to an examination of merit (originality) and of novelty, which guarantees the exercise of exclusivity after having passed said examination and any oppositions from competitors;

5. The market situation today is clearly an attempt to solve the problem of abusive copies of aesthetic innovations introduced in fashion articles. Judges have used, without any solid legal basis, the right arising from fashion stylizations that succeed each year to feed the aesthetic taste of those who can buy the products offered by the big brands preferred by elite. Famous brands seek legal relief to prevent the popularization of stylized models, which would make famous designs imitations available to the general public at lower prices. Judges now allow the search and seizure and destruction of imitation copyrights product designs, which may create a dangerous legal precedent since said measures may be applied to other articles of ordinary use.

We hope to count on the collaboration of other agents dedicated to the fashion industry to study new practical solutions that may allow the search for remedies in the market and in the economy.

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4 - CHINA – Jingtian & Gongcheng

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I. INTRODUCTION

The art law in Mainland China has been in bud and blossom since 1980s due to the development of art market expedited by the China reform and opening-up. More and more legal issues came up in the trading of art works especially for the counterfeit works of famous artists.

Nevertheless, the first legislation of the art law had not been formally promulgated until September 7, 1990, i.e., the PRC Copyright Law, after long-term review and discussion on the draft. After the development of the art law for more than 40 years, a legislation system has been established in Mainland China which mainly includes the laws and regulations of the followings:

(1) The PRC Copyright Law (first promulgated on September 7, 1990 and amended respectively on October 27, 2001, February 26, 2010 and November 11, 2020);
(2) The PRC Auction Law (first promulgated on July 5, 1996 and amended respectively on August 28, 2004 and April 24, 2015);
(3) Administrative Measures on Art Works Operation (promulgated on January 18, 2016);
(4) Law of the Protection of Cultural Relics of the PRC (promulgated on November 4, 2017);
(5) Administrative Regulation on Commercial Performance (first promulgated on July 7, 2005 and amended respectively on July 22, 2008, July 18, 2013, February 6, 2016 and November 29, 2020);
(6) Interim Administrative Provisions on Exhibitions of Cultural Relics in China (promulgated on June 8, 2010);
(7) Interim Administrative Provisions on Internet Cultural Management (promulgated on February 12, 2011); and
(8) Administrative Provisions on the Publications Market (promulgated on May 31, 2016).

In addition to the above laws and regulations specifically formulated for the art market, some high-level laws such as the PRC Civil Code, PRC Criminal Law and PRC Individual Income Tax Law would also be applicable to the administration on art works and art

market in terms of art works trading (including import and export) and art works exhibition.

II. COPYRIGHT

(1) Latest Amendment of the PRC Copyright Law

The PRC Copyright Law constitutes the most important legislation of the PRC art law legislation system. As mentioned above, the first edition of the PRC Copyright Law was promulgated on September 7, 1990 and it has not been amended until October 27, 2001 due to China's acceding to WTO.

After the first amendment as of October 27, 2001, the second amendment was enacted on February 26, 2010 in response to WTO's decision on copyright dispute between China and United States. However, the third amendment was initiated due to the rapid development of the art and culture market recent years in China.

For this third amendment, the Standing Committee of the National People's Congress issued the amended version of the PRC Copyright Law ("**New Copyright Law**") on November 11, 2020, which will take effect as from June 1, 2021. Except for certain minor changes on the wordings of the previous version of the RPC Copyright Law ("**Old Copyright Law**"), we would like to summarize the significant changes and analyze the legal implication on such changes as follows:

Category	Item	Changes on Concerned Provisions	Legal Implication
Definition and Classification of Works	**Definition of Works**	The Old Copyright Law fails to clearly define the concept of the "works" but the New Copyright Law define the Works as **intellectual achievements that are of originality in the fields of literature, arts and science and are capable of being manifested in a certain form**.	The key wording in the definition is "being manifested in a certain form" which emphasizes an important principle under the PRC laws that a pure idea is not protected by laws but it will be protected by laws in case the idea is manifested in a certain form.
	Classification of Works	Under the Old Copyright Law, the classification of works is limited subject to applicable laws and regulations. While under the New Copyright Law, the classification of works is open (any intellectual achievement that meet the characteristics of a piece of work shall be treated as works).	There will be more and more than new intellectual achievement nowadays. Due to the implementation of New Copyright Law, it will be subject to the judgement of the court on deciding whether such intellectual achievement can be recognized as works protected by laws.
Reasonable Use	**Conditions for Reasonable Use**	Reasonable use means a work may be used without authorization from the copyright owner and without payment of remuneration in certain circumstances. The New Copyright Law adds a new condition for the "reasonable use" in	Such change limits the reasonable use with the condition that the normal use of the works shall not be affected by the reasonable use.

		all circumstances, i.e. "shall not affect the normal use of the works".	
	Free Performance	Free performance is a kind of reasonable use, which refers to "performing a published work, on a free of charge basis, with neither collection of fees from the public nor payment of remuneration to the performers." The New Copyright Law adds a new condition for the free performance, i.e. "not for profit".	Such change further limits the free performance under a reasonable use where the free performance cannot be conducted for the purpose of making profits.
	Copying Artworks	It also constitutes a kind of reasonable use under Old Copyright Law that copying, painting, photographing, or visually recording artworks placed or displayed **in outdoor public places**. Under the New Copyright Law, the qualifier "in outdoor public places" has been changed to "in public places".	Copying, painting, photographing, or visually recording artworks placed or displayed no matter **in outdoor or indoor public places** constitutes the reasonable use, which enlarges the reasonable use under this circumstance.
Copyright Ownership	**Audiovisual works**	Under the Old Copyright Law, it is provided that copyright in a cinematographic work or a work created by means similar to cinematography shall vest in the producer. Instead, under the New Copyright Law, it differentiates the film and television dramas from other audio-visual works, and therefore: - the copyright of film and television dramas in a piece of audio-visual work shall be held by the producer; and - the ownership of copyright of other audio-visual work shall be subject to agreement between the parties.	Except for the film and television dramas, the ownership of the copyright of other audio-visual work can be freely agreed by the parties, which grants the flexibility on the ownership in this regard.
Protection of Copyright	**Compensation Calculation**	Under the New Copyright Law, the compensation to be paid by the infringer to the right holder shall be calculated according to the following sequences: - actual losses suffered by the right holder or the illegal income of the	These changes on this provision constitute the **most important changes** under the New Copyright Law in terms of the following major aspects: (1) the New Copyright Law introduces the punitive damages for the first time;

		infringer at the choice of the right holder; - if it is difficult to calculate the actual losses or the illegal income, the compensation can be calculated based on the royalties of the works; - the **punitive damages** can be introduced for willful infringements which ranges from **1 to 5 times** of the compensation calculated based on the actual losses, illegal income, or royalties; - in case the actual loss, illegal income and royalties are difficult to calculate, the people's court shall, based on the severity of the infringement, award compensation of not less than RMB 500 but not more than **RMB 5 million**. It is also provided that the compensation shall also include the reasonable expenses paid by the right holder for excluding the infringement.	(2) under the Old Copyright Law, when the actual loss and illegal income are difficult to calculate, the compensation no more than RMB 500,000 shall be awarded. Instead, under the New Copyright Law, the compensation has been significantly increased to no less than RMB 500 but no more than RMB 5 million. These changes clearly indicate that the PRC legislation has strengthened the penalty on the infringement of copyright.
	Burden of Proof	The New Copyright Law sets out new provisions regarding the burden of proof in case of copyright infringement dispute: - in case the right holder has taken necessary burden of proof, the court may ask the infringer to provide relevant account books or materials provided that such account books or materials are held by the infringer; - in case the infringer refuses to provide such account books or materials, or provides false account books and materials, the court may determine the compensation based on the claims of the right's holder and the evidence provided by the right holder.	This provision is important to solve the practical issue that the right holder may face difficulties in obtaining the evidence for infringement to calculate the compensation. On the other hand, it also shows that the burden of proof on the infringer has been increased.
	Investigation on Infringement	The New Copyright Law sets out new provisions regarding the investigation power of the copyright administrative authority including:	The new provision empowers the administrative authority to investigate on the infringement activities which further the protection on copyrights in addition to the judicial measures.

		- inquire relevant parties concerned and investigate situations related to the alleged illegal activities; - conduct on-site inspection of the premises and items involved in the alleged illegal acts of the parties concerned; - inspect and make copies of contracts, invoices, account books and other relevant materials related to the alleged illegal acts; - seal up or seize premises and items involved in the alleged illegal acts.	

(2) Copyright Protection on New Form of Art Works

As mentioned above, the New Copyright Law is now open on the classification of art works, and this amendment is very important on the protection of various new forms of art works, especially the short video.

The short video has been a very popular form of art works since 2013 in China and the outbreak of COVID-19 also boosts the industry as people work at home and the short video becomes one of the main entertainments. Also, the industry has emerged several famous international and domestic companies including ByteDance (Tiktok) and Kaishou.

The content of the short videos can generally be classified to the following types: (1) news and information; (2) original short films; (3) popular science videos; and (4) film editing.

The regulation on the short video industry has been quite loosen in past a few years though China Netcasting Services Association has promulgated several rules to regulate the issuance of short videos in various platforms.

Nevertheless, on April 9, 2021, a joint statement was published by 15 associations, 5 video platforms (including Tencent, iQIYI, Youku) and 53 film makers for the purpose of the protection of the copyright of films, which clearly proposes to take legal actions against the short videos makers with respect to unauthorized edit, recompose and transmission on films.

In response to such joint statement, the officials of China Film Administration have made the statement that they will actively cooperate with National Copyright Bureau to regulate on the infringement on the copyright of films and ask relevant video platforms to make rectification on its operation and management. So, we believe that the industry of short videos will be regulated in a stricter way afterwards.

III. INTERNATIONAL TRADE

With respect to the import and export of art works into and out of Mainland China, there are generally two scenarios which requires the pre-approval from competent culture administration authority: (1) the normal import and export of art works; and (2) various exhibition activities participated with foreign artists or art works from foreign countries and these exhibitions were held for sales and commercial promotion purposes.

It should be noted that the following art works are prohibited from export: (1) cultural relic; (2) art works of the calligraphers and painters of the art works under the qualification standard of the works for export prohibition of the famous calligraphers and painters died after 1949; and (3) art works of the calligraphers and painters under the import prohibition list of the works of the famous calligraphers and painters between 1795 and 1949.

From the procedural perspective, for the import or export of art works, the following application documents shall be submitted to the competent culture administration authority before the import or export: (1) business license and deregistration form of trading operator of the applicant; (2) the origin and destination of the art works for import and export; (3) photograph catalogue of the art works; and (4) other materials as requested by the competent authority. In addition, for these exhibition activities participated with foreign artists or art works from foreign countries and these exhibition were held for sales and commercial promotion purposes, the following documents shall be submitted 45 days prior to the exhibitions: (1) business license and deregistration form of trading operator of the hosting parties and sponsors of the exhibitions; (2) catalogue of the foreign art works or foreign entities who will participate in the exhibition; (3) photograph catalogue of the art works and (4) other materials as requested by the competent authority.

IV. TAX

On April 26, 2020, the State Administration of Taxation issued an important notice regarding the auction of art works in Mainland China which helps to solve a long-term and critical tax invoice issue for the arts work auction.

Earlier in 1999, the Statement Administration of Taxation issued the *Notice of the State Administration of Taxation on the Levy of Value-added Tax and Business Tax on the Auction Incomes Obtained by Auction Houses*, which provided that 4% value-added tax shall be imposed on the price paid by the purchaser to the auction house when the auction house is entrusted to conduct the auction for specified art works. However, this Notice has not been well implemented and in practice, on one hand, only the commission charged by the auction house was taxable and on the other hand the business tax rather than value-added tax was imposed on the commission.

Later on, on July 25, 2018, the State Administration of Taxation issued the Announcement No. 42 which abolished the above Notice and emphasized that the

auction house should issue value-added invoice for the charged commission. Also, from the practice perspective, the invoice for the price paid by the purchaser is requested to be issued by the entrusting party. However, this approach constitutes an awkward situation against the basic principle for the auction of art works, i.e., the identity of the entrusting party and purchaser will be kept confidential. In case the invoice is issued by the entrusting party, the identity of the entrusting party will be fully disclosed to the purchaser.

So, after the issuance of the above Announcement No. 42, a lot of industry practitioner made proposals to the national people's congress for changing the method for invoice issuing. Finally, on April 26, 2020, the State Administration of Taxation issued Announcement No. 9 which sets out that when an auction house is entrusted with auction of cultural relic artworks and the entrusting party is entitled to value-added tax exemption policy in accordance with relevant provisions, the auction house may issue in its own name the ordinary value-added tax invoice for the price of the goods it has received on behalf of the entrusting party and the corresponding price of goods shall not be included in the taxable income of the auction house.

As this announcement helps the purchaser get the value-added tax invoice for the price paid, it will encourage more and more business entities in Mainland China to participate in the auction of art works.

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5 - CROATIA – ODI Law

ODI . Law

I. INTRODUCTION

Article 69 of the Constitution of the Republic of Croatia[11] guarantees the freedom of scientific, cultural and artistic creation. In the case of art, the Constitution, therefore, prescribes that the state is obliged to stimulate the production and consumption of art. Furthermore, Croatia has a rich and diverse cultural heritage, the foundations for the protection of which are also constitutionally recognised in Article 69 of the Constitution.

Even though the Constitution emphasises the importance of artistic creation, and while Croatia has a long tradition of protection of its cultural heritage, the art market in Croatia is rather small. Galleries are very rare and collectors usually purchase directly from the artists. The scene is quite small and as a consequence, the majority of art initiatives relies on government grants. The upper middle classes that were traditional connoisseurs and buyers of art are diminishing and there is no evident increase in the number of serious art collectors. It is questionable if the art market in Croatia can be referred to as a "real" market since most of transactions are made in the so called "grey zone". Cultural policy does not have clear guidelines in this field, which is also reflected in the bad legal harmonization. Although public financing is provided not only on a national but also on a regional and local level, awarded funds are not sufficient. Stronger initiatives in the private sector are also lacking, since auctioneering of works of art does not have a long tradition in Croatia, nor many galleries or organisations engage in it.

Moreover, as claimed by gallery owners, supply and demand cycles on the art market in Croatia are dictated by the following artwork criteria: rarity, popularity and high-price. The prices of works of art are influenced and formed by many factors; from sellers, gallery owners and museum experts to current trends. Still, the crucial criteria are the quality, author and year of origin, motif and technique of the artwork. The acquisition of the works of art by public museums and galleries is also one of the important factors in the dynamics of the supply and demand situation but the influence of public institutions is limited. Furthermore, the problem of non-transparency is a problem that the Croatian art market faces today, as the prices of works of art are usually determined on the basis of the sales policy of each individual gallery or auction house, only taking into account the appraiser's own data archives and at his or her discretion.

A list of Croatian legislation that is most relevant with reference to artworks, art and culture heritage:

- Copyright and Related Rights Act[12]
- Rights of Freelance Artists and Encouraging Cultural Creativity[13]

[11] Official Gazette of the Republic of Croatia nos. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01,76/10, 85/10 and 05/14.
[12] Official Gazette of the Republic of Croatia nos. 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, 62/17 and 96/18.
[13] Official Gazette of the Republic of Croatia nos. 43/96 and 44/96.

- Protection and the Preservation of Cultural Goods Act[14]
- Trade Act[15]
- Act on Financing Public Needs in Culture[16]

II. CONTRACTS

General contract law provisions are contained in the Obligations Act[17], whereas the special provisions regarding the transfer of rights are contained in the Copyright and Related Rights Act. Moreover, the Protection and the Preservation of Cultural Goods Act contains specific provisions for trade with works of art that pertain to cultural heritage of the Republic of Croatia.

- **Sales Contract**

In Croatia, there are no statistics available on what is sold and what prices are achieved in the sale of works of art, because the grey and black art market predominate. In developed market economy countries, there are annual reports. The market is inevitable, though it is not easily to achieve a fair price. There is no official data on the competences of gallerists and their way of setting prices for the works of art.

The transfer of ownership in a work of art is based on the general principles of transfer of ownership. It must be emphasized that in Croatia under the Copyright and Related Rights Act the transfer of ownership and the transfer of copyright and other related rights are separate transactions. Legal transactions with individual material copyrights or other rights of the artist of the particular work of art do not affect the property right of the things on which this work of art is contained, unless otherwise provided by law or contract. Moreover, legal transactions with the property right of the things on which the work of art is contained do not affect individual material copyrights or other rights of the artist.

Regarding the sale of works of art that pertain to the cultural heritage of the Republic of Croatia, the description of the procedures related to establishing the official status of a cultural good has shown that the issuing of a decree establishing such status does not have any effect on the actual ownership of the cultural good. In other words, the owner remains the person who has owned the item prior to it being declared a cultural good. However, a number of restrictions are subsequently imposed on the owner and/or the holder of other rights on the cultural goods. Furthermore, even though the Constitution and the Protection and the Preservation of Cultural Goods Act do not prohibit the possibility of private ownership of cultural goods and in many cases cultural goods are owned by private persons, whether natural or legal, it must be emphasized that the provisions of the Protection and the Preservation of Cultural Goods Act related to ownership of cultural goods are formulated in such a way that the probability of a cultural good eventually ending up in state or public ownership or at least under substantial control of the state is quite high.

- **Licensing Contract**

[14] Official Gazette of the Republic of Croatia nos. 69/99, 151/03, 157/03, 100/04, 87/09, 88/10, 61/11, 25/12, 136/12, 157/13, 152/14 , 98/15, 44/17, 90/18, 32/20 and 62/20.
[15] Official Gazette of the Republic of Croatia nos. 87/08, 96/08, 116/08, 76/09, 114/11, 68/13, 30/14, 32/19, 98/19 and 32/20.
[16] Official Gazette of the Republic of Croatia nos. 47/90, 27/93 and 38/09.
[17] Official Gazette of the Republic of Croatia nos. 35/05, 41/08, 125/11, 78/15 and 29/18.

The general provisions of the Obligations Act also apply to the Licensing Contract. However, Copyright and Related Rights Act also contains specific provisions. If the Licensing Contract does not specify, which rights are transferred and to what extent, the Copyright and Related Rights Act provides for legal presumptions on the transfer of copyrights and related rights.

- **Loan Agreement**

The majority of galleries in Croatia, national and private, offer enthusiasts the option of concluding a Loan Agreement for the works of art in their collection. Usually, the galleries require the borrower to take appropriate insurance to cover the risk of possible damage to the art. The general provisions of the Obligations Act apply to such Loan Agreements.

III. COPYRIGHT

Under the Croatian Copyright and Related Rights Act, the authors of the works in the literary, scientific, artistic and other domains of creativity have the exclusive right to use or to authorize others to use their works. The author may prohibit, or authorize under agreed conditions, reproduction, public performance, recording, broadcasting, translation or adaptation of his work. The authors frequently entrust the economic rights in their works to natural or legal persons that may commercially exploit them to the best possible extent, subject to payment of remunerations (royalties) that depend on the use of the work. However, moral rights of the author remain forever in the possession of the author, irrespective of whether the author entrusted his economic rights.

Copyright in Croatia does not protect an idea but a work, expressing the idea of the human mind, irrespective of the form or quality of the expression. Copyright is conferred to its author by the mere act of creation of the work of art and, contrary to the majority of other forms of intellectual property, it is not subject to any administrative or registration procedure.

Related rights are comprised of the rights and the system of legal protection of artistic expressions and the protection of organizational, business and financial investments in the performance, production, distribution and broadcasting of copyright works, and include rights of performers, rights of the producers of phonograms and rights of broadcasting organizations. According to Croatian legislation, authors and performers therefore have exclusive rights of public performance while the owners of secondary rights (i.e. phonogram producers) have the right of remuneration for secondary use.

The Rights of Freelance Artists and Encouraging Cultural Creativity Act covers issues such as the rights of freelance artists, cultural and artistic creativity, registration and scope of artistic organizations and can be said to be the main law. There are several other laws regulating other fields (such as the Trade Act, which regulates conditions for trade on domestic and foreign markets; the Consumer Protection Act[18], regulating to consumers' rights) which do not cover issues related to the art market but, in fact, show the lack of regulation in the field of arts market.

- **Copyright Protection**

[18] Official Gazette of the Republic of Croatia nos. 41/14, 110/15 and 14/19.

Copyright and related rights are private rights, meaning that they protect individual interests of certain subjects being the holders of copyright or related rights, respectively. Such rights may be managed individually and collectively.

The management of rights relating to an individual use of a copyright work, (e.g. publication of a particular copyright work, presentation or broadcasting of a particular dramatic or other stage work), or of the subject matter of related rights, shall be, in accordance with the relevant contract between the right holder and the user of the subject matter of protection, carried out by the right holder himself, personally or through a representative. The tasks of an authorized representative may be carried out by an attorney at law, or a legal person specialized in the management of copyright and related rights, or a collective rights management association. Regarding individual rights management – the Croatian Authors' Agency Centre for Intellectual Ownership ltd. (HAA) is a legal successor of the Croatian Authors' Agency that has been in charge of authors' rights and their legal successors for over 55 years, representing them and promoting the importance of copyright.

According to the Copyright and Related Rights Act, in Croatia, it is legally presumed that certain rights are exercised by Collective Management Organisations (CMOs), which conduct this activity for the benefit of their members. Collective management of rights in Croatia may be carried out by an association of right holders, which has the authorization for carrying out such an activity, granted by the State Intellectual Property Office. The Office may grant the authorization for carrying out such an activity to only one association for a particular category of right holders, namely, to the one which has the largest number of members based on the received powers of attorney, together with the appropriate number of contracts on mutual representation concluded with foreign associations. The association may manage one, two or more categories of rights which, as a rule, concern a particular category of holders of copyright or related rights, respectively.

In case of using a large number of copyright works and subject matters of related rights, which is not determined in advance, the user of a work cannot enter into contact with authors, or subjects of protection of related rights individually, and conclude individual copyright contracts or e.g. contracts on the use of a performance for each and every work. In such a case, the relevant contract may be concluded in the manner that instead of authors or holders of related rights, the contract is concluded by a collective rights management association.

The development of the system of collective management of rights has soon caused that, first, the collective management organizations (associations) in a certain country started representing all the right holders of a particular category, and then, started to enter into relationship with related organizations in various countries through contracts on mutual representation. Association registered as a collective rights management organization relevant for artists is the Croatian Association for Protection of Artistic Works "ARS CROATICA".

- **Copyright Violation**

Under Croatian law, right holders may seek civil law protection of their rights and require the payment of remuneration for unauthorised use of a work and compensation for damages.

Furthermore, it should further be noted that infringement of the moral and economic rights of authors, artists and some other rights holders might lead to criminal sanctions against infringers.

However, according to the Criminal Code[19] of the Republic of Croatia, application of criminal sanctions is possible only in cases where infringement of copyright resulted in an unlawful monetary gain for the infringer or damage to the rights holder that exceeds HRK 60,000.00 (approximately EUR 7,920.48). Therefore, it seems unlikely that small-scale copyright infringements could lead to the application of criminal law measures against end-users.

IV. LITIGATION

The majority of case-law of the Croatian courts in this field revolves around copyright violations.

In Croatia, specialized commercial courts i.e., the Commercial Court in Osijek, the Commercial Court in Rijeka, the Commercial Court in Split and the Commercial Court in Zagreb, are competent to decide disputes in the field of copyright and related rights as courts of first instance. The High Commercial Court of the Republic of Croatia in Zagreb acts as the court of second instance in such disputes.

As for the criminal cases regarding works of art, the Department of Economic Crime, organized within the Criminal Police Administration, Police Directorate, is organized for the detection of criminal offenses committed in violation of intellectual property rights.

V. INTERNATIONAL TRADE

The Croatian Copyright and Related Rights Act lists customs measures that are carried out at the request of the holder of copyright or related rights and collective organizations, which demonstrate the likelihood that the import, export or crossing of goods across the state border would violate the right under Copyright and Related Rights Act. At the request of the applicant, the customs authorities shall act in accordance with specific rules laying down procedures for goods infringing intellectual property rights.

Special attention should be put on the legislation of export of works of art that pertain to the cultural heritage of the Republic of Croatia. Cultural property may be publicly or privately owned and may be exported only in exceptional cases. The most important obligations are care and maintenance of the property and public accessibility, with the right, under certain conditions, to receive compensation from the budget for some maintenance costs. The owners of cultural property enjoy tax and duty benefits.

The Protection and the Preservation of Cultural Goods Act states that cultural goods and preventively protected goods represent Croatian national treasures. The provision further prohibits the permanent exports and movement of cultural goods and preventively protected goods from the Republic of Croatia. Exports of cultural goods are defined as exports into third countries outside of the customs zone of the European Union, whereas movement of cultural goods is defined as movement of cultural goods from the Republic of Croatia to other EU Member States.

[19] Official Gazette of the Republic of Croatia, Nos 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/18 and 126/19.

Temporary exports and movement from Croatia are allowed for the purpose of exhibitions, expertise, protective and preservation works or other justified reasons, for a maximum of one year with the possibility of extension to up to five years. The permission of the competent authority is required for any exports or movement of cultural goods from Croatia. Cultural Goods may be imported and moved to Croatia with the permission of the originating country. The importer and the person who moves the cultural good into Croatia must report this fact to the competent authority.

As an off-set for the restrictions imposed on the owners of the cultural goods, the Protection and the Preservation of Cultural Goods Act provides certain rights to the owners. As long as they act in accordance with the Protection and the Preservation of Cultural Goods Act and the measures of protection as ordered by the Ministry of Culture or the competent authorities, the owners have the right of compensation, the right to tax and customs privileges according to special laws and the right to expert assistance of the competent authority for the handling of cultural goods.

VI. NEW TECHNOLOGIES

In Croatia, in parallel with the world art scene, artists began to discover the possibilities of NFT as means of their artistic expression, but also as an instant approach to the world art market. However, the online community that recognizes the monetary value of these works has organically established a visual code by which a certain aesthetic has been established that is not in line with the consensus of the profession from the "real" art world in Croatia.

NFT 021 is the first Croatian NFT exhibition of works of art, as well as one of the world's first exhibitions of NFT works held in a real gallery space. Several Croatian authors have already recognized the possibilities of the first digital tokens and are actively producing works of art encrypted in data chains.

The works of these artists are displayed in the gallery on TV screens or with a projector, but unlike the usual video works and installations, it is possible to buy an original unique work of art – NFT, on online platforms via the on-site link. Sales are of course made in cryptocurrencies.

In Croatia, therefore, the Internet also became a place where artists, who use the achievements of new technologies, can display their works, discuss them and start a new collaboration. Moreover, virtual museums are also raising in popularity in Croatia. Digital technology has introduced changes in the way the museum collection is preserved, and therefore the way they are displayed has also changed. Research shows that virtual museums attract more visitors than real museums. The biggest advantage of virtual museums is that they are available to anyone who owns the Internet. For all its qualities, it is believed that virtual museums cannot completely replace traditional museums, but can complement it.

VII. MANAGEMENT OF ART COLLECTIONS – ESTATES, TRUSTS AND FOUNDATIONS

In Croatia, the management of art collections usually falls on galleries and auction houses. In particular, their services of managing art collections are needed in the event of inheritance of

collections of works of art. Collections of works of art belonging to the cultural heritage are kept by national museums and galleries.

The fact that an item was awarded the official status of a cultural good imposes a set of obligations on the owner according to the Cultural Goods Act. The owner must handle the cultural good with due care, which particularly entails protecting it and regularly maintaining it. Moreover, the owner must implement the measures of protection as prescribed by the Protection and the Preservation of Cultural Goods Act and other relevant laws. The owner is obliged to immediately notify the competent authority of all changes on the cultural good, damage or destruction, disappearance or theft of the cultural good, allow expert and scientific research, technical and other recording and the implementation of technical protection measures, make the cultural good available to the public, preserve the integrity of a protected collection of movable cultural goods; and fulfil all other obligations as prescribed by the Protection and the Preservation of Cultural Goods Act and other laws.

As it was already stated, the competent authority will lay down the measures of protection of the cultural good in a decree. If the owner does not implement these measures, the measure will be implemented by the competent authority at the cost of the owner. All regular costs related to the preservation and maintenance of the cultural good and the implementation of technical protection measures are to be borne by the owner. If there are extraordinary costs, the owner has the right to request compensation from the Ministry of Culture. It is important to highlight that these provisions pertain not only to the owner, but to all holders of cultural goods.

VIII. TAX

- **VAT and the circulation of a work of art**

In Croatia, a special procedure is provided for taxation of the margin for second-hand goods, works of art, collectibles or antiquities. The acquisition of the named movables within the European Union is not subject to VAT, if the seller is a reseller acting as such and VAT on those goods is levied in the Member State of dispatch or transport in accordance with a special margin taxation procedure. Moreover, the acquisition of such goods is also not subject to VAT, if the seller is the organizer of the sale by public auction and VAT on those goods is levied in the Member State their dispatch or transport, in accordance with a special procedure for sale by public auction.

Furthermore, for deliveries of used goods, works of art, collectibles or antiquities performed by the reseller, applies a special procedure for taxation of price differences (margins) earned by the reseller. A reseller is a taxpayer who, within the scope of his economic activity, works for the purpose of resale, buys or imports the said good.

Taxation under a special margin taxation procedure applies, if it is set in advance and the delivery in the EU is made by a person, who is not registered in the register of taxpayer's VAT, and another reseller is applying a special margin taxation procedure. The tax base is the margin provided by the reseller, reduced by the amount of VAT that is contained in that margin, the margin is equal to the difference between the selling prices of the goods it is charged by the reseller and the purchase price for those goods. The reseller may apply the regular taxation procedure to any delivery of goods to which a special margin taxation procedure applies. The reseller may not deduct input tax for the delivery of goods to which special charges apply the margin taxation

procedure and on invoices must not separately show VAT on deliveries of goods to which special margin tax procedures apply.

Moreover, a special procedure for a sale on a public auction is provided. The organizer of a sale by a public auction is a taxpayer, who sells goods through public auctions to the best bidder. The tax base encompasses the total amount of invoices reduced for the net amount paid to the principal and the amount of VAT that the organizer needs pay for your delivery.

The organizers of the sale must issue an invoice to the buyer, which should separately list the price of the work of art, taxes, duties, fees and similar charges and incidental expenses (commission, packaging, transport and insurance costs), and the amount of VAT that may not be set aside to express.

- **Inheritance and gift tax**

In accordance with the provisions of the Local Taxes Act[20], the inheritance and gift tax in Croatia is paid on cash, cash receivables and securities (securities) and on movables, such as works of art, if the individual market value of movables exceeds HRK 50,000.00 on the day of determining the tax liability.

Taxpayers of this tax are natural and legal persons who, in the territory of the Republic of Croatia, inherit, receive as a gift or acquire on another basis without compensation the property on which the tax on inheritances and gifts is paid. In the event that the heir renounces the inheritance or assigns it in probate proceedings, the tax on inheritances and gifts is paid by the person to whom the inheritance belonged or was assigned to him.

The inheritance and gift tax base is determined by the competent tax authority, and consists of the amount of cash and the market value of monetary claims and securities (securities), as well as movables, such as works of art, on the day of determining the tax liability, after deduction of debts and costs related to property on which that tax is paid.

The competent tax authority calculates the tax base according to the residence or usual residence of the taxpayer of a natural person i.e., according to the seat of the taxpayer of a legal person.

The obligation to pay inheritance and gift taxes arises at the moment when the decision on inheritance becomes final, at the time of the decision of the public body or court, or at the time of receipt of the gift (the gift is considered received at the time of signing the gift contract, and if no written gift contract has been concluded, at the time of receipt of the gift).

An important novelty of the last tax reform is the complete relief of citizens from the obligation to report the occurrence of tax liability, which is now carried out *ex officio*. Namely, now the tax on inheritances and gifts is considered declared when the notary, court or other body prepares documents or adopts a decision on the acquisition of movables, submits those documents to the competent tax authority. Exceptionally, if the document on the acquisition of movable property has not been notarized or issued by a court or other public body, the taxpayer is obliged to submit it to the competent tax authority within 30 days from the date of its creation. It is still stipulated that the tax on inheritances and gifts is paid within 15 days from the day of delivery of the decision on determining that tax.

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[20] Official Gazette of the Republic of Croatia nos. 115/16 and 101/17.

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6 - CZECH REPUBLIC - Schaffer & Partner Legal Sro

I. INTRODUCTION

On the Czech art market, you may find painting from the Czech internationally acknowledged painters such as František Kupka, Emil Filla, Toyen, Josef Čapek, Jan Zrzavý, scuptors Olbram Zoubek, František Bílek and Otto Gutfreund or photographer Jan Saudek or Jadran Šetlík.

If your taste is more contemporary, search for popular street artist such as David Černý and Pasta Oner.

You may find in the Czech Republic also the worldwide acknowledged experts who can advise you on specific art items and objects such as antique violin and bow, suitable for collection as well as for investment.

Art goods are usually sold by auction houses (1. Art Consulting, Galerie Kold and Adolf Loos Apartment) or in galleries.

Under the Czech legislation, which is relevant with reference to artworks and art & culture heritage, fall the following Arts regulations:

Czech Copyright Act, Civil Code, Advertisements Regulation Act, Consumer Protection Act, Act on Consumer Loans, Anti-Money Laundering Act, Act on Restitution of Illicitly Exported Goods (based on the EU legislation), UNESCO 1970Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and Act on Alleviating Some Property Injustices Incurred by the Holocaust.

II. CONTRACTS

- **Sales Contract**
  - Purchase Agreement does not need to be in writing, however; executing the Purchase Agreement in writing is recommendable.
  - The ownership is transferred to the purchaser on the effective date of the Purchase Agreement (i.e. the date when the Agreement is signed by both parties or a later date indicated in the Agreement).

- The parties to the Agreement are free to stipulate another moment of the ownership transfer like handing over the artwork or the full payment of the purchase price.
- The purchase is not subject to any public registration.

- **Licensing Contract**
  - The licence may be stipulated as exclusive or non-exlusive.
  - Contrary to the non-exclusive licence the licensor under the exclusive licence may not grant the same licence to a third person for the period of the exclusive licence and is not allowed to exercise the licenced rights himself.
  - The Licence Agreement must be in writing, especially when an exclusive licence is granted.
  - In principle the Agreement should specify the amount of payment which will be paid by the licensee to the licensor, otherwise it might be declared invalid.

- **Loan Agreement**
  - Loan Agreements in connection with an artwork are not very frequent in the Czech Republic.
  - When the borrower is a natural person (human) and is not acting within his/her business activities he/she may qualify as a consumer. In that case the Act on Consumer Loans applies and the lender as well as the Loan or Credit Agreement has to meet the relevant statutory requirements.

- **Pledge Agreement**
  - An artwork may be used as collateral based on a Pledge Agreement. The artwork may be delivered to the pledgee or to a third person for safekeeping for the pledgee or the art piece remains with the pledgee and the pledge comes into existence by its registration at the pledge registry. In the latter case the Pledge Agreement has to be in the form of a notarial deed. The pledge registry is not public and is maintained by the notary (whether an item is encumbered can be verified).

  - The registration of a pledge may be preferable when the same artwork is used for more pledges. The registered pledge has priority over a pledge that is not registered (i.e. in particular a pledge constituted by the delivery of the artwork to the pledgee or a third person). For the rank of registered pledges, the moment of its registration is decisive.

- **Contract with Social Media Influencers in the art sector**
  - There are no statutory requirements which a contract with a Social Media Influencer should meet. However; the Advertisements Regulation Act and the Consumer Protection Act apply to the advertising of product and services on social media. Therefore, the collaboration with a Social Media Influencer in the art sector has to be disclosed. Otherwise the collaboration may be qualified as illegal misleading advertising.

- **Any additional point of interest to highlight**
  - Before concluding a Purchase Agreement the entrepreneur must identify the buyer in line with the Anti-Money Laundering Act. In some cases (depending on the

circumstances such as if a politically exposed person is involved, buyer from a country considered by the EU as a high-risk country or the value of the transaction exceeds EUR 15,000) the seller is also obliged to screen the buyer and determine the ultimate beneficial owner (if a legal entity is involved).

- If the seller is an entrepreneur and the purchaser is qualified as a consumer, the consumer protection law applies. The seller has a special information duty towards the purchaser and the purchaser is entitled to withdraw from the contract within 14 days without giving a reason in case the contract was concluded outside from seller's business premises or in a distant way (online sales).
- The purchaser of an art piece is under the Czech law not obliged to conduct any due diligence regarding the origin or authenticity of the art piece. However; the inspection of the authenticity as well as the provenance of the artwork by the purchaser before the purchase represents a standard procedure and is highly advisable. Particularly it is recommendable to check the police register of stolen artwork which is public and online. In case of any dispute over the ownership of the artwork in the future, the purchaser should be ready to prove his/her bona fidae in the moment of the purchase.

III. COPYRIGHT

- **Copyright Violation and Protection**
  - The Author is entitled to defend his/her rights against any infringement. The courts are authorised to provide protection to the Author and decide on his/her claim.
  - The Author is in particular entitled to demand:
    - determination of his/her authorship,
    - prohibition of endangering its right (prohibition of unauthorized production, marketing, import or export of the original or copy or imitation of a work, unauthorized communication of the work to the public, and unauthorized promotion, including advertising etc.)
    - elimination of the consequences of interference with the law (withdrawing an unauthorized copy or imitation of a work, destroying such copy or imitation of a work)
    - compensation for immaterial damage (apology or monetary satisfaction), and
    - compensation for damage and unjust enrichment, and
    - publishing the judgment at the expense of the defendant.

- **Appropriation Art**
  - The artistic method of appropriation qualifies usually as processing of a foreign work. Therefore, the artist needs consent of the author or licence to use the original work to comply with the Czech Copyright Act.

- **Street Art**
  - A so-called "graffiti" is a special type of painting. This is legally an interesting issue, as the art piece is actually created in violation of the law, when the author interferes with the rights of third parties, commonly with the rights of the property owner. The

Street art fulfils all the requirements of the author's work and is therefore also copyrighted.

- From the point of view of the law, it does not matter whether the work is temporary or permanent, or its scope or purpose. In the case of graffiti, however, it must be a creative expression of an author, not just the "tags" and similar signs, they would only be protected as ordinary signature.
- Nevertheless, precisely because of the illegality of the creation, the copyright protection must be limited, for example the owner of the property is not obliged to ask for the author's consent if he wants to demolish the property or remove the (illegal) creative work. It is not obligatory to take into account the author's rights, he may even sell the work without the author's consent or, for example, separate it from the rest of the wall and expose. Nevertheless, he must not impersonate the author. Other persons must respect the author's rights in the legal extent.
- Graffiti will usually constitute a criminal offence of damage to a foreign property as anyone who damages a foreign object by spraying, painting or marking it with paint can be punished by imprisonment for up to one year regardless of the amount of damage caused.

- **Authorship on AI's artworks**
  - Czech law does not define who has the authorship of artworks which were produced by software and the authorship may be attributed to several human beings (co-authorship). As the author could be identified the authors of the software, authors of the material (poets, composers, musicians etc.) on the basis of which the "creative framework" is created, and users of the platform who provide the data transformed into the resulting creation.

- **Other artist's rights (e.g. "Resale Rights")**
  - Under the Czech Copyright Act, when the original artwork is sold for a purchase price of EUR 1,500 or more, the author (or his/her heirs) shall be entitled to royalties from any resale of the work, provided that a gallery operator, auctioneer or any other art entrepreneur participates in the sale as a seller, purchaser or intermediary.
  - The royalty ranges from 0.25 per cent to 4 per cent of the relevant part of the purchase price. The total amount of the royalty may not exceed EUR 12,500.
  - The exact percentage of the royalty is set out in the Annex to the Copyright Act.
  - The persons liable to pay the royalty are the seller and the dealer jointly and severally. The royalty is paid to the relevant collective administrator.
  - The right to royalties shall not apply to the first resale if the seller obtained the original artwork directly from its author less than three years before that resale and the purchase price of the resold artwork does not exceed EUR 10.000.

IV. LITIGATION

- A three-year suspended sentence to amateur painter and an eight-month suspended sentence to forensic expert was imposed by the criminal court in one of the biggest counterfeiting cases in recent years. The convicted painter created at least two hundred imitations of Czech local masters and the expert prepared several

false expert opinions, which evaluated the counterfeits as originals. In addition the expert is not allowed to work as an expert witness for two years.

- In a recent case from August 2019, the Court condemned three persons for sale of counterfeits to prison for 6 to 8 years and fine amounting from 5 to 15 million Czech Crowns. They were selling paintings of internationally famous Czech painter like Emil Filla, Josef Čapek, Josef Lada, František Kupka, Václav Špála, Jan Zrzavý, Jindřich Štyrský and Toyen.
  Among the victims was also a very popular Czech actress.
  They sold paiting for the purchase price amounting to more than 30 milions of Czech Crowns. Other counterfeits worth about 53 million were offered for sale
  An appeal was filed and the case will be reviewed by the Appellate Court.

V. INTERNATIONAL TRADE

- **Customs legislation and duty policies with reference to import and export of artworks**

Exports outside the EU

By issuing an export document (hereinafter referred to as "VDD"), which accompanies the goods to the borders of the EU, the work of art is released into the customs regime of export. The goods shall be released for export on condition that they leave the customs territory of the EU in the same condition as when the export declaration was accepted.

The VDD proves that the goods did not enter the EU internal market and therefore their sale is exempt from VAT. The determination of any duty and its amount is then made in the country of consignee to which the goods are exported.

Objects of a cultural value are considered significant heritage of the country, respectively its nation, and are protected by many laws. This interest is reflected in particular in many restrictions that the state imposes on export of works of art, and thus seeks to control the movement of its country's cultural heritage.

Import of art objects to the Czech Republic

When importing goods into the Czech Republic, it is necessary to take into account customs duties and VAT. The first reduced VAT rate of 15% applies to the import of works of art, collectors' items and antiquities to the Czech Republic.

- **Report on Art Freeports operating in your Jurisdiction**

A Freeport in the Czech Republic requires a licence granted by the Customs Administration of the Ministry of Finance of the Czech Republic. Goods delivered from abroad placed in a Freeport (free zone) are not subject to any import (customs) duties or taxation.

There is no specialised Art Freeport operating in the Czech Jurisdiction. A Freeport may offer rental storage also in a closed, locked and temperate space which could be appropriate for storage of an artwork as well.

- **Any additional point of interest that you wish to highlight**

There is a regulation of the Ministry of foreign affair which implemented the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. This Regulation defines goods of cultural value. This regulation obligates the Czech authorities to control whether there is any illicit import of goods of cultural value into the Czech Republic. Export of goods of cultural value is subject to prior export permit issued by the Ministry of Culture.

The export permit may be issued upon the application of the owner of the artwork for permanent export or temporary export. The owner may be represented by an Attorney-at-Law, art dealer or auction house acting on behalf of the owner on the basis of a Power of Attorney.

If goods of cultural value are exported without the necessary permission of the Ministry of Culture into another member state of the EU, the Act on Restitution of Illicitly Exported Goods applies.

Under this Act, the Ministry of Culture is authorised to initiate proceedings which could lead to the restitution of the goods of cultural value back to the Czech Republic. The first phase of this proceeding is conducted between the relevant state authorities of both involved countries (Ministry of Culture in the Czech Republic and its counterparty in the other state). An inspection of the goods on site or a deposition of the goods of cultural value into custody may be ordered. The return of the cultural goods may be enforced based on a judgement. This judgement does not affect the ownership and the question of the ownership of the goods of cultural value is subject to further judicial proceedings.

VI. NEW TECHNOLOGIES

- **Digitalisation, Virtual Reality/Augmented Reality: e.g. copyright relating to the reproduction of an artwork**

The Artwork enjoys copyright protection at the moment when it is expressed objectively perceptible form. Thus, any sense-perceptible form, even electronic, is sufficient and digital Artworks enjoy the copyright protection as well. The reproduction of a digital artwork required its author's consent or a licence, otherwise the downloading, making a digital copy etc. are illegal.

- **E-Commerce: relevant legislation on online trade of artworks**

Online sales and auction are very popular in the Czech Republic and their popularity has even increased during the coronavirus pandemic and governmental restrictions adopted in connection with it.
As the contract are concluded remotely, the Civil Code and its regulation on remotely concluded contracts apply, when the purchaser is a consumer and the seller is a professional artist or the art broker is an entrepreneur.

In this case the special information duty towards the consumer must be fulfilled and the purchaser in entitled to withdraw from the contract within 14 days without giving a reason.

VII. MANAGEMENT OF ART COLLECTIONS – ESTATES, TRUSTS AND FOUNDATIONS

Ownership and transfer of an art collection (in case of a sale or transfer to heirs).

- The inheritance proceeding is held by a public notary in the Czech Republic. The fee paid by the heirs to notary depends on the value of the inherited assets. Therefore it is preferable to donate assets to decedents while the owner is still alive as there is no income tax imposed on donation within close family members.
- Another way to deal with a collection in case of death is to put it into a trust, foundation or endowment fund. Paintings, jewellery or antiquities are placed in these entities by a contract which transfers ownership of them. The situation of trusts is slightly different. As trusts are not persons in the legal sense, they cannot enter into contracts on their own behalf and thus a trustee is acting on behalf of the trust.
- If the donor wants to continue to use the invested property, for example until the death, it is necessary to state this explicitly in the contract. However, whatever option is chosen for the transfer of assets, it is always necessary to keep in mind the tax implications associated with the transfer.
- If someone wants his property to be beneficial even after his death, this can be achieved through a foundation or endowment fund. The assets may be donated to an existing foundation/endowment fund or to a future foundation/endowment fund which will be set up in case of donor's death. Ownership of assets will be transferred to a foundation/ endowment fund at the moment of the owner's death. This variant is especially suitable in case of collections of art objects.
- And what to do if handing over the property to someone abroad is envisaged? The transfer of tangible movables is governed by the law of the state in which the owner of the object is domiciled or established. This is especially important when transferring works of art and antiquities.

Trust under Czech law

- Under the Czech law, trusts are not a legal entity but only assets collection managed by the trustee.
- Similarly to legal persons like foundation, companies etc. also trusts come into existence by their registration in a public register. However, if a trust is established in a testament, it comes into existence already at the moment of the owner's passing and it will be registered in the public register afterwards.
- The trust may be established by the founder's decision on establishment of a trust or in the will of its founder. This decision (or the will) needs to be executed in the form of a notarial deed. In addition, a statute of the trust in a form of a notarial deed is required. The statute regulates how the fund will be operated and every issue concerning the trust.
- The statute sets forth in particular the person of the trustee, who controls the disposition with the assets in the trust, the purpose of the fund, the beneficiaries, the method of how the beneficiaries will be provided from the trust's assets and rules and procedure for the management of the trust's assets and the trust itself.

- The trustee acts externally on behalf of the trust and is authorized to administer the trust and the assets and therefore has also a significant responsibility.
- The trust regulation under Czech law is quite flexible and the statute of the trust may be widely adapted to the individual needs and wishes of the founder. The main limits set out in the Czech Civil Code concern the trustee. For example, the trustee may be only a natural person – individual (no company) and if the founder and the trustee or beneficiary is the same person, the founder has to appoint a second trustee. Both trustees have to act on behalf of the trust jointly.

VIII. TAXES

VAT

According to Czech law, the sale of works of art is considered to be the sale of goods to which the general rules concerning trade within the Czech Republic, within the EU and trade between the Czech Republic and a non-member state apply. However, in some cases, this sale may be considered a service. The Czech VAT Act also allows, under certain conditions, the use of a special regime for art traders.

When selling a work of art, the basic VAT rate of 21% is applied. If it is a sale within the EU between two VAT payers, the reverse charge regime applies (i.e. the tax will be paid by the buyer from another Member State). However, another regime would apply if the author creates a work of art based on an order directly for a specific customer. In such a case, the supply may be regarded as a service provided by the artist, which is taxed using the first reduced VAT rate of 15%.

If the works of art are sold by a trader who is a VAT payer and has purchased these works of art from a non-VAT payer, he may use a special regime. The principle of this special scheme is that VAT is paid only on the margin received by the trader, and not on the full value of the work of art sold. In this case, however, the right to deduct input VAT expires. The use of the special scheme is voluntary.

Income tax

If works of art are sold by a natural person, he pays a personal income tax of 15% on the profit and a tax of 23% on the part of the profit that exceeds the limit of 48 times the average wage (in 2021 this limit is CZK 1,701,168). If this person sells works of art in the course of his business activities (i.e. not as a private person), social and health insurance must also be paid.

A legal entity taxes the profit from the sale of works of art at a corporate tax rate of 19%.

Inheritance and gift tax

In the Czech Republic, inheritance and donation tax was completely abolished in 2014. Taxation of these types of income was implemented in the Income Tax Act. Inheritance is exempt from the income tax. Gifts are also exempt in the case of a donation between close relatives.

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7 - ESTONIA - Sorainen

SORAINEN

I. INTRODUCTION

In Estonia, the importance and relevance of art law is quite underestimated, yet the market itself is highly vigorous. In past, the Estonian art market has been known for being too small and having too high prices compared to the actual value of the pieces. Recently, this prejudice was overturned by the creation of Estonian Art Index[21] which shows clearly that the art market in Estonia is very active and attractive.

The Estonian Art Index can be accessed by anyone, although it might be of more interest to collectors, gallery owners and investors. It provides an overview of the Estonian art market based on numeric data, i.e. shows the general trend of the art market prices similarly to the stock market index. The database forming the basis of calculation for the numeric index enables to determine in detail the volume of transactions involving works of art in Estonia, the profitability of acquiring Estonian artwork as an investment and the trends on the art market.

Users of the Estonian Art Index website can also search for information about specific transactions. For example, inserting the name "Eduard Wiiralt" enables to see the prices of the works of Estonian most famous graphics artist in auctions and calculate how their value and prices have changed over time.

Despite of year 2020 being overshadowed by the worldwide COVID-19 pandemic, the Estonian art market had a record-breaking year with works of art from Estonian contemporary artists sold more and with higher prices than ever. The Estonian artist Olev Subbi's painting "Via della Lungara" became the third biggest sale in Estonian art auctions with over EUR 115,000 with the opening price of EUR 22,000.

In the beginning of year 2021, Estonia was recognised as #1 in Europe regarding the number of start-up unicorns per capita. Experts say that the Estonian art market shows similar signs of booming as the start-up sector did few years back. Thus, considerable upgrowth can be expected to take place within next years. As Estonia is also known for being very tech-wise, certain movement from more classical types of art to more experimental forms and new technologies is anticipated.

Legislation

The Constitution[22] of the Republic of Estonia states that science and art and their teaching shall be free and that authors have the inalienable right to their creative works whereas the authors' rights are

[21] Estonian Art Index *Kunstiindeks*. Available: https://kunstiindeks.ee/.
[22] The State Gazette *Riigi Teataja*. Constitution of Estonia *Põhiseadus*, Sections 38 and 39. Available:

protected by the state. Estonian Law of Property Act[23], General Part of the Civil Code Act[24] and Law of Obligations Act[25] regulate the contractual and non-contractual aspects, rights and obligations of all art and valuables. There are no specific laws concerning art in that regard.

Art monuments can be placed under the state protection pursuant to the procedure provided for in the Estonian Heritage Conservation Act[26]. Estonian Act of Commissioning Artworks[27] is prevalent if art is commissioned to improve a public space aesthetically. Republic of Estonia Principles of Ownership Reform Act is relevant regarding assets that were taken unlawfully during the Soviet occupation.

Estonia has joined and ratified several UNESCO Conventions such as the Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972 and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970. Estonia has also joined the Berne Convention for the Protection of Literary and Artistic Works of 1886, Convention Establishing the World Intellectual Property Organization of 1967 and Geneva WIPO Copyright Treaty 1996and the Hague Convention of 1954. Estonia is also bound by the European Union law.

II. CONTRACTS

There are no special laws in terms of contracts relating to artwork. Estonian Law of Obligations Act, applicable to all civil law contractual relationships, establishes the regulation on sales, loan and licensing contracts. General part of the Estonian Law of Obligations Act applies to all contracts, whereas the regulation on each of the named contract type is further specified under relevant chapters. Certain aspects of the contracts relating to artworks are covered also by the Estonian Copyright Act[28].

Under the Estonian Copyright Act, copyright consists of author's economic and moral rights. Economic rights of the author are transferable as single rights or set of rights for a charge or free of charge. However, moral rights of the author are inseparable from the author's persons and non-transferable. Thus, from contract law perspective, author's economic rights can be transferred, but author's moral rights can only be licensed.

It is important to note that, according to the Estonian Law of Obligations Act, either party may cancel a contract for license entered into for an unspecified term by giving at least one year's notice. Thus, depending on the circumstances, it is advisable to conclude contracts for licensing of copyrights for a specified term, e.g. for the "entire duration of the legal protection of the rights".

Estonian Copyright Act defines author's contract as an agreement for use of a work concluded between the author, or author's successor, and the person seeking to acquire the right of use of the

https://www.riigiteataja.ee/en/eli/530122020003/consolide.

[23] The State Gazette ***Riigi Teataja.*** Estonian Law of Property Act ***Asjaõigusseadus***. Available: https://www.riigiteataja.ee/en/eli/529082019011/consolide.

[24] The State Gazette ***Riigi Teataja.*** Estonian General Part of the Civil Code Act ***Tsiviilseadustiku üldosa seadus***. Available: https://www.riigiteataja.ee/en/eli/ee/501042021006/consolide/current.

[25] The State Gazette ***Riigi Teataja.*** Estonian Law of Obligations Act ***Võlaõigusseadus.*** Available: https://www.riigiteataja.ee/en/eli/512012021002/consolide.

[26] The State Gazette ***Riigi Teataja.*** Estonian Heritage Conservation Act ***Muinsuskaitseseadus***. Available: https://www.riigiteataja.ee/en/eli/ee/513122020003/consolide/current.

[27] The State Gazette ***Riigi Teataja.*** Estonian Act of Commissioning Artworks ***Kunstiteoste tellimise seadus.*** Available: https://www.riigiteataja.ee/en/eli/ee/508122020008/consolide/current.

[28] The State Gazette ***Riigi Teataja.*** Estonian Copyright Act ***Autoriõiguse seadus.*** Available: https://www.riigiteataja.ee/en/eli/ee/504032021006/consolide/current.

work. On the basis of the author's contract, the author transfers his or her economic rights to the other party or grants to the other party an authorisation (license) to use the work to the extent and pursuant to the procedure prescribed by the respective conditions of the contract.

The law prescribes that, at minimum, the following needs to be recorded in an author's contract:

(1) a description of the work (format, volume and name of the work, etc.);
(2) transferable rights, and rights concerning which authorisation is granted, type of licence agreement (non-exclusive or exclusive licence agreement) and the right to grant a sublicence;
(3) manner of use of the work and the territory where the work is to be used;
(4) the term of the author's contract and the term of commencement of use of the work.

Although there is no respective legal obligation, it is recommended to contractually stipulate also the amount and manner of payment of the remuneration, as well as the term of and procedure for payment thereof.

According to the Estonian Copyright Act, author's contract needs to be concluded in a written format (a non-exclusive license can be provided in a format reproducible in writing). However, the Estonian Supreme Court has ruled that the failure to comply with the requirement of a written form does not lead to the author's contract being void. The requirement to conclude author's contract in a written form protects the both parties to the contract by creating clarity with regard to the rights and obligations of each party. Considering the agreement to be void due to non-compliance with the mandatory format of the contract would be more detrimental to the author whose work has been used, but as a result of it may be deprived of the right to receive remuneration.

Estonian Copyright Act further specified that if an author transfers the original or a copy of his or her work, this does not constitute a transfer of the author's economic rights or grant of an authorisation (license) to use the work unless otherwise determined by a contract. A work of visual art created on the basis of an author's contract for the creation of a new work is considered to transfer into the ownership or possession of the person commissioning the work unless otherwise prescribed by the contract. In both of the above referred cases, the acquirer of a work has the right to display it to the public without payment of any additional remuneration to the author unless otherwise determined by the contract.

III. COPYRIGHT

Estonian Copyright Act provides for, among others, the protection of a specific rights (copyrights) of authors of literacy, artistic and scientific works for the results of their creative activity.

As mentioned above, copyright consists of author's economic and moral rights. With regard to the moral rights, the author of a work has the right to:

(1) appear in public as the creator of the work and claim recognition of the fact of creation of the work by way of relating the authorship of the work to the author's person and name upon any use of the work (right of authorship);
(2) decide in which manner the author's name shall be designated upon use of the work – as the real name of the author, identifying mark of the author, a fictitious name (pseudonym) or without a name (anonymously) (right of author's name);
(3) make or permit other persons to make any changes to the work, its title (name) or designation of the author's name and the right to contest any changes made without the author's consent (right of integrity of the work);

(4) permit the addition of other authors' works to the author's work (illustrations, forewords, epilogues, comments, explanations, additional parts, etc.) (right of additions to the work);
(5) contest any misrepresentations of and other inaccuracies in the work, its title or the designation of the author's name and any assessments of the work which are prejudicial to the author's honour and reputation (right of protection of author's honour and reputation);
(6) decide when the work is ready to be performed in public (right of disclosure of the work);
(7) supplement and improve the author's work which is made public (right of supplementation of the work);
(8) request that the use of the work be terminated (right to withdraw the work);
(9) request that the author's name be removed from the work which is being used.

With regard to the economic rights, the author of a work enjoys the exclusive right to use its work in any manner, to authorise or prohibit the use of the work in a similar manner by other persons and to receive income from such use of the work. Author's economic rights include the right to authorise or prohibit:

(1) reproduction of the author's work (right of reproduction of the work);
(2) distribution of the author's work or copies thereof (distribution right);
(3) translation of the author's work (right of translation of the work);
(4) making adaptations, modifications (arrangements) and other alterations of the work (right of alteration of the work);
(5) compilation and publication of collections of the author's works and systematisation of the author's works (right of collections of works);
(6) public performance of the work as a live performance or a technically mediated performance (right of public performance);
(7) displaying the work to the public (right of exhibition of the work). "Exhibition of a work" means presentation of the work or a copy thereof either directly or by means of film, slides, television or any other technical device or process;
(8) communication of the work by radio, television or satellite, and retransmission thereof by cable network, or direction of the work at the public by other technical devices, except in the manner specified in clause 91 of this section (right of communication of the work);
(9) making the work available to the public in such a way that persons may access the work from a place and at a time individually chosen by them (right of making the work available to the public);
(10) carrying out the author's architectural project pursuant to the procedure prescribed by law;
(11) carrying out the author's project of a work of design or a work of applied arts, etc.

Author's copyrights are protected for the life of the author and seventy years after his or her death, irrespective of the date when the work is lawfully made available to the public, except in some specific cases prescribed by the law. The authorship of a certain work, the name of the author and the honour and reputation of the author is protected without a term.

Specifically with regard to visual works of art, the Estonian Copyright Act establishes that the author has the right to receive an additional remuneration (maximum of EUR 12,500) based on the sale price each time when the visual work of art is sold after the first transfer of the right of ownership in the work. This applies to all acts of resale which involve auctioneers, galleries or dealers as seller, buyer or intermediate. Also, in order to make a copy of his or her work, the author of a visual work of art has the right to request access to the original at any time.

One of the most important free use exceptions in the Estonian Copyright Act stipulates the following. Provided that this does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, it is permitted to reproduce works of architecture, works of visual art, works of applied art or photographic works which are permanently located in places open to the public, without the authorisation of the author and without payment of remuneration, by any means except for mechanical contact copying, and to communicate such reproductions of works to the public except if the work is the main subject of the reproduction and it is intended to be used for direct commercial purposes. If such work carries the name of its author, it is required to indicate the name in communication of the reproduction to the public.

IV. LITIGATION

There has rarely been any cases concerning paintings, sculptures or any kind of visual arts in the Estonian courts. Rather, the litigation has been more focused on the protection of intellectual property in terms of published literary works and musical pieces.

There are several on-going cases concerning some valuables that were stolen during the Soviet occupation that Estonia requests to be returned. One of these cases concerns the Chain of Office that belonged to Estonia's first president Konstantin Päts, but which still resides in Moscow and has not been returned to the Republic of Estonia. There are also hundreds of artistic monuments still missing, mostly form churches and chapels that are being "hunted" in the hope of one day bringing them back to Estonia.

V. INTERNATIONAL TRADE

Movement of cultural objects within European Union (intra-community transport) and to a country outside of European Union customs territory (export) is regulated by the Estonian Intra-Community Transport, Export and Import of Cultural Objects Act[29]. Cultural objects are things of historical, archaeological, ethnographic, artistic, scientific or other cultural value including works of visual art of Estonian artists made before 1945.

A person may transport or export a cultural object out of Estonia based on an export licence issued by the National Heritage Board which conducts expert assessment of the object. The national Heritage Board may refuse to grant export licence in certain considerations enacted in law including if a cultural object is rare, or part of a set or connected to a significant process, event or person in history of Estonia. National Heritage Board may not, however, refuse to grant an export licence if the cultural object belongs to the household effects of a person settling permanently in a foreign state.

Export licence shall be submitted to a customs official in case of export of the cultural object. A customs official may, based on evaluation of risks, ask for an export licence also in case of intra-Community transport of goods.

An export licence is either permanent or temporary. In the case of temporary intra-Community transport or export a person is obliged to bring the cultural object back to Estonia. In addition to Estonian Intra-Community transport, Export and Import of Cultural Object Act, the Council Regulation No 116/2009 on the export of cultural goods shall be observed.

[29] The State Gazette *Riigi Teataja.* Estonian Intra-Community Transport, Export and Import of Cultural Objects Act *Kultuuriväärtuste väljaveo, ekspordi ja sisseveo seadus.* Available : https://www.riigiteataja.ee/en/eli/ee/514032019003/consolide/current.

Based on the EC Directive 2014/60/EU Estonia has adopted the Act on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State of the European Union. The law regulates the return of a cultural objects which have been unlawfully removed from the territory of a Member State of the European Union after January 1, 1993 and brought to Estonia. The Act on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State of the European Union provides a mechanism for the return of such cultural objects to the requesting EU nation. Only the courts have power to order the object's return to the requesting country if the possessor should refuse to hand it over. Return proceedings may be initiated during three years after the requesting state has become aware of its location and the identity of its holder but not more than 30 years after the object has unlawfully removed from the requesting EU country. The return proceedings can be initiated only by the EU Member States and not by private owners. Private owners of cultural objects shall subject to proceedings under regular laws.

Estonia is party to UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Both conventions aim to provide framework among nations for alleviating abuses in the international trade of cultural property with some differences. For example UNESCO Convention is non-self-executing treaty while UNIDROIT Convention is a self-executing treaty – it does not need additional legislation to be implemented into national law. Both conventions apply to the cultural objects removed only after the ratification of the conventions. Thus, it cannot be applied to the cultural object which have been illegally removed from Estonia before 1993 or 2001 respectively.

Based on UNESCO Convention Estonia has adopted bilateral treaty with Russia on Co-operation of Safekeeping Cultural Objects.

International art trade entails numerous formal requirements. If art pieces outside of EU are crossing the border to Estonia with the purpose of being displayed in a museum or gallery or for educational purposes, then the import can be arranged tax free, i.e. with no import tax charges.

The import of art pieces from non-EU Member States for purposes other than display in the museum or gallery or for educational purposes is subject to the regular import procedure.

VI. NEW TECHNOLOGIES

In the field of E-Commerce, transactions with works of art in Estonia are carried out via e-auctions as well or online auctions. . Popularity of online auctions have become increasingly popular in Estonia. Auctions are usually held twice a year: at the end of April and in October. During 2020 and 2021 the online auctions have set the records and turnover generated via online platform has increased significantly.

There are several online auction houses as well as established galleries developing state of the art online platforms on the Estonian market. Estonia is a tech-oriented country and digital solutions are widely popular and well received by the nation.

Video and audio art have become increasingly popular and several galleries and specialising in selling video art internationally.

Recently there have been talks of opening an NFT (non-fungible token) art gallery in Estonia. The idea is yet to be materialised but it has fuelled discussions about legal provisions around the topic as well as display of the digital art. Online trade of artworks is covered in the general provisions

of the Law of Obligations Act, as well as the Consumer Protection Act[30], the Electronic Identification and Trust Services for Electronic Transactions Act[31], and the Personal Data Protection Act[32].

VII. MANAGEMENT OF ART COLLECTIONS – ESTATES, TRUSTS AND FOUNDATIONS

In Estonia, usually public museums and public foundations manage the art collections, but there are also several private initiatives such as private companies and museums which manage, administrate, preserve and sell art. Several private museums are registered as private limited companies or non-profit organisations. Currently there are no special regimes such as law on trusts or private foundations regulating the management of art collections in Estonia. Private art collections are usually part of individual's home furnishings or purchased by a non-profit or limited liability company and exhibited either in private gallery or museum. There are several private collections in Estonia which have their own curators and expertise and which are taking care of specifically of artworks created by Estonian artists. Access to private collection is up to its possessors decision but often it will be granted for scientific purposes. There are no wealth, gift or inheritance taxes in Estonia. Thus several typical estate planning issues such as charitable transfers, appraisal and valuation for example do not have the same importance as in several other countries.

VIII. TAXATION

Individuals

There is no general obligation to declare or disclose the ownership of private artworks in Estonia. There is no voluntary list of inventories or alike present for disclosing purposes.

If the artwork is sold, the classification of an art piece as (tax exempt) household good or (taxable) investment asset is crucial when deciding whether or not the art piece has to be declared in the tax return.

Income taxes

Capital gains resulting from the sale of privately held, movable assets are generally tax exempt while income from the sale of investment assets is taxable.

There is currently no legal certainty when the art work is considered to be a privately held household good and when an investment asset. The value of an art piece or collection should generally not be crucial but it can be referred to and considered by the tax authorities in making the distinction. Household goods are items serving residential purposes in the house, as everyday objects, such as furniture, rugs, paintings. Such household goods are personal belongings that serve the taxable person in everyday life and are not primarily held as a capital investment. This means that an art piece, serving as a decorative object like an item of furniture, may well be a household good, but this is not considered the sole argument that tax authorities would base their opinion on.

[30] The State Gazette *Riigi Teataja*. Consumer Protection Act *Tarbijakaitseseadus*. Available: https://www.riigiteataja.ee/en/eli/505032021002/consolide.

[31] The State Gazette *Riigi Teataja*. Electronic Business and Electronic Identification and Trust Services for Electronic Transactions Act *E-identimise ja e-tehingute usaldusteenuste seadus*. Available: *https://www.riigiteataja.ee/en/eli/511012019010/consolide*.

[32] The State Gazette *Riigi Teataja*. Personal Data Protection Act *Isikuandmete kaitse seadus*. Available: https://www.riigiteataja.ee/en/eli/523012019001/consolide.

Items which are serving capital investment purposes are no longer classified as household goods.

If the sale happens as an act of management of private assets and does not exceed the "common" management of assets, i.e. the owner of artwork has made capital gain from a randomly arisen opportunity which has been exploited, the capital gain is generally tax free.

However, if the sale happens to be in the course of carrying on a business by an individual such income from the sale of artworks could be seen as income from self-employment in which case the profits received would be charged with social contributions and income tax.

There is no obligation to disclose taxable private art pieces to the tax authorities. In order to prevent conflicts, it is however recommended to declare the sale of art pieces, if they could be considered as investment assets, in the annual tax return. In general, privately held assets are valued at their fair market value. There is no legislation in this respect, thus the valuation theme entails difficulties and there is no legal certainty. The fair market value is defined as the objective market value of an asset and equals the price which could be achieved in case of a sale of the asset in the ordinary course of business. Friendship prices or sentimental values are therefore irrelevant in verifying the fair market value . The fair market value is usually an estimated value or a comparable figure, except for assets subject to regular trade. For the latter, the fair market value is usually available.

When it comes to art pieces, which are usually unique items, there is normally neither a periodic return on the asset nor is there a liquid market with regular trade. The valuation of art pieces can therefore not be conducted by means of a comparable fair market value or purchase price. However, factors like cost or insurance value could become relevant in case of conflicts. It is evident that the valuation of art pieces entails substantial legal uncertainty in Estonia. There is no certain method used to value the art pieces. In practice, there is the possibility to get an expert opinion, contact databases, gallery catalogues or auction results. All these auxiliary factors may

be taken into account in order to determine an art piece's value. It is the tax-payer's right to prove another value than the insurance value or value estimated by the tax authorities.

Inheritance and gift taxes

The receipt of an inheritance is tax exempt. The sale of the inherited assets is liable to personal income tax. The documented costs related to the inheritance are deductible.

Gifts between natural persons are tax exempt. Gifts made by companies to natural persons are liable to corporate income tax and considered as non-business expenses and taxed accordingly on the corporate level. Gifts received from non-resident companies are taxable unless the taxpayer proves that the tax was paid abroad.

Taxation of legal entities (as owner of artworks)

Estonian companies pay CIT on a deferred basis i.e. when distributing profits, paying non-business expenses, conferring fringe benefits and making gifts. Business income earned from the sale of art works is therefore not taxable on receipt but is deferred until the profit distribution. CIT is 20% of the gross payment.

In case of investment items the benefit arises from the deferred taxation of the companies, whereas the individuals must declare the sale in their annual tax return and consequently pay income tax on the profit.

VAT and Customs

Turnover generated by art trade through legal entities is taxable.

The Estonian VAT Act[33] para. 41 enacts special arrangements for imposing VAT on the resale of original works of art.

A taxable person that acquires original works of art with a view to resale and does not use the goods may, upon resale, apply the special arrangement procedure for the calculation of the taxable value on the condition that the taxable person acquired the goods:

→ from a person of Estonia or another Member State who is not a taxable person;

→ from a taxable person of Estonia or another Member State who did not add value added tax to the price of the goods upon transfer of the goods and who could not deduct input value added tax paid upon acquisition of the goods;

→ from a taxable person of Estonia or another Member State, in so far as the resale of original works of art by that other taxable person was subject to value added tax.

If the above-mentioned conditions are met then the taxable value of the supply is the difference between the sales price and purchase price of the goods which has been reduced by the value added tax.

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[33] The State Gazette *Riigi* Teataja. Estonian Value-Added Tax Act *Käibemaksuseadus.* Available: https://www.riigiteataja.ee/en/eli/527042020008/consolide.

8 - FRANCE - Sagasser Tax & Law

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1. MOVEMENT (IMPORT EXPORT) AND SALE OF CULTURAL GOODS

The French Heritage Code (*Code du patrimoine*) has implemented specific provisions in order to protect the French cultural heritage.
There are two types of cultural goods that are subject to export restrictions:

- National Treasures
- Cultural goods of significant historical, artistic or archaeological importance.

1.1. French National Treasures

Cultural goods that are considered as national treasures in accordance with article L.111-1 of the Heritage Code may not be exported outside of France (unless they are exported

temporarily, and provided this temporary export has been duly authorised by the relevant authority).
Such goods are those that are part of collections of French museums, public archives, goods classified as '*monuments historiques*', or goods that present a significant importance in terms of the French national heritage, whether historical, artistic or archaeological. Such is the case for Nicolas Poussin's *The Flight into Egypt*, or the 15th Century *Book of hours of Joan of France*, daughter of French king Charles VII.

1.2. Cultural goods of significant interest

In accordance with article L. 111-2 of the French Heritage Code, the export of cultural goods which are not national treasures, but nonetheless are of significant historical, artistic or archaeological interest ("**Cultural Goods of Significant Interest**") are subject to the prior granting of an Export Certificate in the event they are to leave France for another Member State (in this case national law applies), unless they have been in France for less than 2 years (***art. R. 111-2 of the French Heritage Code***).
The goods that are considered as Cultural Goods of Significant Interest are listed under Appendix 1 of the French Heritage Code in 15 different categories.
The granting of a certificate is necessary for cultural goods that exceed the age and value thresholds in their respective categories in accordance with Appendix 1 of the French Heritage Code. The thresholds vary depending on whether the export is to be made within the EU, or outside of the EU towards a third country.

1.2.1. Intra-EU trade and exports

For example, paintings that are more than 50 years old and that have a value of more than EUR 300 000 need an Export Certificate in order to be able to leave France.
However, in accordance with article L. 111-4 of the French Heritage Code, cultural goods that were imported less than 50 years ago are automatically granted with the Export Certificate.
Upon application for a certificate, the Ministry of Culture which is in charge of granting the Export Certificate may request to see the good.
Once an Export Certificate has been granted by the relevant body in France, said certificate is valid for an unlimited period for goods that are more than 100 years old, and a 20-year period for goods that are less than 50 years old (***art. L. 111-2 French Heritage Code***).

1.2.2. International trade and export

For information, the export of Cultural Goods of Significant Interest outside of the EU (from a Member State to a third country) is subject to both EU law and national law.
In accordance with Reg. (CE) 116/2009, anyone wishing to export such a good outside of the EU shall have to apply for an Export Licence, provided the thresholds under Appendix 1 of Reg. (CE) 116/2009 are reached. The thresholds under national law may be higher than those provided for under EU law.
For example, in France the export of a Cultural Good of significant interest towards a third country shall be subject (i) to the restrictions that apply to national treasures and (ii) to the different thresholds for the purposes of the granting of an Export License (provided the good is not a national treasure).

1.3. Sanctions for illegal export of Cultural Goods of Significant Interest

Pursuant to article L. 114-1 of the French Heritage Code, anyone who illegally exports out of France a Cultural Good of Significant Interest faces 2 years imprisonment and a fine of up to EUR 450 000.
Furthermore, article 2 of Directive No. 2014/60/UE provides for the return of Cultural Goods of Significant Interest that were imported illegally in a Member State from another Member State.

2. TRADE OR EXPORT OF MATERIALS DERIVED FROM ENDANGERED SPECIES

During the Middle Ages and the Renaissance, materials such as ivory, tortoise shell, or rosewood were very much used in the confection of works of art (e.g. 13th Century ivory sculpture of the *Virgin and Child from the Sainte-Chapelle*, currently in the Louvre, Paris), in the inlay of furniture (e.g. tortoise shell and ivory inlayed in furniture, such as Boulle furniture).
The trade and the export of such products is strictly regulated under the Convention on International Trade in Endangered Species of Wild Flora and Fauna 1973 (CITES).
Under the international convention (CITES), species are divided in three different categories in accordance with their level of protection. The least concerned are classified under Appendix III (such as porcupines or snapping turtles), whereas the most endangered species, such as the African elephant, the rhinoceros, or Brazilian rosewood, appear in Appendix I of CITES.
CITES was in EU law under Reg. (CE) No. 338/97. The categorisation of species in accordance with their level of risk is made on the basis of CITES. These different categories are, from the most endangered to the least endangered, Annex A, Annex B, C, and D.
African elephants, and any products derived therefrom such as ivory, feet, hair, etc. are subject to the highest levels of protection (Annex A listed species under Reg. (CE) No. 338/97 – Appendix I under CITES).
Since many antique artefacts are made of or contain small amounts of products derived from endangered species, the export and trade restrictions under CITES and Reg. (CE) No. 338/97 have a significant impact on the art market.
The restrictions vary based on the provenance and destination of the artefact. Thus, the rules that apply to intra-EU trade may be less restrictive than those that apply to the export from the EU to a third country.

2.1. Movement of products derived from endangered species

2.1.1. Import within a European Union Member State from a third country

For species listed under Annexes A and B (Reg. (CE) No. 338/97), the importer must obtain (i) an import license from the Member State into which the good is to be imported, and (ii) an export license from the country of provenance.
For species listed under Annex C, the importer must have (i) a notice of import, which is simply a statement that must be presented to customs, and (ii) an export license from the country of provenance.
For species listed under Annex D, the importer must only have a notice of import.

2.1.2. Export outside of the European Union

For species listed under Annexes A, B and C, an export license must be obtained from the Member State from which the good is to be exported. Annex D species do not require any permit.

2.1.3. Circulation within the European Union

CITES listed goods can freely travel and be sold within the EU without the need of any certificate, provided their holder is able to prove their legal acquisition (authenticity certificate, invoice, etc.).
The sale of works that include products derived from Annex A species is prohibited, unless it is pre-convention, in which case one shall have to obtain a certificate, and provided national laws are not more restrictive.
Pre-1947 worked specimens (ivory sculptures, taxidermized animals, etc.) may be sold freely without a certificate provided their authenticity may be established. Here again, national laws may be more restrictive.

2.2. Specific restrictions in France

Some countries have implemented more restrictive measures than international or EU law, in particular with respect to the trade and export of ivory or rhinoceros horn.
In France, a decree dated August 16, 2016, modified by a decree dated March 4, 2017, implemented a general prohibition of the commercial trade of elephant ivory and rhinoceros horn.
Thus, the commercial trade of the following products is strictly prohibited in France:

- raw elephant ivory,
- raw rhinoceros horn and horn powder,
- any artefact containing elephant ivory or rhinoceros horn manufactured after March 2, 1947.

The decree dated May 4, 2017 loosened the restrictions and introduced an exemption applicable to objects containing elephant ivory or rhino horn that were manufactured before 1947. The trade of antique artefacts is therefore permitted, provided their provenance and authenticity can be established.

3. TAXATION OF THE SALE OR PERMANENT EXPORT OF WORKS OF ART

The actual ownership of works of art is not taxed and these do not fall within the scope of the French wealth tax which is based on real estate property.
However, cultural goods are subject to a specific taxation upon their transfer, whether (i) upon their sale or permanent export out of France, (ii) upon the settlement of an inheritance.
The transfer of works of art and cultural goods may be encouraged by the State, in particular with regard to philanthropy.

3.1. Flat-tax on sales and permanent exports of works of art

Articles 150 VI to 150 VM of the French General Tax Code (Code général des impôts).
As the purchase price and the ownership traceability of works of art may not always be established by private art owners, the French Tax Code (*Code général des impôts*) has implemented a 6% flat tax (6,5% including 0,5% CRDS) that applies to the sale and the permanent export of cultural goods ('*taxe forfaitaire sur les métaux précieux, bijoux, objets d'art, de collection et d'antiquité*'). The tax base is either the sale price or the value declared at customs. The rate that applies to the sale or permanent export of precious metals is 11%.
This flat rate tax which does not apply to professional dealers carries on the sale or the permanent export of precious metals, jewellery, artworks, collections and antiques (article 150 VJ of the French Tax Code) whose value exceeds EUR 5000,00.
However, if ever the purchase price and date of purchase can be established, one may decide to opt for the general rules in relation to the taxation of capital gains applicable to moveable property.
Capital gains for moveable property in France are taxed at a 19% rate (plus 17,2% social contributions), with a 5% tax allowance for each year of ownership from the second year following its acquisition. Therefore, after 22 years of ownership, the sale of a work of art would be exempt from any taxation.
The option for capital gains tax may in particular be interesting when (i) the acquisition was made a long time ago, or (ii) when the capital gain derived from the sale of the work of art is low or negative.

3.2. Inheritance law and works of art

In accordance with article 764 of the French tax code, works of art are valued, for the purposes of establishing inheritance tax, (i) on the basis of the sale price if the work was sold at auction less than 2 years prior to the death of its owner, (ii) if there was no sale at auction, on the basis of an inventory established by an auctioneer ('*commissaire priseur*').
However, cultural goods that furnish one's home are considered in France as a '*meuble meublant*' (article 534 of the French Civil Code) and are integrated to the estate for the purposes of establishing the inheritance tax on the basis of a 5% flat rate, based on the value of the rest of the estate. Thus, a painting which is merely decorative may be considered as a simple piece of furniture and be included in the global 5% rate in which the rest of the furniture is included. The application of the 5% rate is particularly interesting when the real-estate assets of the deceased have a low value.
Collections of works of art are not considered as furniture and are therefore excluded from the 5% flat rate.
In the event the estate of the deceased is important, it may be more interesting for the heirs to have an inventory established by an auctioneer ('*commissaire priseur*') which determines the true value of the works of art.

3.3. Private and corporate philanthropy

3.3.1. Patronage by individuals

In accordance with article 200 of the French General Tax Code (CGI), individuals domiciled in France may benefit from a 66% income tax reduction on the amounts of donations to a charitable organisation.

This reduction is limited to 20% of the taxable amount, the excess of which may be carried forward for the next five years.
This article establishes an exhaustive list of beneficiaries; these are essentially foundations or associations of public interest, or works or organisations of general interest of a philanthropic, educational, scientific, social, humanitarian, sporting, family or cultural nature.

3.3.2. Transfer in lieu of payment ('dation en paiement')

Individuals may also benefit from a reduction of their inheritance, gift or wealth taxes by transferring cultural goods such as works of art, books, documents of high artistic or historical interest to the State, in particular valuable goods from the estate of the deceased parent. The transfer in lieu of payment is a legal transaction by which a debtor transfers ownership of a good or right in settlement of all or part of a debt (article 1342-4 of the French Civil Code).
The classic example of transfer in lieu of payment in France is the transfer by the heirs of Pablo Picasso of a collection of works of art which was at the origin of the Picasso Museum in Paris.

3.3.3. Corporate patronage

3.3.3.1. Donations to charitable organisations

In accordance with article 238 bis of French Tax Code (CGI), gifts by companies to entities such as foundations or associations of public interest, works or organisations of general interest, or endowment funds can entitle them to an income tax or corporate tax reduction based on the amount of the donation. The rate varies depending on the value of the donation: 60% for donations under EUR 2 million, and 40% for donations higher than EUR 2 million, capped at either EUR 20,000 or 5‰ of the company's annual turner over if the latter is higher. Any excess may be carried forward for the next five years.

3.3.3.2. Donations to the State for the acquisition of a national treasure

Companies may also benefit from a 90% tax reduction with respect to donations to the State for the purposes of acquiring a national treasure (article 238 bis-0 A of the French tax code). The reduction may however not exceed 50% of the company's corporate income tax.

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9 - GERMANY - Sagasser Tax & Law

ART AND LAW INSIGHTS - GERMANY

1. MOVEMENT (IMPORT EXPORT) AND SALE OF CULTURAL GOODS

The German Culture Property Protection Act (KGSG *Kulturgutschutzgesetz*) has implemented specific provisions in order to protect the German cultural heritage.
There are two types of cultural goods that are subject to export restrictions:

- Cultural goods[34],
- National cultural goods[35] including valuable cultural goods[36].

1.1. Cultural goods

An export ban applies to cultural goods if

- a registration procedure is still in progress (No. 1),
- an export licence has not been granted (No. 2) or
- if cultural good has been unlawfully imported (No. 3) or seized (No. 4) or stopped (No. 5)[37].

Such goods are any movable object or set of objects of artistic, historical or archaeological value or archaeological value or from other areas of the cultural heritage, in particular of palaeontological, ethnographic, numismatic or scientific value.[38] The definition is very large. Archaeological cultural goods, irrespective of their value, are considered to be cultural goods from an age limit of 100 years.[39]
For each export of cultural goods[40] to the EU internal market, specific value and age limits apply[41]. An export is only subject to authorisation if both the age and value limits are exceeded cumulatively.[42]
The export of cultural property owned by the originator is generally exempt from export licensing[43]. The export of cultural goods that is only temporarily in Germany, i.e. for up to two years, does not require an export licence either.[44]

1.2. National cultural goods including valuable cultural goods

All objects entered in the list of nationally cultural goods are of national value[45].
National cultural goods also include all cultural goods that are publicly owned, irrespective of the organisational form of a cultural goods preservation institution as an institution under public law (No. 2) or under private law, but which is predominantly financed by the public sector (No. 3), or which is part of an art collection of the Federation or the States (No. 4).

1.2.1. Exports

[34] Section 2 paragraph 1 no 10 KGSG
[35] Section 6 para 1 KGSG.
[36] Section 7 para 1 KGSG.
[37] Section 21 KGSG
[38] Section 2 para 1 no 10 KGSG.
[39] Die Neuregelung des Kulturschutzrechts, NJW 2016, 3400.
[40] within the meaning of section 2 para 1 no. 10 KGSG
[41] Section 24 para 2 KGSG
[42] Die Neuregelung des Kulturschutzrechts, NJW 2016, 3398.
[43] Section 7 para 1 phr 2 KGSG
[44] Section 24 para 8 KGSG
[45] Section 6 paragraph 1 no 1 KGSG,

The licensing requirement for a temporary or permanent export to a EU member state or a third country refers to national cultural goods regardless of value and age limits, in particular cultural goods in public hands and cultural goods that are listed as "nationally valuable"[46].
For temporary export, section 22 KGSG is applicable. Permission shall be granted if the applicant offers a guarantee that the cultural goods will be returned in due time and undamaged.

An export is permanent if the export is longer than five years[47]. The export shall be denied if essential interests of the German cultural heritage prevail.
For information, the export of Cultural Goods outside of the EU (from a Member State to a third country) is subject to both EU law and national law.
In accordance with Reg. (CE) 116/2009, anyone wishing to export such a good outside of the EU shall have to apply for an Export Licence, provided the thresholds under Appendix 1 of Reg. (CE) 116/2009 are reached. The thresholds under national law may be higher than those provided for under EU law.
The ultimately decisive question of whether an export licence is granted is governed by national law. In Germany, it depends on whether a work of art is listed in the register of nationally valuable cultural goods. The Licences are issued by the States (*Länder*).[48]
An important exception is the export permission for cultural goods which were seized due to persecution by the National Socialists and is to be exported abroad in the course of restitution.[49]

1.2.2. Import

Paragraph 28 KGSG defines three cases in which cultural goods may not be imported into Germany.
The importation of cultural goods shall be prohibited if they
1. have been classified or defined as national cultural goods by a Member State or a State Party and has been removed from its territory in violation of its legislation on the protection of national cultural goods,
2. have been transferred in breach of directly applicable legal acts of the European Union, published in the Official Journal of the European Union, which restrict or prohibit the transboundary movement of cultural goods.
3. Moved in breach of Section I(1) of the Protocol to the Hague Convention arising out of an armed conflict.
According to paragraph 30 KGSG a full documentation of the lawful export from the country of origin is required, when the importing goods are subject to special protection in the country of origin.[50]

1.2.3. Trade

The prohibition norm of paragraph 40 KGSG regulates for the first time the circulation of lost, unlawfully excavated or unlawfully imported cultural goods.

[46] Section 22 and 23 KGSG
[47] Section 2 paragraph 1 no. 18 KGSG
[48] Die Neuregelung des Kulturschutzrechts, NJW 2016, 3400.
[49] Die Neuregelung des Kulturschutzrechts, NJW 2016, 3401. Section 23 paragraph 3 KGSG.
[50] Die Neuregelung des Kulturschutzrechts, NJW 2016, 3401.

Paragraph 2 (1) No. 9 KGSG defines putting on the market that it is any transfer of cultural goods in one's own or another's name, whether free of charge or not.
According to paragraph 41 KGSG, anyone who puts cultural goods into circulation must exercise due diligence to determine whether they are lost, illegally excavated or unlawfully imported cultural goods.

1.3. Sanctions for illegal export and import of Cultural Goods

Pursuant to paragraph 83 KGSG, anyone who exports out of Germany cultural goods where paragraph 21 KGSG (see no. 1.1) applies or who import goods which one were not allowed to import faces 5 years imprisonment or a fine.
Furthermore, article 2 of Directive No. 2014/60/UE provides for the return of Cultural Goods of Significant Interest that were imported illegally in a Member State from another Member State.

2. Trade or export of materials derived from endangered species

The trade and the export of products like ivory, tortoise shell, or rosewood is strictly regulated under the Convention on International Trade in Endangered Species of Wild Flora and Fauna 1973 (CITES).
Under the international convention (CITES), species are divided in three different categories in accordance with their level of protection. The least concerned are classified under Appendix III (such as porcupines or snapping turtles), whereas the most endangered species, such as the African elephant, the rhinoceros, or Brazilian rosewood, appear in Appendix I of CITES.
CITES was integrated into EU law under Reg. (CE) No. 338/97. The EU Regulation applies directly in Germany. The categorisation of species in accordance with their level of risk is made on the basis of CITES. These different categories are, from the most endangered to the least endangered, Annex A, Annex B, C, and D.
African elephants, and any products derived therefrom such as ivory, feet, hair, etc. are subject to the highest levels of protection (Annex A listed species under Reg. (CE) No. 338/97 – Appendix I under CITES).
Since many antique artefacts are made of or contain small amounts of products derived from endangered species, the export and trade restrictions under CITES and Reg. (CE) No. 338/97 have a significant impact on the art market.
The restrictions vary based on the provenance and destination of the artefact. Thus, the rules that apply to intra-EU trade may be less restrictive than those that apply to the export from the EU to a third country.

2.1. Movement of products derived from endangered species

2.1.1. Import within a European Union Member State from a third country

For species listed under Annexes A and B (Reg. (CE) No. 338/97), the importer must obtain (i) an import license from the Member State into which the good is to be imported, and (ii) an export license from the country of provenance.

For species listed under Annex C, the importer must have (i) a notice of import, which is simply a statement that must be presented to customs, and (ii) an export license from the country of provenance.
For species listed under Annex D, the importer must only have a notice of import.

2.1.2. Export outside of the European Union

For species listed under Annexes A, B and C, an export license must be obtained from the Member State from which the good is to be exported. Annex D species do not require any permit.

2.1.3. Circulation within the European Union

CITES listed goods can freely travel and be sold within the EU without the need of any certificate, provided their holder is able to prove their legal acquisition (authenticity certificate, invoice, etc.).
The sale of works that include products derived from Annex A species is prohibited, unless it is pre-convention, in which case one shall have to obtain a certificate, and provided national laws are not more restrictive.
Pre-1947 worked specimens (ivory sculptures, taxidermized animals, etc.) may be sold freely without a certificate provided their authenticity may be established. Here again, national laws may be more restrictive.

3. Taxation of works of art

3.1 Taxation at the transfer of works of art

The holding of works of art for private reasons is not taxable. Works of art can nevertheless also be booked as assets in a business either as permanent assets e.g. if a work of art decorates the waiting room at the dentist's or current assets for art trade businesses.

3.1.1 Transfer through sale

The sale of works of art created in Germany or the sale through a German gallery or art trader is taxable in Germany. Private sales of movables are mostly exempted.

3.1.1.1 Sale through German tax residents

As a German tax resident, he is taxable with his world-wide income. The taxable gain is the selling price minus the purchase price and any acquisition costs. The taxable gain especially in the case of creation of works of art is mostly difficult to evaluate. In this case the purchase costs should equal the costs of material and time.

An exception is made for sale transactions for private movable assets for which the period between acquisition and sale exceeds one year or private real estate held for more than 20 years.

3.1.1.2 Sale by non resident

The sale of works of art created abroad (e.g. paintings or sculptures) and sold in Germany leads to taxable income in Germany since the sale in Germany fulfils the fact of domestic exploitation even if the works of art have been created abroad[51]. No tax deduction is applicable[52].

However, the foreign artist is not subject to limited tax liability if his works of art are purchased abroad by a German gallery with subsequent sale in Germany. In this case, the foreign artist does not fulfil the fact of domestic exploitation.

The ownership must be proven by means of suitable documents (e.g. import documents or customs documents) and increased obligations to cooperate in foreign matters apply[53].

3.1.1.3 VAT

A reduced VAT rate for the importation of works of art and for supplies as well as intra-Community acquisition of goods by the author or his legal successor as well as for certain occasional sales applies[54].

Moreover, the flat-rate margin in the case of margin taxation in the art trade is applicable if the purchase price is insignificant or cannot be determined[55]. This mostly applies for resales through an art trader who purchased the goods from a private person.

3.1.1.4 special rules for real estate

For income tax purposes, an increased deductibility of expenses for production and preservation measures can be applied. This concerns own cultural assets worthy of protection, which includes nationally valuable cultural assets if their preservation is in the public interest due to their importance for art, history or science and if they are made accessible to the public[56].

A property tax relief can be claimed for real estate assets which are objects of artistic significance and made usable for the purpose of research or public education. The gross income for real property must be permanently reduced by the above described use[57].

3.1.2 Transfer through succession or donation

Works of arts that form part of the succession or are transferred through donation are usually taxed according to the general inheritance / gift tax rules.

Nonetheless, gifts or inheritances of cultural property may be exempt from inheritance and gift tax if the cultural property is registered as being of national value, its preservation is in the public interest due to its importance for art, history or science, the annual costs generally exceed the income generated and the object is made useful for the purposes of research or popular education[58].

Further, if a taxpayer owes inheritance tax, it may be permitted that certain cultural property be transferred in lieu of payment if there is a public interest in its acquisition due to its significance[59].

[51] Section 49, paragraph 1, no. 3 EStG (German Income Tax Code); OFD Frankfurt S 2300 A-24-St 513
[52] Section 50 a EStG
[53] Article 90 paragraph 2 AO (German General Tax Code)
[54] Section 12 paragraph 2 no 12/13 UStG (German Value Added Tax Act), see annex 2 no 49 lit.f, 53, 54
[55] Section 25a UStG
[56] Section 10g EStG
[57] Section 32 paragraph 2 GrStG (German real estate tax)
[58] Section 13 paragraph 1 no. 2 ErbStG (German Inheritance Tax Code)
[59] Article 224a AO

3.2 Private and corporate philanthropy

Owners or possessors of cultural property can benefit at least indirectly from the fact that there are numerous tax benefits for the cultural sector, in particular in that the promotion of art and culture is recognised as a charitable purpose[60]. Mostly foundations with a charitable purpose (*gemeinnützige Stiftung*) comprehend art collections and are destined to pursue the artistic inheritance of collectors or artists. One example is the Peter and Irene Ludwig Foundation, which continues the spouses' interest in "world art". interest in "world art" through its own exhibitions and the sponsorship of associated museums. pursued.

The charitable purpose has to be recognized by the founding authority (*Stiftungsbehörde*) and the tax administration. In practice, it is advisable to involve the foundation authority and, if necessary, the tax authorities before notarising the foundation deed and the foundation articles, even in supposedly simple cases.

The establishment and management of a charitable non-profit institution is mostly tax exempted. In the course of the establishment of a charitable foundation, for instance, the transfer of cultural assets by donation can be claimed as deductible donation for income tax purposes[61].

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[60] Article 52 paragraph 2 sentence 1 number 5 AO

[61] Section 10b EStG

10 - GHANA – ENS Africa Ghana

I. Introduction

- Ghanaian Law has not seen much development and inroads with regard to the art sector. Discussions in this submission will therefore be limited to general laws which will also apply to the art sector.

- Ghana has recently passed the Creative Industry Act, 2020 (Act 1048) which is an Act to establish a Creative Arts Agency to provide the institutional framework for the development and management of the creative arts industry (including visual art and the fine arts) and for related matters.

II. Copyright

- Art works in Ghana are generally protected by the Copyright Act. [62]

- An author, co-author or joint author of an art work is entitled to the copyright and protection afforded to that work under the Copyright Act[63].

- An artwork is not eligible for copyright unless:

(a) it is original in character;

(b) it has been fixed in any definite medium of expression which is known or later to be developed with the result that the work can either directly or with the aid of any machine or device be perceived, reproduced or otherwise communicated, and

(c) it is:

(i) created by a citizen or a person who is ordinarily resident in Ghana;

[62] Copyright Act, 2005 (Act 690).
[63] Section 1(1) of the Copyright Act, 2005 (Act 690).

(ii) first published in Ghana and in the case of a work first published outside Ghana is subsequently published in Ghana within 30 days of its publication outside Ghana; or

(iii) a work in respect of which Ghana has an obligation under an international treaty to grant protection[64].

III. Litigation

- The Ghanaian courts are yet to pronounce on a dispute in the art sector regarding authenticity, copyright violations and provenance of a work of art, to the best of our knowledge.

- We are also not aware of any report on court decisions or arbitral award on a crime in the art sector. However, there are laws on dishonest receiving under the Ghanaian Criminal Law[65] which will apply to receiving stolen or looted art work. Under Ghanaian Law, a person is guilty of dishonestly receiving any property which he knows to have been obtained or appropriated by any crime, if he receives, buys, or in any manner assists in the disposal of such property otherwise than with a purpose to restore it to the owner[66].

- With regard to the limitation of claims in the art sector, if it is in relation to a contract or a wrongful act, the action becomes statute-barred after six (6) years from the time the claim accrued[67].

- Actions in relation to the conversion (wrongful interference with another person's property) or wrongful detention of art work also have a limitation period of six years from the date the right to make a claim arose.[68]

IV. Tax

- There are no special tax regimes applicable to the sale of works of art by an art merchant, an art collector or an art speculator. Profits from the sale of works of art are taxed just like income from any taxable activity is taxed in Ghana.

- With regard to VAT and the circulation of art work, there is no special regime. The general law is that VAT is charged on the supply of goods or services made in Ghana other than exempt goods and services[69]. The sale of artwork in Ghana is not exempted from VAT.

- On the question of inheritance tax issues relating to art collection, inheritance is generally exempted from tax in Ghana. Where an individual realises an asset on death, by way of transfer of ownership of the asset to another person[70]:

(a) that individual is treated as deriving an amount in respect of the realisation equal to the market value of the asset at the time of realisation; and

[64] Section 1(2) *Ibid*.
[65] The Criminal Offences Act, 1960 (Act 29).
[66] Section 147(1) of Act 29.
[67] Section 4 of the Limitation Act, 1972 (N.R.C.D. 54)
[68] Section 7(1) Ibid
[69] Section 1(1) of the Value Added Tax Act, 2013 (Act 870).
[70] Section 44 of the Income Tax Act, 2015 (Act 896), as amended.

(b) the person who acquires the asset is treated as incurring an expenditure of the amount specified in paragraph (a) in acquiring the asset.

- Further, a taxable gift received by a person under a will or upon intestacy, from that person's spouse, child, parent, brother, sister, aunt, uncle, nephew or niece, by a religious body which uses the gift for the benefit of the public or a section of the public and for charitable purposes, are exempted from the tax[71].

- Thus, by necessary implication, artwork received as inheritance is not subject to tax under the laws of Ghana. However, if the artwork is used in a profit-generating manner, then the profit will be subject to tax.

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[71] https://gra.gov.gh/domestic-tax/tax-types/gift-tax/

11 - GREECE - Tsibanoulis & Partners

Tsibanoulis & Partners LAW FIRM

Copyright protection for Artificial Intelligence production

I. Introduction

According to WIPO's definition of copyright "*Copyright (or author's right) is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings*"[72]. Copyright protection extends only to expressions, and not to ideas, procedures, methods of operation or mathematical concepts as such. Copyright also may or may not be available for a number of objects such as titles, slogans, or logos, depending on whether they contain sufficient authorship. They are two types of rights under copyright, economic rights, which allow the rights owner to derive financial reward from the use of their works by others; and moral rights, which protect the non-economic interests of the author.[73]

The treaty that protects copyrights is the Berne Convention and it is based on three basic principles: a) Works originating in one of the Contracting States (which means works the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals (principle of "**national treatment**"), (b) Protection should not be conditional (principle of "**automatic**" protection), (c) Protection is independent of the existence of protection in the country of origin of the work (principle of "**independence**" of protection)[74].

II. Copyright Protection for AI Production?

a) Central theme

The development of Artificial Intelligence and Learning Machine facilitates our lives but also brings some problems and uncertainties as far as the legal framework is concerned. More specifically, in terms of Copyrights, there is an ongoing debate as to the availability of copyright protection for

[72] WIPO available at: https://www.wipo.int/copyright/en/
[73]WIPO available at: https://www.wipo.int/copyright/en/
[74]Berne Convention available at : https://www.wipo.int/edocs/lexdocs/treaties/en/berne/trt_berne_001en.pdf

'works' created by or with the help of AI. It is true that from articles to music, film, poetry and painting, AI machines create 'work' that has economic value and that competes with productions of human authors[75].Robots and computers have recently generated 'works' of art, composed symphonies, and wrote news articles, poetry, and novels. All of these 'works' would undeniably be protected by copyright if created by humans[76]. But what happens when AI is the "author" of this work?

Firstly, it is vital to distinguish between 'computer-assisted' works and 'autonomously-generated works', the first refers to works that are produced by humans with the contribution of AI and the second one to works that are generated by AI. The importance of such a distinction is that works of the first category will be protected as original works while those in the second category will not, "*unless individual jurisdictions amend copyright law to afford protection to those works and identify who the rightsholder is to be and for how long the right is to last*".[77]

b) Arguments for and against protection for AI production

The first argument for the protection of AI production is the protecting value which is the right of machine production to be protected by law. The second reasoning to justify the grant of copyright protection is based on marketplace competition and argues that machine production should be protected because, if machine-productions are copyright-free, then machines will produce free goods (e.g., music) that compete with paid works (generated by humans) and this will distort the market. The last reasoning, the so-called "humans as a proxy author" argues that the person who owns the AI code should also owns the production of AI.[78]

On the other hand, there are many who are against protection for AI production. One of their arguments is the lack of responsibility; will programmers, owners or users of AI machines accept responsibility for all potential acts of the machines they program, own or use, including all literary and artistic outputs? It is safer to answer in the negative. No copyright should be granted to an author who is not also responsible for the work's meaning and content. Another point is that according to the author's theory, author's rights are human rights and only human should be consider the author of a work.[79]

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[75] The Machine as Author, Daniel J. Gervais, PhD , Abstract, available at: https://poseidon01.ssrn.com/delivery.php?ID=884112031001096097089024115019005024001024032007049053005122123102085113088112084121124025056115114005124127019101099101110100023039056023040022119002103012004072040073010074093091013001099116120118018000112072106087014007022028031124126113073117065&EXT=pdf&INDEX=TRUE

[76] ARTIFICIAL CREATIVITY: EMERGENT WORKS AND THEVOID IN CURRENT COPYRIGHT DOCTRINE, Tim W. Dornis, p.1, available at: file:///C:/Users/User/Downloads/SSRN-id3451480.pdf

[77] Computer Generated Works and Copyright: Selfies, Traps, Robots, AI and Machine Learning, Dr Paul Lambert, p.2 available at: file:///C:/Users/User/Downloads/Preprint%20Computer%20Generated%20Works%20and%20Copyright%20(2).pdf

[78] The Machine as Author, Daniel J. Gervais, PhD, p. 2064-2068, available at: https://poseidon01.ssrn.com/delivery.php?ID=884112031001096097089024115019005024001024032007049053005122123102085113088112084121124025056115114005124127019101099101110100023039056023040022119002103012004072040073010074093091013001099116120118018000112072106087014007022028031124126113073117065&EXT=pdf&INDEX=TRUE

[79] The Machine as Author, Daniel J. Gervais, PhD, p. 2079, 2087-2088 available at:https://poseidon01.ssrn.com/delivery.php?ID=884112031001096097089024115019005024001024032007049053005122123102085113088112084121124025056115114005124127019101099101110100023039056023040022119002103012004072040073010074093091013001099116120118018000112072106087014007022028031124126113073117065&EXT=pdf&INDEX=TRUE

Finally, the opponents of the protection of AI production present two doctrinal arguments; the requirement of originality and the notion of derivative work. As far as the first argument is concerned, the question that occurs is whether the choices that an AI machine makes are considered creative. The creation process must be human.[80] As for the "directive work" argument, a crucial point is that a derivative work, if it is to be protected by copyright, must also be an original work of authorship. The author of the derivative work must "*add original expression to each derivative work in order to qualify it for copyright protection of its own.*" This takes us back to the original question; can machines generate 'work' with the originality required to obtain copyright protection? The answer to that question must be negative.[81] To conclude, the machine has no liability and should be granted no right in productions for which it cannot be held liable.

III. EU Policy

According to different case law of the European Union Court of Justice (CJEU), CJEU is likely to define the 'Author' as the natural person who created the work. For example, in Article 1 par.1 of Directive 2006/116 (EU) it is mentioned that '*The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public*'[82]. Moreover, in Article 2 par.1 of Directive 2009/24 (EU) [83]and in Article 4 par.1 of Directive 96/9 (EU) [84]it is referred that '*The author of a computer program/database shall be the natural person or group of natural persons who has created the program/base or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation*'. Respectively, in a CJEU Case law on originality (C-145/10) it is mentioned: *'(…) reflects the author's personality (…)*'[85]. All these statements prove that the 'Author' of a work is considered as a natural person.

Another point that should be considered is that CJEU is likely to consider the 'Work' as excluding AI generated production. This is implied from the case Levola (C-310/17) where in order for a work to be a 'Copyrighted Work', has to meet two conditions; 'author's own intellectual creation' (originality) and 'expression'[86]. Moreover, the CJEU is likely to exclude 'originality' where the AI production is the outcome of a process that could possibly exhaust all expression of an idea. This occurs from the meaning that several law cases give to the term 'originality'; in the case C-393/09 it is stated that *'(…)*

[80] The Machine as Author, Daniel J. Gervais, PhD, p. 2093, available at: https://poseidon01.ssrn.com/delivery.php?ID=884112031001096097089024115019005024001024032007049053005122123102085113088112084121124025056115114005124127019101099101111010002303905602304002211900210301200407204007301007409309101300109911612011801800011207210608701400702202803112412611307311706 5&EXT=pdf&INDEX=TRUE

[81] The Machine as Author, Daniel J. Gervais, PhD, p. 2097-2098, , available at: https://poseidon01.ssrn.com/delivery.php?ID=884112031001096097089024115019005024001024032007049053005122123102085113088112084121124025056115114005124127019101099101111010002303905602304002211900210301200407204007301007409309101300109911612011801800011207210608701400702202803112412611307311706 5&EXT=pdf&INDEX=TRUE

[82] Article 1 par.1 of Directive 2006/116 (EU) available at: https://eur-lex.europa.eu/legal content/EN/ALL/?uri=CELEX%3A32006L0116

[83]Article 2 par.1 Directive 2009/24 (EU) available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0024

[84]Article 4 par.1 of Directive 96/9 (EU) available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996L0009

[85] Decision C-145/10 par. 88, Court of Justice, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=115785&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1551566

[86] Decision C-310/17, Court of Justice, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=207682&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1553453

where the expression of those components is dictated by their technical function, the criteria of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable'[87] and in the case "Herbert Rosenthal Jewelry Corp. v. Kalpakian" (9th Cir. 1971) *'When the 'idea' and its 'expression' are (...) inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by the patent law'*[88]. And as for the point that from the situation where only one way to express an idea, to the situation where limited number of ways to express an idea, the case law of CJEU C-833/18 argues that *'(…) that cannot be the case where the realization of a subject matter has been dictated by technical considerations, rules or other constraints which have left no room for creative freedom or room so limited that the idea and its expression become indissociable'* and *'Even though there remains a possibility of choice as to the shape of a subject matter, it cannot be concluded that the subject matter is necessarily covered by the concept of 'work' within the meaning of Directive 2001/29 (…)'*[89].

According to the report of European Union Commission in the "Trends and Developments in Artificial Intelligence - Challenges to the Intellectual Property Rights Framework", the European Commission concludes that "*assuming these choices are expressed in the final AI-assisted output, the output will then qualify as a copyright-protected work. By contrast, if an AI system is programmed to automatically execute content without the output being conceived or redacted by a person exercising creative choices, there will be no "work".*" [90]

IV. Conclusion

Authorless works must necessarily be ownerless works. Leaving works in which copyright may otherwise subsist without IP protection leaves potentially expensive or valuable works in the public domain and it that way leaves investment unrewarded. Definitely, there are difficulties allocating authorship to an individual, particularly in complex productions (like the generation of 'work' by AI), and reforms will be necessary to achieve greater certainty of authorship and thus ownership, however, it is an urgent policy goal.[91]

Although reviewing the history, we conclude that copyright is meant to promote human creativity and that creating incentives to have more productions in the literary and artistic field made by machines could in fact pose a threat to (human) progress. Machine productions should also be

[87] Decision C-393/09, par. 49, Court of Justice, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=83458&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1553930

[88] Law case Herbert Rosenthal Jewelry Corp. v. Kalpakian, available at: https://casetext.com/case/herbert-rosenthal-jewelry-corp-v-kalpakian

[89] Decision C-833/18, par. 32, Court of Justice, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=227305&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1554983

[90] Trends and Developments in Artificial Intelligence – Challenges to the Intellectual Property Rights Framework, p. 117, available at: file:///C:/Users/User/Downloads/kk0220789enn_002_FBA99172-F330-D25A-DAA9184637B75530_71915.pdf

[91] "The vanishing author in computer-generated works: A critical analysis of recent Australian case law", J. Mccutcheon, p. 956, available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0016/1700125/36_3_4.pdf

denied copyright because machines cannot be held liable for their work, and copyright and responsibility for that work historically have gone hand in hand[92].To conclude, from our point of view the copyright law should not protect machine productions as 'works' that meet the requirements for Copyright protection.

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[92] The Machine As Author, Daniel J. Gervais, PhD, p.1206 available at: https://poseidon01.ssrn.com/delivery.php?ID=994020123000098108090078019069108010116045067060095028110099080103022123108020017101018063099111026042034105125027091095006020029066004033083000079122098005031092037089020100180250091040840260951210210191160260130860960090011130731180031130731000 17&EXT=pdf&INDEX=TRUE

12 - INDIA - Titus & Co., Advocates

INTERNATIONAL TRADE

India has a rich cultural legacy which is embodied in the diverse works of art produced by its inhabitants through the ages. Indian Art has evolved over many centuries offering a legacy that conveys beauty, dignity, form, and style. The variety in Indian Art is comprehensive and ranges from age-old stone carvings to modern handicrafts making use of glass flints and mirrors. The Government of India is very protective over these works of art and jealously guards the export of Indian art. However, import of overseas art is permitted subject only to custom duty payments.

1. Definitions

To understand the Indian rules and regulations governing International Trade in works of Art we may divide the term "Art" into two broad categories:

a) Antiquities and Art Treasures

b) Handicraft Works

1.1. Antiquities and Art Treasures

The Antiquities and Art Treasures Act, 1972 (hereinafter referred to as "**the Antiquities Act**") is the principal act that governs the free movement of art objects within and outside India. It is implemented by the Archaeological Survey of India and the Ministry of Culture.

The Antiquities Act was originally formulated to prevent smuggling and fraudulent dealings in Indian art and antiquities. Its mandate also extends to the compulsory acquisition and preservation of objects perceived as important to the nation in public places.

The definition of the term "Antiquity" under Section 2(1)(a) of the Antiquities Act states that:

*"**Antiquity** includes:*

***(I)** (i) any coin, sculpture, painting, epigraph or other work of art or craftsmanship;*

(ii) any article, object or thing detached from a building or cave;

(iii) any article, object or thing illustrative of science, art, crafts, literature, religion, customs, morals or politics in bygone ages;

(iv) any article, object or thing of historical interest;

(v) any article, object or thing declared by the Central Government, by notification in the Official Gazette, to be an antiquity for the purposes of this Act, which has been in existence for not less than one hundred years; and

***(II)** any manuscript, record or other document which is of scientific, historical, literary or aesthetic value and which has been in existence for not less than seventy-five years;"*

Further, Section 2(1)(b) of the Antiquities Act states that "**art treasure**" means

"any human work of art, not being an antiquity, declared by the Central Government by notification in the Official Gazette, to be an art treasure for the purposes of this Act having regard to its artistic or aesthetic value. Provided that no declaration under this clause shall be made in respect of any such work of art so long as the author thereof is alive".

1.2. Handicrafts

India is a major supplier of handicrafts in the international market. This sector is crucial for Indian economy as it not only generates employment it also has a vast export potential. Most famous handicraft manufacturing states include Madhya Pradesh, Rajasthan, Karnataka, Tamil Nadu and Kashmir.

In India, the Ministry of Textiles is responsible for the formulation of policy, planning, development, export promotion and regulation of the handicraft industry. There are several other bodies and organizations which help to formulate and execute these policies.

The Supreme Court of India in the Louis Shoppe case[93], has defined Handicrafts as *"Item or product produced through skills that are manual, with or without mechanical or electrical or other processes, which appeal to the eye due to the characteristics of being artistic or aesthetic or creative or ethnic or being representative of cultural or religious or social symbols of practices, whether traditional or contemporary. These items or products may or may not have a functional utility and can be used as a decorative item or gift."*

2. Trade Policy

[93] 1996 SCC (3) 445

2.1. Import Policy

The Indian Trade Classification (Harmonised System) (hereinafter referred to as "**ITC (HS)**") is the harmonised compilation of codes used for import of goods. In accordance with ITC (HS) works of art and handicraft products fall under Code 97 and includes tariff rates for the following goods:

a) *Paintings, drawings and pastels, executed entirely by hand, other than hand-painted or hand-decorated manufactured articles; collages and similar decorative plaques;*

b) *Original engravings, prints and lithographs;*

c) *Original sculptures and statuary, in any material; (does not apply to mass-produced reproductions or works of conventional craftsmanship of a commercial character, even if these articles are designed or created by artists.)*

d) *Postage or revenue stamps, stamp-post marks, first-day covers, postal stationery (stamped paper), and the like, used or unused;*

e) *Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest;*

f) *Antiques of an age exceeding one hundred years.*

2.2. Works of Art exempted from Import Duty

The government of India has exempted import duty on the following goods, under the Customs Tariff Act[94]:

a) *works of art created abroad, by Indian artists and sculptors, whether imported on the return of such artists or sculptors to India or imported by such artists or sculptors subsequent to their return to India*

b) *Works of art including statuary and pictures intended for public exhibition in a museum or art gallery*

c) *Works of art namely memorials of a public character intended to be put up in a public place including, materials used or to be used in their construction, whether worked or not*

d) *Antiquities intended for public exhibition in a museum or art gallery*

e) *Books, being antiques of an age exceeding one hundred years.*

[94] *GENERAL EXEMPTION 221 Exemption to Art Works, Antiques etc.: [Notifn. No. 26/2011-Cus., dt. 1.03.2011 as amended by 14/15, 43/17]; and GENERAL EXEMPTION 224 Exemption to Works of Art Created Abroad by Indian Artists and Sculptors: [Notifn. No. 32/2017-Cus., dt. 30.6.2017].*

The above listed works of art are exempted from import duty subject to the following conditions:

- The importers must run a museum or an art gallery which allows unrestricted access to the public and must have a certificate issued by the Ministry of Culture in the Government of India certifying as such
- Such importers must themselves be the purchaser or owner of such works of art or antiques
- The importer must submit an undertaking before the Commissioner of Customs that the goods so imported shall be used for public exhibition and shall not be sold or traded after importation and that in case of failure to comply with this condition, the importer shall be liable to pay, in respect of such quantity of the said goods as is proved to be not being so used for the specified purposes, an amount equal to the duty leviable on such quantity but for the exemption under this notification and
- Such antiquities must be registered with the Archaeological Survey of India within 90 days from the date of importation.

However, the exemption provided for works of art created abroad, by Indian artists and sculptors, as mentioned under point "a" above, is provided free of any conditions as mentioned above.

2.3. Works of Art not exempted from Import Duty

According to the Customs Tariff Act 1975, the customs duty applicable on import of "*paintings, decoratives and sculptures*" and other items under Code 97 is 10%. On top of this there is a Social Welfare Surcharge @ 10%. Further, such goods are also subject to GST at the rate of 12%. Thus, including cesses the import duty comes to around 25% of the value of the import.

In Re Safset Agencies Private Ltd (Astaguru.com) , an auction company dealing in goods including paintings, antique jewellery, antique watches, collectibles etc., raised the question whether all the goods so mentioned may be considered as second hand goods and would attract tax concessions provided for second hand goods under the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "CGST Rules, 2017").

Maharashtra Authority for Advanced Ruling held that, Paintings, Antique jewellery, Antique watches, etc., that are classifiable under Chapter 97 of the ITC (HS) shall attract GST of 12% as such goods cannot be considered as second hand or used products and hence concessions for second hand goods would not be applicable in this case. With regard to collectibles and memorabilia, the court stated that in the absence of specifics this question cannot answered, however, court provided some clarity with the example of a cricket bat signed by Sachin Tendulkar (world renowned cricket player from India) and stated that an ordinary cricket bat would cost substantially less than a bat that has been autographed by the cricket legend. Keeping that in mind in such cases it cannot be said that the goods are sold as second hand or used goods and therefore any concessions for second hand goods would not be applicable.

2.4. Export of *Antiquity and Art Treasure*

Section 3 of the Antiquities Act prohibits export of any work of art that falls under the definition of "*Antiquity*" or "*Art Treasure*" as defined by the said Act, by anyone other than the Central Government or any authority or agency authorized by the Central Government. Violation of this section will result in penal action of confiscating the material, imposition of monetary penalties and/or imprisonment of six months, which may be extended up to three years. There is no leeway or special powers with the Central Government to grant exclusive exemption for exports as this would amount to loss of a national treasure.

2.5. Loan of *Antiquity and Art Treasure*

Although export of Antiquity and Art Treasures is prohibited in India, however, the Government of India allows for the loaning of such works of Art. These loans are governed by "*The Guidelines for Lending Art/Antiquity to Institutions/Museums Abroad and Within the Country*", provided by the Ministry of Culture, India. These Guidelines provide the process of temporarily loaning art to foreign and national institutions and museums. The said Guidelines also specify that works of Art may be loaned to international institutions or museums for three years, which is extendable by two years on a request made by the borrowing institution. Further, with regard to exhibitions abroad, works of Art may be loaned for six months, which is extendable by an additional six months on a request made by the borrowing institution, after the Inter-Ministerial Committee for Exhibition, headed by the Culture Secretary has granted its approval for the same.

3. Conclusion

The Indian art market is an industry, which includes artisans, weavers, tribal and contemporary artists. Although majority of the work created by these artisans is for the domestic market, a significant part of it is also exported around the world. India has taken been very mindful of protecting the various traditional art forms and ensuring that it supports artisans in the remote corners of the country. Handicraft products exported from India to different countries of the world, has earned significant recognition in the international market.

However, the Antiquities Act combined with the Customs Act, are the only legislations that govern the free movement of works of Art within and outside India. While these legislations have had a positive impact on prevention of smuggling and fraudulent dealings in Indian antiquities and facilitated compulsory acquisition and preservation of objects perceived as important to the nation in public places, however parts of the Antiquities Act have become archaic and there is a dire need to take measures towards modifying it to adhere to contemporary realities.

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13 - ITALY - Zaglio Orizio e Associati

ZAGLIO ORIZIO
E ASSOCIATI

I. INTRODUCTION

Article 9 of the Italian Constitution provides for the Republic promoting the development of culture and of scientific and technical research and the safeguard of the natural landscape and the historical and artistic heritage of the Nation. In particular, pursuant to article 33, Italy guarantees the freedom of the arts and sciences, which may be freely taught and, as per article 21, anyone has the right to freely express their thoughts in speech, writing, or any other form of communication, provided however that publications, performances, and other exhibits offensive to public morality shall be prohibited. Moreover, The State has exclusive legislative powers in the protection of the environment, the ecosystem and cultural heritage, provided however that concurring legislative power vested in the Regions applies to the enhancement of cultural and environmental properties, including the promotion and organization of cultural activities (article 117 Italian Constitution).

In accordance with art. 10 of the Italian Heritage and Landscape Code ("HLC"), cultural property consists in immovable and movable things belonging to the State, the Regions, other territorial government bodies, as well as any other public body and institution including civilly recognized ecclesiastical bodies, and to private non-profit associations, which possess artistic, historical, archaeological or ethno- anthropological interest. Cultural property also includes the collections of museums, picture galleries, art galleries and other exhibition venues of the State, the Regions, other territorial Government bodies, as well as any other government body and institute; the archives and single documents of the State, the Regions, other territorial government bodies, as well as of any other government body and institute; the book collections of libraries of the State, Regions, other territorial government bodies, as well as any other government body and institute.

When the declaration of cultural interest provided for in article 13 HLC is made, cultural property may include as well immovable and movable things of artistic, historical, archaeological or ethno-anthropological interest, archives and single documents, belonging to private individuals, which are of particularly important historical interest; collections or series of objects, to whomsoever they may belong, which through tradition, renown and special environmental characteristics are as a whole of exceptional artistic or historical interest.

Without prejudice to the application of article 10 HLC, the following may be considered cultural property: frescoes, escutcheons, graffiti, plaques, inscriptions, tabernacles and other building ornaments, whether or not they be exhibited to public view (art. 50.1); artists' studios (art. 51); works of painting, sculpture, graphic art and any art created by a living author or which was not produced more than seventy years ago (art. 64-65); the works of contemporary architecture of particular artistic

value (art. 37); photographs, with their relative negatives and matrixes, samples of cinematographic works, audio-visual material or sequences of images in movement, the documentation of events, oral or verbal, produced by any means, more than twenty-five years ago (art. 65); means of transport which are more than seventy-five years old (art. 65-67.2); property and instruments of interest for the history of science and technology which are more than fifty years old (art. 65).

Pursuant to article 54 HLC, the following cultural properties – amongst others - belonging to the State cannot be alienated: buildings and areas of archaeological interest; buildings recognised as national monuments by measures having the force of law; the collections of museums, picture galleries, art galleries and libraries and archives; immovable and movable things which are the work of non-living artists and whose production goes back more than seventy years, until release from State ownership occurred.

Deeds which transfer, in whole or in part, by whatever legal right, property or the possession of cultural properties shall be reported to the Ministry (art. 59 HLC).

The Ministry or, in the case provided for in article 62, paragraph 3, the Region or another interested territorial government body, has a pre-emption right on cultural properties at the price set in the deed of transfer (art. 60 HLC).

The Ministry, the Regions and other territorial public bodies may allow the reproduction as well as the instrumental and temporary use of the cultural properties that are committed to their care, without prejudice to (i) the provisions relating to copyright and (ii) the prohibition to reproduce cultural goods which consists in producing casts, by contact, from the originals of sculptures and works in relief in general, of any material such goods are made of (art. 107 HLC).

The concession fees and the fees connected to the reproductions of cultural goods are determined by the authority to whose care the property is committed. However, no fee is payable for reproductions requested or performed by private individuals for personal use or for study purposes, or by public or private subjects for enhancement purposes, as long as they are implemented on a non-profit basis (art. 108 HLC).

The recent decree law 22 March 2021, nr. 41 ("D.L. Sostegni") added over one billion euros to the resources allocated so far to support a sector significantly hit by the pandemic. In particular, with over 200 million euros, an extraordinary allowance of 2,400 euros will be donated to all entertainment workers. In addition, 400 million euros will increase the existing emergency funds, according to this breakdown: 80 million euros will be allocated to support state museums, 200 million euros to the current-account fund to support cinema and entertainment and 120 million euro to the fund for the support of businesses and cultural institutions[95].

II. CONTRACTS

[95] https://www.beniculturali.it/comunicato/dl-sostegni-franceschini-oltre-un-miliardo-per-la-cultura-indennita-di-2400-euro-per-i-lavoratori-dello-spettacolo-e-400-milioni-per-teatri-cinema-musei-e-istituzioni-culturali-prorogata-sospensione-delle-autorizzazioni-per-i-dehor#allegati, last seen 21 April 2021.

A) Sale and Purchase of Works of Art - Authenticity and the artworks in the Italian case-law

"Gli uomini in universale giudicano più agli occhi che alle mani, perché tocca a vedere a ciascuno, a sentire a pochi" (Niccolò Machiavelli, Il Principe, 1532).

1. The issue of authenticity: a matter of perspective

Authenticity is the result of the correspondence between the author to whom an artwork is attributed to and the actual creator of the artwork and it might play a key role from different perspectives, depending on the art-market operator whose point of view is taken into consideration from time to time.

2. The Artist's perspective

Under Italian law the author of a work of art always "*retains the right to claim the authorship of the work and to oppose any deformation, mutilation or other modification, and any act to the detriment of the work itself, which may be detrimental to his honour or reputation*" (see Article 20 L. n. 633/1941, Law for the Protection of Copyright or CPL).

Article 142 CPL provides that: "*The author, in case of serious moral reasons, has the right to withdraw the work from the market, without prejudice to the obligation to indemnify those who have acquired the right to reproduce, disseminate, perform, represent or distribute the work*".

In certain precedents the courts deemed that the "*serious moral reasons*" - under the abovementioned Article 142 - should be construed as the potential detriment to honour or reputation under Article 20 CPL[96].

In other cases, the courts held that disavowal of an artwork falsely or wrongfully attributed to an artist may be claimed only provided that the false attribution results in the wrongful use of the artist's name under Articles 7 and 8 of the Italian Civil Code ("ICC")[97].

In practice, the choice whether to raise a claim for the non-authenticity of an artwork and its consequent disavowal on the grounds of Articles 20 and 142 CPL or on the basis of infringement of the right to use a name might vary considerably on account of the relevant scenario. If the artist is dead, the first remedy would be available exclusively for the heirs referred to by Article 23 CPL, while the second remedy could be resorted to by the wider category of subjects provided under Article 8 ICC.

The case-law does not appear to be settled yet on this matter, likely on account of the difficulty in finding a reasonable balance between the artist's right not to be associated to non-authentic artworks and the general need to safeguard the stability of the art-market. The issue is not purely theoretical, since Italian and international case law is studded with precedents where artists have arbitrarily claimed non-authenticity of artworks which they had actually created[98].

[96] See Tribunale di Milano,18/01/2006; Tribunale di Milano, 17/10/2007.
[97] See Corte d'Appello di Milano, 11/12/2002.
[98] See Corte di Cassazione sent. n. 2765/1982 on the famous De Chirico case, which constitutes a landmark in the area of Italian extra-contractual liability. For more recent examples in a comparative perspective see "G. CALABI et Al. "*Le Opere d'Arte e le Collezioni*", Milano, 2020 pag. 48".

3. The seller's perspective

Authenticity is a major concern for art dealers and art traders too.

Article 64 HLC states that: "*Whoever sales to the public, exhibits for commercial purposes or serves as an intermediary for the sale of works of painting, sculpture, graphics (…), or in any case habitually sells such works or objects, has the obligation to deliver to the purchaser the documentation demonstrating their authenticity or at least the probable attribution and provenance of such works; or, failing that, to issue (…) a declaration containing all available information on the authenticity or probable attribution and provenance (…)*".

However, Article 64 does not provide for any special remedy the buyer might resort to in case of art trader's failure to comply with the information requirements on authenticity, with the consequence that, in case of breach of Article 64 HLC, the buyer might sue the seller for compensation of damages deriving from the execution of a contract which he would not have entered into if it had known the circumstances concealed by the seller in breach of the obligation to act in good faith in the course of the negotiation, whereas the art trader bears a duty to make any reasonable effort to provide the buyer with all available information on the authenticity of the artwork.

This information might be gained from different sources such as the author or the author's heirs issuing a declaration of authenticity, or an archive, trust or foundation issuing a certification of authenticity (which, however, does not provide for any reliability other than the reputation of the expert providing the opinion).

4. The buyer's perspective

When dealing with the issue of authenticity, the buyer's perspective is clearly the most critical as the commercial risk of purchasing a non-authentic artwork ultimately lies upon the buyer.

It is then paramount to investigate what remedies the buyer is entitled to resort to in case the authenticity of an artwork becomes disputed after the execution of the purchase contract.

In this respect, the Court of Appeal of Milan[99] establishes a fundamental precedent on the right to annul a contract for the purchase of an artwork on the grounds of an error of both parties on its authenticity (see Article 1429 ICC).

The background of the case might be summarized as follows:

- in 2002 the claimant purchased from the resistant the painting named "Movimento di Danza" by G.S., 1956 - 1957 for Euro 240.000 by relying on author's daughters written declarations of authenticity of the painting provided by the resistant;

- in 2015 the claimant entered into a contract for the auctioning of the painting and the auction house raised concerns on authenticity of the painting based on the opinion the worldwide most influential expert on G.S. and refused to promote the sale of painting.

99 See Corte d'Appello di Milano n. 3260, 11/12/2020.

- in 2020 the painting was the object of the preventive confiscation order issued by the public prosecutor's office (Procura della Repubblica di Milano) in the context of an investigation on the crime of counterfeiting of a work of art (under art. 178 Legislative Decree n. 42/2004).

In the first grade the Tribunal of Milan held the claim inadmissible arguing that the claimant should have requested the termination for contract because the seller delivered an *aliud pro alio* rather than acting for the annulment of the contract. In particular, Article 1497 ICC entitles the buyer to terminate the contract for breach of the seller in case the good purchased by the former lacks of the promised qualities (it is the situation described as *aliud pro alio*, where the good actually delivered by the seller presents features completely different from those agreed upon by the parties). The purchaser might then request the termination of the contract pursuant to Articles 1497 and 1218 ICC - claiming for the subsequent refund of any amount paid to the seller[100] – by proving the existence of a contract (title for the action) and deducing the lack of a fundamental quality of the artwork (i.e. the authenticity). The proof of the authenticity of the artwork therefore rests upon the seller, which would be deemed liable regardless of his awareness of the lack of authenticity of the artwork.

The Court of Appeal has overturned the judgment of the Tribunal by ruling that if the buyer is the owner of a non-authentic painting which authenticity has been warranted by the seller, he will be entitled to bring alternative actions, regarded as not incompatible. Specifically, he may resort either to the remedy of termination for lack of essential qualities or to the annulment for error on the qualities of the good in accordance with Article 1429 ICC.

B) Social Media Influencers for art and works of visual art in the public domain[101]

Italy has been recently experiencing the engagement of social media influencer to support and promote cultural heritage.
Among the many initiatives carried out[102], we recall the collaborations between the Uffizi Galleries in Florence and the influencer Chiara Ferragni[103], as well as the one between the Vatican Museums and the Estetista Cinica[104].

From a legal point of view, it is of interest to investigate whether and to what extent the promotion of cultural heritage may also contemplate the use and reproduction of cultural assets on social media channels, which may finally lead to a viral dissemination of those contents by followers. Hence, where the reproduction of museum art works on social networks is not authorized on the

[100] In accordance to Article 2033 of the Italian Civil Code.

[101] This section contains an excerpt of the article "*Social Media Influencers for art and works of visual art in the public domain*" by Matteo Piccinali, originally published in the Art Law Magazine, Volume 13, Fondation pour le Droit de l'Art.

[102] Examples of initiatives involving influencers and celebrities in the sector of art:

- https://firenze.repubblica.it/cronaca/2020/06/12/news/gli_uffizi_da_ridere_cosi_i_capolavori_con_martina_socrate-259053110/;

- https://artslife.com/2020/07/27/mahmood-bene-la-ferragni-e-lui-gira-un-video-nel-suo-museo-egizio/;

- https://www.nytimes.com/2018/06/17/arts/design/louvre-jay-z-beyonce-video.html.

[103] https://www.insidemarketing.it/galleria-degli-uffizi-di-firenze-effetto-chiara-ferragni/

[104] https://www.corriere.it/cronache/20_ottobre_22/estetista-cinica-pubblicizza-cappella-sistina-scoppia-polemica-lei-un-estetista-non-puo-andare-musei-vaticani-f469554c-147c-11eb-945d-f4469a203703.shtml;

basis of *ad hoc* contracts with the institutions, on what legal basis is the reproduction of the works based?

Art. 70, section 1-bis, Law for the Protection of Copyright or CPL, states that the free publication through the internet, of images music and figurative art[105] is allowed provided that said publication is (i) free of charge, (ii) of low resolution or degraded, (iii) for educational or scientific use, (iv) the reproduction contains the reference to the title of the work and the name of the author, and (v) such use is not for profit.

Further to the principles on copyright, in the Italian legal system the works considered cultural properties (that is, having more than seventy years and of cultural interest that are delivered in museums or other places of culture) can be reproduced within the limits of what is established by arts. 107 and 108 HLC (see above)[106]. At any rate, the reproduction of cultural properties - if carried out on a non-profit basis, for purposes of study, research, free expression of thought or creative expression, promotion of knowledge of cultural heritage – are always allowed (art. 108, section 3-bis, HLC) provided that said reproduction is implemented (i) in compliance with the copyright legislation and (ii) in ways that do not involve any physical contact with the asset, (iii) nor the exposure of the same to light sources, (iv) nor, within the cultural institutes, with the use of stands or tripods.

According to art. 14 Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market ("Directive"), upon expiry of the term of protection of a work of visual arts, the material deriving from an act of reproduction of that work is not subject to copyright or related rights, unless such reproduction constitutes by itself an intellectual creation.
The above-mentioned provision introduces the possibility of disseminating, sharing (including online) and reusing (including for commercial purposes) non-original copies of works of art that have become public domain.
However, the current Italian legislation on the reproduction of public domain works in Italy (e.g. arts. 87-88 CPL[107] and art. 108 HLC) is more restrictive than what is required by the relevant EU Law. Italy has recently implemented the Directive with Law n.53/2021[108] but missed to include the transposition of art. 14 Directive, with the consequence that those norms providing for restriction of images reproducing cultural heritage in the public domain are not expected – at least now - to be reformed in a way that is consistent with art. 14 Directive.

[105] Corte d'Appello di Roma, 8 febbraio 1993, Dir. Aut. 1994, 440: "*The photographic reproduction of a painting cannot be considered attracted to the orbit of free uses governed by art. 70 of the law on copyright, which referring to passages or parts of a work can be considered effective only for partial reproductions (the so-called particular) and not for those that reproduce the entire figurative work, nor appear recurrent in the species (catalogs of exhibitions) the precise critical-didactic purpose required by the aforementioned provision and the condition of non-competition in the economic use of the work.*"; Corte di Cassazione, 19 dicembre 1996, n. 11343, in Gius. Civ. I, 1997, 1606: "*The publication of a catalog containing the photographic reproduction of works of art included in an exhibition is suitable for establishing Siae's claim to collect the reproduction rights due to the authors, as art. 13 l. n. 633 of 1941 not only prohibits the multiplication of copies physically identical to the original, but protects the economic use that the author can carry out by means of any other type of multiplication of the work capable of entering the reproduction market; nor the indicated reproduction, when it is integral and not limited to details of the works themselves, whatever the scale adopted in proportion to the originals, integrates some of the hypotheses of free use, provided, by way of exception to the ordinary regime of exclusivity , from art. 70 of the aforementioned law.*"
[106] D.L. 31 May 2014, nr. 83, converted by Law 29 July 2014, nr. 106; Law 4 August 2017, nr. 124.
[107] Art. 87.1 CPL: The images of persons, or of aspects, elements or events of natural or social life, obtained by photographic or analogous processes, including reproductions of works of figurative art and stills of cinematographic film, shall be considered photographs for the purposes of this Chapter (V);
Art. 88.1 CPL: The exclusive right of reproduction, dissemination and marketing of a photograph shall belong to the photographer […] and without prejudice to any copyright in works of figurative art reproduced in photographs.
[108] https://www.gazzettaufficiale.it/eli/id/2021/04/23/21G00063/sg.

III. COPYRIGHT

A) Italian Law for the Protection of Copyright

Pursuant to articles 1 and 2 of the Law No. 633 of April 22, 1941 (Law for the Protection of Copyright or CPL), works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theatre or cinematography, whatever their mode or form of expression, shall be protected.

In particular, protection shall extend to literary works, musical works and compositions, choreographic works, works of sculpture, painting, drawing, engraving and similar figurative arts, including scenic art, architectural plans and works, works of cinematographic art, works of photographic art, computer programs, databases meant as collections of works, works of industrial designs which themselves have a creative and artistic value.

An author shall have the exclusive right:

- to publish his work and he shall, in addition, have the exclusive right to the economic utilization of the work in any form or manner (art. 12 CPL);
- of reproduction which concerns the multiplication of copies of the work in all or in part, either direct or indirect, temporary or permanent, by any means or in any form, (art. 13 CPL);
- of transcription which concerns the use of means suitable for transforming an oral work into a written work or into a work reproduced (art. 14 CPL);
- of public performance or recitation which concerns the performance or recitation however carried out, and for payment or not, of a musical, dramatic or cinematographic work (art. 15 CPL);
- of communication to the public of the work by wire or wireless means which concerns the use of any means of diffusion at a distance, such as telegraphy, telephony, radio or television broadcasting, and other like means including communication to the public by satellite and cable retransmission (art. 16 CPL);
- of distribution which concerns the right to market, place in circulation or make available to the public, by whatever means and for whatever purpose a work (art. 17 CPL);
- of translation which concerns all forms of modification, adaptation and transformation of a work (art. 18 CPL).

The exploitation rights of a work shall subsist for the lifetime of the author and until the end of the seventieth calendar year after his death (art. 25 CPL). Even after the transfer of such rights, the author shall retain the right to claim authorship of his work and to object to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the work, which would be prejudicial to his honour or reputation. However, in the case of works of architecture, the author may not oppose modifications deemed necessary in the course of construction (art. 20 CPL).

The author of an anonymous or pseudonymous work shall at all times have the right to reveal his identity and to have his position as author recognized by judicial procedure (art. 21 CPL).

Whenever serious moral reasons arise, the author shall be entitled to withdraw his work from the market, subject to liability to compensate any persons who have acquired rights to reproduce, disseminate, perform or sell such work. This right is personal and is not transferable (art. 142 CPL).

Authors of works of art and manuscripts shall be entitled to compensation on the price of any sale subsequent to the first transfer of such works by the author (resale right – art. 144 CPL). In this regard, a subsequent sale is understood to be any sale that involves the intervention, as sellers, buyers or intermediaries, of subjects that operate professionally in the art market, such as auction houses, art galleries and, in general, any dealer in works of art. The resale right does not apply to sales if the price of the sale is less than 3,000.00 euros (art. 150 CPL), as well as when the seller has purchased the work directly from the author less than three years prior to such sales and the sale price does not exceed 10,000.00 euros. The sale is presumed to have taken place more than three years after the purchase, unless proof to the contrary is provided by the seller.

For the purposes of article 144, works means the originals of works of the figurative arts, included in article 2, such as paintings, "collages", paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glass works and photographs, as well as the originals of manuscripts, provided that they are creations made by the author himself or specimens considered as works of art and original (art. 145 CPL). Copies of works of the visual arts produced in limited numbers by the author himself or under his authority shall be considered originals provided they are numbered, signed, or otherwise duly authorized by the author.

The resale right is also granted to authors and their assignees from countries not belonging to the European Union, only if the legislation of such countries provides for the same right in favor of authors who are Italian citizens and their assignees (art. 146 CPL). Authors from countries not belonging to the European Union who do not hold Italian citizenship, but who habitually reside in Italy, are treated in the same way as Italian citizens in this section.

The resale right cannot be alienated or renounced, not even in advance, and lasts for the whole life of the author and for seventy years after his death. After the death of the author, the resale right belongs to the heirs, according to the rules of the civil code; in the absence of successors up to the sixth degree, the right is transferred to the national welfare and assistance Institute for painters and sculptors, musicians, writers and dramatic authors (ENAP) for its own institutional purposes (artt. 147-149 CPL).

B) Street Art

Street Art – generally, art that is produced on private property not owned by the artist and with or without permission and often involving artists' application of their work to the sides of buildings owned by others - is relevant in the Italian legal system under various profiles.

The Italian Constitution recognizes the right to freedom of expression of thought in art. 21, as well as the principle of freedom of art in art. 33. At the same time, the property right is protected by art. 42. In the context of the conflict between the right of private property, on the one hand, and freedom of expression, on the other, the principle of protection of the right of the owner of the building on which the work is created prevails over the right of the artist.

In particular, the street artwork that has been authorized by the holder of the building belongs to the latter by virtue of the accession principle provided for by art. 936 ICC, unless a different agreement is envisaged between the parties.

Regarding copyright, art. 1 CPL states that "*Works of the mind having a creative character […], whatever their mode or form of expression, shall be protected in accordance with this Law*". Street artworks are legally framed as figurative creative works; the illegality of street art which does not pertain to the content of the work but rather to its method of expression and concrete implementation, does not prevent the recognition of copyright.

In the case of street artwork that is the subject of an employment contract or work performance, the employer or the client who owns the building or other support on which the artwork is applied may also be the owner of the artwork itself. In any case, the use of the work for commercial purposes by said owner must be expressly authorized by the artist who - as the owner of the copyright's moral rights relating to the authorship and integrity of the work - may oppose to any deformation, mutilation or other modification to the detriment of the work and, hence, to the artist's honor or reputation.

In the case of street artwork carried out without the authorization of the support owner, the same may, pursuant to art. 936 ICC, decide to keep the work - paying the artist the value of the materials and the price of the labor or the increase in value caused to the wall - or ask for its removal within six months from when he was informed of the application of the artwork to the building or support.

The street artist's behaviour may also be relevant under criminal law, for example as a crime of damage to property (Article 635 of the Italian Criminal Code), or of defacing and soiling of other people's things (Article 639 of the Italian Criminal Code).

The Italian Court of Cassation has decided that if one draws with spray cans on windows or walls without permission, the offense of defacing and soiling of other people's things can qualify pursuant to Article 639 of the Criminal Code. This conduct, in fact, having non-permanent harmful effects with the possibility of restoring the thing in its original aspect and value without particular difficulty, cannot be part of any of the damage to the property cases provided for by art. 635 of the Criminal Code[109].

More recently, the Italian Court of Cassation confirmed the acquittal of the accused artist from the crime referred to in art. 639 of the Criminal Code, for having smeared a wall placed on the public street with various spray cans, since for the judges in the merits, the sanctioned behaviour - although abstractly configurable as a crime - was not punishable due to its particular tenuousness, deriving from the circumstance that the wall in question had already been defaced by unknown persons and therefore the intervention of the accused artist did not cause any damage[110].

If alongside the creative features, street artworks also have a cultural interest, they will also be protected by the Code of Cultural Heritage and Landscape.

D) Appropriation Art in Italy

[109] Criminal Cassation section II, 11/12/2002, n.12973, in Studium Juris 2003, 1117.
[110] Criminal Cassation section II, 05/04/2016, n.16371, in Diritto e Giustizia 2016, 21 April.

Artists historically have borrowed and copied existing expression without objection or conflict.[111]

An example of how artists borrow from each other is most evident in an artistic movement called appropriation art, whereas appropriation is defined as taking "possession of another's imagery (or sounds), often without permission, reusing it in a context which differs from its original context, most often in order to examine issues concerning originality or to reveal meaning not previously seen in the original."[112].

From a legal point of view, the phenomenon of appropriation art takes on importance in relation to the legislation on copyright, according to which the right to modification and transformation of a work belongs exclusively to its author and can only be authorized by the latter (art. 18 CPL). The lawfulness of the creative work derived and created by another artist is therefore made to depend on the authorization of the author of the original creative work for the modifying use of the latter.[113]

It is often of the outmost importance to investigate whether the act of appropriation stands in the realm of infringement, plagiarism or parody of one's artwork.

In the Italian legal experience, counterfeiting consists in the substantial reproduction of the original work, with differences of mere detail that are the result not of a creative contribution but, rather, of the masking of the counterfeiting itself. In particular, counterfeiting of the work will qualify whenever the violation consists in the unlawful exploitation of the author's economic right[114].

Plagiarism, on the other hand, is achieved through the total or partial reproduction (appropriation) of the creative elements of someone else's work, so as to reproduce in a parasitic and slavish way what is conceived and expressed by others in a specific and identifiable form.

Unlike counterfeiting, in which the patrimonial rights of the artist are infringed, in the case of plagiarism there is a violation of the moral right of paternity of the work (the plagiarist claims to be the author of a work that is actually attributable to another subject)[115].

On the subject of plagiarism, the Italian Court of Cassation has recently expressed itself in the following terms[116]:

"*In the matter of ascertaining the plagiarism of figurative works of art, including modern ones, the judge must proceed with the following investigations: a) the original work must have the characteristics of creative originality, even if minimal, provided that the protection is not recognized to the idea itself, but to its expressive form, through which the content of the intellectual product is expressed; b) the judgment is based on an overall and synthetic, non-analytical evaluation of the works in comparison, focused on the comparative examination of the essential elements of the works themselves, through the verification of any discrepancies, having to evaluate the overall result, or the effect unitary; c) plagiarism should be excluded when the two works, while taking their cue from the same inspiring idea, differ in the essential elements that characterize their expressive form; d) on the other hand, plagiarism exists when, from the comparison, it emerges that there is no semantic gap, capable of giving the second a different and proper artistic meaning, as it has borrowed from the first the so-called individualizing or creative nucleus, tracing the creative*

[111] Jean Lipman & Richard Marshall, Art about Art, 6-7(1978); Arewa, Olufunmilayo, Freedom to Copy: Copyright, Creation and Context (February 19, 2007). Northwestern Public Law Research Paper No. 07-06, UC Davis Law Review, Vol. 41, No. 2, 2007, Available at SSRN: https://ssrn.com/abstract=964054.

[112] Rachel Isabelle Butt, Appropriation Art and Fair Use, Ohio State Journal on Dispute Resolution, Vol. 25:4, 2010, pag. 1055.

[113] Donati, A., Quando l'artista si appropria dell'opera altrui, in Rivista di Diritto Industriale, 1, 2018, 86.

[114] Cassano, G., Personaggi di fantasia e tutela autoriale: i limiti all'operatività del plagio evolutivo, in Il Diritto Industriale 6/2019.

[115] Cassano, op. cit.

[116] Cassazione Civile Sezione I, 26 gennaio 2018, n. 2039, in Foro it. 2018, 3, I, 855.

elements, since original elements of mere detail are not sufficient compared to those of the original".

In this case, the Supreme Court confirmed the judgment on the merits which, in the light of these principles and in accordance with a technical expert, had ascertained that some paintings, marketed through teleshopping, constituted plagiarism of the works of Emilio Vedova, presenting the same technique, as well as the identity of the position of the levels, of the chromatic masses, of the proportions, while the minimal differences were not attributable to a creative re-elaboration, but to commercial needs, for example the small size, and simplification.

Since appropriation art represents an intentional and deliberate creative imitation of someone else's work (which, starting from the original work, intends to go further, to achieve further objectives and expressions), the analysis above shows that the appropriation art does not constitute hypotheses of counterfeiting or plagiarism, given that in both cases, albeit in different ways, it is assumed that the imitation of the work of others is not creative in itself but is rather carried out with concealment and deception.

On the subject of parody, art. 5.3, par. k, of Directive 29/2001 / EC on the harmonization of certain aspects of copyright and related rights in the information society, granted to Member States the right to provide for exceptions or limitations to the rights of reproduction and communication to the public when the use is made for the purpose of caricature, parody or pastiche[117]. Nevertheless, a specific discipline on parody in the Italian legal system is absent.

Despite this, the parody element into appropriation art is relevant, since in appropriation art, as well as in parody, the reference to the original artistic creation (its starting point) is actually intentional and explicit. In this regard, we recall two interesting decisions of the Italian courts on the matter.

The first decision - passed by the Court of Milan[118] - affirmed that the appropriation work of art is original, and therefore cannot be qualified as derivative, when the reinterpretation of the pre-existing image has involved a total change of the meaning of the appropriation work of art, transforming the original work not only in its features, dimensions, materials and shapes, but above all by modifying the material and conceptual sense of its meaning. In this sense, the Court of Milan specified that "*The transformation therefore exists, both in a material and conceptual sense, and the result is a creative work, endowed with its own autonomous artistic value*.", hence going beyond the concept of a simple parody and focusing attention on the actual transformation of the original work through the creation of a new form of expression[119].

The second decision – passed by the Court of Venezia[120] - clearly defined the connotative characteristics and requirements of the parody work and stated as follows: "*The appropriation work of art that, by making use of detournement, scandal and mockery, sends out a clearly perceptible creative, original and autonomous message, cannot be reduced to a mere counterfeiting of the appropriated work, but must be considered lawful by virtue of the exemption of the parody, according to what is argued by the European Court of Justice, decision no. 201 of 3*

[117] Member States may provide for exceptions or limitations to the rights provided for in Articles 2 (Reproduction right) and 3 (Right of communication to the public of works and right of making available to the public other subject-matter) in the following cases: […]; k) use for the purpose of caricature, parody or pastiche.

[118] Tribunale di Milano 13 luglio 2011, Rivista di Diritto Industriale 2011, 6 (Baldessari v. Giacometti Foundation).

[119] Spedicato, G., Opere dell'arte appropriativa e diritti d'autore, in Giur. comm., fasc.1, 2013, pag. 118.

[120] Tribunale Sez. spec. Impresa - Venezia, 7 novembre 2015, Rivista di Diritto Industriale 2018, 1, II, 81.

September 2014 (C-201/2013), since the parody itself is recognized as a constitutionally guaranteed right in the domestic legal system by articles 21 and 33 of the Constitution".

The Court of Venezia has specified that the work of the appropriation artist does not amount to an appropriation of the conceptual content of the original work, but represents it solely as an image, so that the appropriation artist uses it as a tool to give it a creative message that is in itself original in terms of sarcastic criticism. In this sense, having recalled the ruling no. C-201/2013 of the Court of Justice, the Court of Venezia concluded for the lawfulness of the appropriation artwork as a manifestation of freedom of expression and creation pursuant to articles 21 and 33 of the Italian Constitution.

In light of the Italian jurisprudence analyzed here, we can therefore conclude that in our legal system:

- if the author does not take a critical, parody or sarcastic position towards the original work or artist, the appropriative behaviour must be interpreted and evaluated in the light of the copyright legislation: the lawfulness of the work resulting from the appropriation will be based on the assumption that the original work constitutes a simple tool and material for the production of a new expressive creation;

- if the author takes a parody or sarcastic position towards the original work or artist, the lawfulness of the work resulting from the appropriation will be based on those constitutional principles protecting freedom of expression and creation.

IV. INTERNATIONAL TRADE

The definitive exit of movable cultural property indicated in article 10, paragraphs 1, 2 and 3 from within the territory of the Republic is forbidden (article 65 HLC).

The exit of the following properties is also forbidden:

a) movable things belonging to the subjects indicated in article 10, paragraph 1, which are the work of no longer living artists and whose production goes back more than seventy years, until the verification provided for by article 12 is carried out.

b) properties, to whomsoever they may belong, which are included in the categories indicated in article 10, paragraph 3, and which the Ministry, after consultation with the competent advisory body, has preventively identified and for which it has excluded exit, for defined periods of time, because it would be harmful for the cultural heritage in relation to the objective characteristics and the provenance of the aforesaid properties and to the milieu to which they belong.

Apart from the cases provided for in paragraphs 1 and 2, the definitive exit of the following from the territory of the Republic are subject to authorisation according to the procedures established in the law: things, to whomsoever they may belong, which present cultural interest and which are the work of no longer living artists and whose production goes back more than seventy years; archives and single documents, belonging to private individuals, which present cultural interest; properties included in the categories indicated in article 11, paragraph 1, letters *f), g)* and *h),* to whomsoever they may belong.

It is further stated that whosoever wishes to definitively remove the things and properties indicated in article 65, paragraph 3, HLC (i.e. things, to whomsoever they may belong, which present cultural interest and which are the work of no longer living artists and whose production goes back more than seventy years; archives and single documents, belonging to private individuals, which present cultural interest; properties included in the categories indicated in article 11, paragraph 1, letters *f), g)* and *h),* to whomsoever they may belong) from the territory of the Republic, must make a declaration to that effect and present them to the competent export office, indicating at the same time the market value for each item, in order to obtain the certificate of free circulation.

The control over international traffic is aimed at preserving the integrity of the cultural heritage in all its components, as identified on the basis of this code and the previous regulations (article 64 bis HLC).

The temporary exit from the territory of the Republic of the things and cultural properties indicated in article 65, paragraphs 1, 2, letter *a)*, and paragraph 3, may be authorised for art events, exhibits or expositions of great cultural interest, on condition that the integrity and safety of the aforesaid things are ensured (article 66 HLC).

The following may not, in any case, be removed from national territory: properties which are susceptible to damage during transportation or in unfavourable environmental conditions; properties which constitute the principal collection of a determined and integral section of a museum, picture gallery, art gallery, archive or library or of an artistic or bibliographical collection.

For cultural properties illegally taken out of their territory, European Union Member States may bring an action for restitution before the ordinary courts of law, in accordance with article 75 (article 77 HLC). The action shall be brought before the court which has jurisdiction over the area in which the property is located.

Pursuant to article 78 HLC, the action for restitution shall be brought within the peremptory term of one year, starting from the day when the requesting State knew that the property illegally taken out of its national territory is to be found in a determined place and identified the possessor or holder of the property by whatever legal right. The action for restitution is limited in any case within the term of thirty years from the day of the illegal exit of the property from the territory of the claimant State. There is no time limit for action for restitution for the properties belonging to public museum collections, archives, conservation funds of libraries and ecclesiastical institutions or other religious institutions.

A databank of stolen cultural property is established within the Ministry pursuant to article 85 HLC.

V. NEW TECHNOLOGIES

A) Blockchain and Smart Contracts for Museums Patronage[121]

Initiatives and forms of fundraising should be evaluated in order to facilitate the support of the national artistic and cultural system through the systematic participation of the new Italian

[121] This section contains an excerpt of the article "*Verso un nuovo tecno-mecenatismo per i musei*" by Matteo Piccinali, originally published on the website "collezionedatiffany.com" on June 22, 2021, https://www.collezionedatiffany.com/musei-nuove-tecnologie-mecenatismo-2021/.

generations, while increasing the role (and social responsibility) of each individual in participating in the support of a heritage that, at the same time, is a fundamental economic resource for the country.

From this point of view, we wonder whether an innovative technological system based on cryptocurrency, blockchain and smart contracts, could provide a useful working tool to facilitate and, indeed, to stimulate the widespread participation of new generations in cultural and artistic patronage, configuring donors as real investors for the support and enhancement of the national artistic and cultural heritage.

An interesting study recently conducted by Prof. Amy Whitaker[122] identifies blockchain technology as an important tool to support the art sector.

In our case, we could hypothesize that the technological convergence between cryptocurrencies, blockchain and smart contracts operates as follows:

1. donations (directly made to an institution or built into the price of museums tickets, merchandising or membership subscriptions[123]) could be carried out through the giving of cash or cryptocurrencies (in this case to support the use of cryptocurrencies on official and legal channels, and by the new generation of consumers that will be more familiar with these means of payment)[124];
2. in exchange for the donations, donors would receive tokens that do not confer a fractional ownership right but rather, given the non-disposable nature of Italy's artistic and cultural heritage, a bundle of rights, which might include the following:

- the right to be recognized as a patron of an artwork, an art collection, an asset or a universality of assets that are part of the Italian artistic and cultural heritage (where the artwork or art collection are represented by a finite and limited number of tokens, so as to secure the element of digital scarcity combined with the asset itself, from which will consequently derive the economic interest in the exchange of the same in the relevant market);
- the right to dispose of the tokens as a tradeable good against payment of a consideration through cryptocurrency (with determination of a price regulated by the market), so as to allow the donor to be able, for example, to develop a digital collection of tokens related to a specific work of art (leading to the construction of a virtual art collection, leveraging the gaming and social interaction experience of users, thus proposing an ecosystem that the cybergeneration can easily relate to with greater stimulus, similar to what happens for other models such as, for example, the Sorare trading card market operating on blockchain technology based on Ethereum[125]). A portion of the economic value connected to the trading of tokens would then be automatically re-directed as financial support to the benefit of the national museum system;

[122] Whitaker, A., Art and Blockchain: A Primer, History, and Taxonomy of Blockchain Use Cases in the Arts, Artivate, Summer 2019, Vol. 8, No. 2 (Summer 2019), pp. 21-46.

[123] Drubay D., How Blockchain Can Impact Museums? September 25, 2018, https://dianedrubay.medium.com/how-blockchain-can-impact-museums-70f23a598697, last seen April 24, 2021.

[124] There are several examples of donations through the use of cryptocurrencies, which are also exploited for other purposes related to the world of art and museums. Among others, see (last seen April 24, 2021):

- https://www.coindesk.com/bitcoin-community-funds-italian-red-cross-medical-facility-to-combat-coronavirus;
- https://www.greenpeace.org/usa/greenpeace-now-accepting-bitcoin-donations/;
- https://www.savethechildren.org/us/ways-to-help/ways-to-give/ways-to-help/cryptocurrency-donation;
- https://www.artnews.com/art-news/market/mak-vienna-becomes-first-museum-to-acquire-art-using-bitcoin-a-harm-van-den-dorpel-3995/;
- https://cuseum.com/blog/how-cryptocurrency-could-transform-the-museum;
- https://winstonchurchill.org/donate/cryptocurrency/.

[125] https://sorare.com.

- the right to tax relief programs, such as the one identified as "Art Bonus" under Decree Law 31.5.2014, n. 83;
- the right to membership benefits: for example, obtaining free tickets for entry to the museum directly benefiting from the original donation; access to discounts and promotions on tickets, merchandising and ancillary services of the provincial, regional or national museum network; obtaining and accumulating "loyalty" points that grant discounts and other benefits at tourist facilities and services at the regional or national level (hotels, restaurants, means of transport, other cultural facilities, access to sea/mountain/lake services, etc.), so as to incentivize and promote at the same time the tourist system and the national territory;

3. the model above would be managed by resorting to blockchain and smart contracts:

- the blockchain would go on to record donations, issue tokens incorporating the bundle of rights listed above, as well as record the transfers of ownership of those tokens that are made the subject of economic transactions;
- the smart contracts would instead be the IT tool to perform automatically, if certain conditions are met, the various effects related to the behaviour described above such as, for example: the effects of the circulation of tokens, the reversal of a percentage of the value of the economic transaction involving the tokens to be conveyed to a "culture fund", the granting of loyalty points to the donor and the redemption mechanisms of said points accumulated once they are spent for touristic goods and services, etc.

The operating model described above gives rise to a number of interpretative questions: for example, it seems appropriate to investigate the nature of the tokens "issued" as a result of the donations, as well as the bundle of rights "incorporated" in them. With the intent of soliciting analysis on this point, we just wish to observe that, in the proposed model, the purchase of the tokens by the donor would not be suitable for attributing to the same party the right of ownership (even if fractioned) of the work of art, given the unavailable nature of the national artistic and cultural heritage. It must therefore be excluded that the rights "incorporated" in the token can be assimilated to the right of property, being the same rather qualified as a credit right.

B) E-commerce for Art

The growth of online sales was the most significant development in the art market in 2020. Despite the contraction of sales overall, the component of online sales of art and antiques reached a record high of $12.4 billion, doubling in value from 2019. The share accounted for by online sales also expanded from 9% of sales by value in 2019 to 25% in 2020[126].

In particular, as businesses, events, and travel were closed or restricted in 2020, the pivot to online communication, exhibitions, and sales became critical for many businesses' survival. Traditional galleries and auction companies significantly ramped up digital initiatives, and like other industries built on travel, events, and personal contact, began to engage in a more mainstream way with online technologies that offered a means to maintain liquidity[127].

[126] The Art Market 2021, An Art Basel & UBS Report, https://www.artbasel.com/about/initiatives/the-art-market?gclid=Cj0KCQjw-LOEBhDCARIsABrC0Tm80H7JeR-r83VI2tVAAnpvI26B2FFbVBbe4SDjsuBRI4bcGU56P0kaAqSXEALw_wcB; Online sales include sales carried out via a dealer's website (including dealer's social media channels, OVR or email), via a third-party platform or a fair's online viewing rooms.

[127] *Ibidem*.

The most commonly used channels for purchasing art online in 2020 have been through: online auctions, gallery OVRs, art fair OVRs and social media. In particular, Instagram has been the most widely used social media channel to target an artwork to be purchased directly or through a link on Instagram to an artist, gallery, or other seller. On Instagram particularly, but also across other online platforms, there has been a generational component to the prevalence of use for purchasing: while collectors have been somewhat more aligned regarding the use of online auctions, millennials had significantly wider use of OVRs (both for fairs and galleries) and social media channels. This once again reinforces the findings that younger generations of collectors are more active online.

In this context, regulations aimed at ensuring adequate protection for consumers purchasing goods and services online are more important than ever. It is therefore not surprising that EU legislation on the topic is rapidly evolving and, indeed, EU institutions have just adopted a new package of rules, including a directive on contracts for the supply of digital content and services, as well as a directive on contracts for the sale of all kind of goods, including goods with a digital component.

From a national perspective, the legal framework on e-commerce contracts is mainly contained in the Legislative Decree nr. 206/2005, i.e., the Italian Consumer Code ("CC"). In general, the CC aims at protecting the weak party of the contractual relationship (the consumer) against professionals within the sale of goods and services.

It is important to note that the provisions of the CC also apply to "distance contracts", which refers to any contract concerning goods or services concluded between a professional and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded (art. 50 CC).

Article 51 par. 1 of the CC states that the professional has a pre-contractual duty of information towards the consumer.

In cases in which a distance contract to be concluded places the consumer under an obligation to pay, the supplier shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the following information: *(i)* the main characteristics of the goods or services […]; *(ii)* the identity of the trader; *(iii)* the total price of the goods or services inclusive of taxes, all additional freight, delivery or postal charges and any other costs; *(iv)* the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; *(v)* where applicable, the minimum duration of the consumer's obligations under the contract.

Moreover, article 51.4 of the CC indicates the minimum pre-contractual information that the supplier shall provide in any case, even if the contract is concluded through a mean of distance communication which allows limited space or time to display the information.

The supplier shall also provide the consumer with the confirmation of the contract concluded, on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the performance of the service begins.

Furthermore, article 52 of the CC states that the consumer who has executed a distance contract or an e-commerce contract is entitled to unilaterally withdraw from it within 14 days from: a) in case of

service contracts, the day of the conclusion of the contract; b) in case of sales contracts, the day on which the consumer acquires physical possession of the goods.

In order to offer greater protection to the consumer, the same provision also indicates the starting date of the right of withdrawal in specific cases, as follows:

1) in the case of multiple goods ordered by the consumer in one order and delivered separately, the day on which the consumer acquires physical possession of the last good;2) in the case of delivery of a good consisting of multiple lots or pieces, the day on which the consumer acquires physical possession of the last lot or piece;3) in the case of contracts for regular delivery of goods during defined period of time, the day on which the consumer acquires physical possession of the first good.

In any case, if the consumer has not been duly informed of the right of withdrawal, he can withdraw within 12 months from the execution of the contract (art. 53 CC).

C) Piece of art made by AI: some thoughts concerning the ownership of the relevant copyright (if any) according to Italian law

Legal backgrounds

Art. 2576 of the ICC states that copyright rises through creation of the artwork[128]. Furthermore, art. 2580 of the ICC states that the ownership on the copyright belongs to the author and his/her assignees[129].

At the same time, art. 6 of the L. 633/41(i.e. the special law concerning copyright: hereinafter also as CPL) confirms that copyright rises through creation of the artwork[130]. Furthermore, art. 7 CPL provides that, in case of collective artworks (i.e. artwork the creation of which requested the contribution of more than one person) it has to be considered as creator, the person that organized and managed the creation itself[131]. It has also to be considered that art. 10 CPL provides that if the artwork was created with the indistinguishable contribution of more than one person, the copyright jointly belongs to all the authors[132]. Moreover art 12 bis CPL provides that, in case of software realized by an employee (but it is the same for any other kind of artworks commissioned to a third party), the ownership of the relevant copyright belongs to the commissioning party if not differently agreed[133].

More in general, it has to be considered that, according to Italian law, in order to be the owner of a right, it is essential to have the "juridical capacity" (capacità giuridica) which, at the present time,

[128] The full text provides that "*Il titolo originario dell'acquisto del diritto di autore è costituito dalla creazione dell'opera, quale particolare espressione del lavoro intellettuale*".
[129] The full text provides that "*Il diritto di autore spetta all'autore ed ai suoi aventi causa nei limiti e per gli effetti fissati dalle leggi speciali*".
[130] The full text provides that "*Il titolo originario dell'acquisto del diritto di autore è costituito dalla creazione dell'opera, quale particolare espressione del lavoro intellettuale*".
[131] The full text, among the others, provides that "*È considerato autore dell'opera collettiva chi organizza e dirige la creazione dell'opera stessa*".
[132] The full text, among the others, provides that "*Se l'opera è stata creata con il contributo indistinguibile ed inscindibile di più persone, il diritto di autore appartiene in comune a tutti i coautori*".
[133] The full text, among the others, provides that "*Salvo patto contrario, il datore di lavoro è titolare del diritto esclusivo di utilizzazione economica del programma per elaboratore o della banca di dati creati dal lavoratore dipendente nell'esecuzione delle sue mansioni o su istruzioni impartite dallo stesso datore di lavoro*".

belongs only to physical persons and to certain specific category of juridical persons (such as companies, foundation etc.), not to software and the like.

Preliminary thoughts

Obviously, AI itself cannot "claim" (at least at the present time) any right on the piece of art, due to the fact that it has no juridical capacity as explained above[134].

Just as obviously, if the AI, in order to create a piece of art, needs the help of a physical person (e.g. the AI needs to receive instructions in order to realize the piece of art), no issue at all. The ownership of the copyright belongs to that person as the creator of the artwork even if through the means of AI.

But what if the AI can create the piece of art in a fully autonomously manner (deciding both when or at least how realize it)? Who will be the owner of the relevant copyright? The owner of the relevant IP rights on the AI (e.g. the software house)? The user/owner of the "physical copy" of the AI (e.g. a company who bought the AI program/machine on the market and use it)? The owner of the artwork itself (i.e. the buyer of the physical piece of art)? The artwork must be managed as if it is fallen in public domain?

In our opinion, copyright belongs once again to whom used/asked the AI to create the artwork. This, also considering that, on a matter of fact, the artwork was "commissioned" to the AI by its user and therefore the relevant rules must apply. However, without any specific regulation and/or caselaw, it is clearly a disputable matter. At the present time, the thesis according to which an artwork made by AI has to be treated as a collective artwork (i.e. that the relevant copyright jointly belongs to the developer of the AI and the user of the AI) is not completely groundless.

We do not believe, instead, that the developer of the AI and/or the owner of the relevant IP right can claim also the whole copyright on the artwork, as a sort of derivative work, since there is no direct link between his creation (the software) and the artwork[135] i.e. the latter is not a creative elaboration of the former.

We also disagree on the opportunity to manage artworks made by AI as if immediately fallen in public domain, freely exploitable by anyone since if there is a copyright (due the fact that the artwork is creative) it must be managed and protected with no exception[136].

Suggestions

According to the considerations above, it is clear the importance to contractually manage the ownership of copyright on artworks made by AI. When commissioning/buying/licensing an AI software capable to realize piece of art, it will be very important to regulate not only the ownership of any IP right on the AI itself but also those eventually arising on the products of the work of the AI, such as usually made for derivative rights arising from an initial licensed know-how.

VI. MANAGEMENT OF ART COLLECTIONS – ESTATES, TRUSTS AND FOUNDATIONS

[134] As far as patent law is concerned, in 2019 the EPO refused two patent applications in which the inventor was indicated as an AI program due to the fact that the EPC requires the inventor to be a physical person. The decision was appealed (cases J 8/20 and J 9/20) and, at the time of the present article, it was issued a preliminary opinion confirming the needs for legal capacity in order to be indicated as inventor. The oral proceedings of the cases are expected for December 2021.

[135] BADIALI, *La protezione giuridica delle opere d'arte create dall'Intelligenza Artificiale*, in www.iusinitinere.it

[136] For a comprehensive exam of the actual legal thesis, see RACO, *L'intelligenza Artificiale irrompe nel mondo dell'arte: l'apertura di nuove frontiere giuridiche*, LLR 2, 2020, pp. 46 and ff.

Once the declaration of cultural interest as per article 13 HLC is issued, cultural property cannot be destroyed, deteriorated, dismembered, damaged or used for uses that are not compatible with their historical or artistic character or such as to prejudice their conservation (article 20 HLC).

Private owners, possessors or holders of cultural properties must ensure the conservation of the aforesaid properties (article 30 HLC), and the superintendents may at any time carry out inspections for ascertaining the existence and the state of conservation and conditions of custody of the cultural properties (article 19 HLC).

Pursuant to article 21 HLC, the following activities are subject to the authorization of the Ministry:

a) the removal or demolition, even with subsequent reconstitution, of cultural assets; b) the movement, even temporary, of movable cultural property, except as provided for in paragraphs 2 and 3; c) the dismemberment of collections, series and collections; d) the discarding of documents from public archives and private archives for which the declaration pursuant to Article 13 has been made, as well as the discarding of bibliographic material from public libraries, with the exception provided for in Article 10, paragraph 2, letter c), and private libraries for which the declaration pursuant to article 13 has been made; e) the transfer to other legal persons of organic complexes of documentation of public archives, as well as of private archives for which the declaration has been made pursuant to article 13.

The movement of cultural goods, depending on the change of residence or seat of the holder, is previously reported to the superintendent, who may set out the necessary measures to prevent the goods from being damaged during transport.

The directors of archives and of institutions managing artistic, archaeological, bibliographical and scientific collections may receive movable cultural property from private owners on free loan for the purpose of letting them to be enjoyed by the public (in accordance with 44 HLC.

Pursuant to article 48 HLC, the loan of the following for exhibits and expositions is subject to authorisation:

a) work of artists who are no longer living and which were produced more than seventy years ago); b) immovable and movable things of particularly important artistic, historical, archaeological or ethno-anthropological interest, which belong to subjects other than those indicated in article 10, paragraph 1; collections or series of objects, to whomsoever they may belong, which through tradition, renown and particular environmental characteristics are as a whole of exceptional artistic or historical interest; d) collections and individual items pertaining to them, referred to in article 10, paragraph 2, letter a); book collections indicated in article 10, paragraph 2, letter c) and paragraph 3, letter c); as well as archives and single documents indicated in article 10, paragraph 2, letter b), and paragraph 3, letter b).

A) The Trust

1. General introduction to the trust

The recognition of the trust in Italy seems to be settled in a favorable sense by the recent case law, both on the basis of the provision in art. 11 of the Hague Convention of 1985 (ratified by Italian Law no. 364 of October 16, 1989), and in consideration of art. 6 of Italian Law no. 112/2016, where the legislator has expressly provided for the possibility of setting up a trust to provide for the assistance, care and protection of persons with severe disabilities.
According to the most prominent Italian scholars, the trust does not qualify as a contract, but rather as a unilateral deed of the settlor. Therefore, the trust is not a subject and cannot be the holder of any legal position, with the exception of the attribution of tax liability for IRES purposes.
Reference is generally made to the so-called "internal" trust, *i.e.,* the trust not characterized by elements of transnationality. Although lacking elements of connection with foreign countries, the internal trust remains subject to a foreign law, subject to the application of Italian law with regard to the management of assets (located in Italy) constituting the fund of the trust.

2. The "dormant" trust and its compatibility with Italian inheritance law

In the dormant trust, the settlor establishes the trust by a unilateral deed inter vivos, setting out the plan and purpose of the trust and identifying the trustee and the beneficiaries, provided that the assets are segregated and become part of the trust fund only when the death of the settlor occurs.
The figure of the so-called dormant trust has raised a number of interpretative questions with reference to the discipline of succession and, in particular:

1) Can the establishment of dormant trusts constitute a violation of the prohibition of agreements on inheritance under art. 458 of the ICC?
The issue was recently addressed by the Supreme Court, which in an authoritative *obiter dictum* has established that the act of establishing a dormant trust does not constitute a violation of the prohibition laid down by art. 458 of the ICC.

2) Does the settlement of dormant trusts result in a breach of the settlor's reserved share?
The set-up of a trust may be qualified as indirect liberality and thus it may amount to a potential breach of the legitimate share of the settlor.
In such a case the legitimate heirs could formulate an action for reduction pursuant to art. 559 of the ICC. (Court of Udine, decision no. 1148/2015).

It should be noted that, on the one hand, the action for reduction does not concern the validity or effectiveness of the trust, constituting an indirect donation; on the other hand, the action for reduction is only a faculty of the legitimate beneficiary whose legitimate share has been limited, so that he/she could freely waive it.
It should also be pointed out that, although the potential violation of the rights of the legitimates must certainly be taken into consideration by the settlor when establishing the trust, any verification will necessarily be subject to a margin of uncertainty, since the calculation procedure set out in art. 556 of the ICC can be correctly carried out only at the time of the opening of the succession.
For all the reasons set out above, establishing a dormant internal trust - to manage one's assets represented by works of arts or art collections - does not generally pose problems of validity, effectiveness or recognition.

A) The "Fondazione di Partecipazione" and its role in the acquisition of new works for museum projects

The acquisition of new works of art is an essential part of the museum's activity. The acquisition of new works of art does not only make it possible to enhance their cultural value, as they are often relegated to contexts where any form of fruition is impossible, but also to enhance their economic value.
The economic valorization of new works, on the one hand, should allow the progressive increase of the museum's patrimony and, on the other hand, encourages the creation of new revenue streams.
It is necessary to consider that the acquisition of new works and collections could be sustainable primarily with the involvement of private individuals, who would actively contribute to these initiatives through their own support - financial or otherwise.
Therefore, it seems appropriate to take into account models of cooperation between the museum and private individuals who voluntarily wish to participate in an acquisition campaign aimed at supporting the museum's constant commitment to the cultural and economic enhancement of its works and collections.
This collaboration may take the form of a "fondazione di partecipazione", that is, a meta-individual organizational structure which, although attributable to the legal category of the foundation, has atypical elements that make it possible to attribute to the participants in the entity more importance than in the codified model of the foundation, with positive effects in terms of flexibility of the organizational model.
In our case, the "fondazione di partecipazione" would allow the museum to combine the typical features of the foundation (pursuit of an ideal purpose predetermined by one or more founders) with a highly discretionary governance structure, appropriate for managing and exploiting the works of art purchased by the foundation. In particular, the separate assets consisting of the contributions made by the founders at the time of the entity set-up gradually increase the endowment fund of the foundation, as subsequent donations by the participants may be added to the initial donations made by the founders.

VII. TAX

A) Art and the VAT

The sale of artworks may be subject to VAT; in order to determine whether VAT is applicable it is necessary to distinguish between two scenarios:

1) occasional sale made by a private (e.g an art collector who purchases an artwork directly from another collector) ;
2) sale made a professional market player, engaged in the sale of artworks on a regular basis.

In case 1 sale would not be subject to VAT, but if the sale is made by someone who is regularly active in the art market, VAT shall apply.
However, Italian tax law provides for a facilitated tax regime of transactions concerning artworks in all the cases where the sale is made by the author of the artwork or by his/her heirs. Specifically, if the sale is made by the author of the artwork or by his/her heirs the VAT rate is equal to 10% (instead of the ordinary rate of 22%). The same discounted rate applies with reference to the import of artworks. In all the other cases the VAT rate is equal to the 22% of the sale price.
The issues concerning art authorship and the use of new technologies may give rise to interpretative issues with reference to the applicability of the above-described VAT facilitated regime.
In particular, due to the increasing role played by technology in the creation of artworks the Italian revenue service (Agenzia delle Entrate) might deny the application of the favourable rate of 10% and apply the 22% VAT rate instead.

In this respect, it is remarkable the reply 303/2020 issued by the Agenzia delle Entrate (Italian revenue service) to the tax payer's interpellation in the following case: "*The Applicant reports that as an artist-sculptor he designs, with the use of the computer and through three-dimensional software, original figurative sculptures that he then proceeds to print with the use of his own FDM printers or with the help of a 3D printing company with MjF technology. After 3D printing, he obtains "raw" sculptures that he sometimes provides to plaster, smooth or which are subject to other post-production craftsmanship. In any case, the "raw" sculptures are painted by the Applicant. The Applicant finally reports that the sculptures are sold as unique pieces or in limited series of 50 or 200 pieces per color, directly to the private final customer, mainly online, both on its own site and on third party specialised sites.*" (see Agenzia delle Entrate, Direzione piccole e medie imprese, reply to interpellation n. 303/2020 pp. 1 and 2).

In the scenario depicted above the Agenzia delle Entrate refused to consider the sculptures produced by the taxpayer as "artworks" and therefore applied the 22% VAT rate (instead of the 10% VAT rate provided under the facilitated regime for authors of works of art) based on the fact that the works had been performed in whole or in part through the use of mechanical processes, such as 3D printers, FDM 3D modelling software, as well as with the intervention, in some cases, of other subjects who use the same technology. The manual intervention of the taxpayer was thus deemed to be residual and the goods were not considered as "Art objects (see Agenzia delle Entrate, Direzione piccole e medie imprese, reply to interpellation n. 303/2020 p. 3).

This case shows how the current Italian VAT regime applying to the sale of artworks does not reflect yet the recent trends of the art market and could potentially represent a disincentive for authors interested in exploring techniques involving the use of new technologies. The aforementioned case also shows how sometimes the assessment on which VAT rate should apply might lead to the general, significant and highly controversial question of what is art.

That said with reference to sales made by authors, it is also necessary to take into account the discipline governing the sales made though the intermediation of professional companies, such as art dealers and art galleries.

It must be remarked that the VAT regime varies considerably depending on the intermediary acting in its own name or on behalf of the seller.

If the intermediary acts in the name and on behalf of the principal, the sale is considered made directly by the latter and hence (if the seller is subject to VAT) the seller shall invoice the buyer directly for the whole transaction and the intermediary will only invoice to the principal his own commission.

If the intermediary acts in the interest of the seller, but not as a seller's representative, for VAT purposes it is necessary to take into account two transactions:

a) the transaction between the principal (owner of the artwork) and the intermediary (agent) (the application of the VAT will depend on the nature of the seller the principal);

b) the transaction between the intermediary (agent) and the final purchaser. This will always be a relevant transaction for VAT purposes since the intermediary must be a VAT subject.

It should be noted that in the situations outlined above, the intermediary's commission will have to be invoiced separately from the price of the artwork, as the performance of the intermediary qualifies as a service.

The Legislative Decree no. 41/1995, provides for the "margine-regime" i.e., a special, optional scheme for the application of VAT to the trade in second-hand movable property, works of art, antiques or collectors' items, the main purpose of which is to avoid the risk of double taxation of VAT on the purchase of second-hand goods. In order to avoid double taxation, the sale price of the resold goods is not subject to VAT, but only the difference between the sale price and the purchase price including any VAT, plus repair and accessory costs.

B) Art and inheritance tax

Artworks sometimes represent a significant portion of the inheritance of an art collector. In order to calculate the inheritance tax due in accordance with D.Lgs. n 346/90, the artworks must be taken into account by attributing to them their common market value (often not easy to establish, since artworks lack of suitable benchmarks).

Italian inheritance tax law provides for a few exemptions from the inheritance tax in case of artworks and, specifically when:

1) artworks are transferred to the State;
2) artworks are transferred to public and private museums.

Similarly to other European jurisdictions, Italy allows the heirs of an art collector to propose the transfer of works of art forming part of the heritage to the State, in total or partial payment of inheritance tax and the relative mortgage and cadastral taxes (see art. 39 of Legislative Decree no. 346/90).

This provision has a broader scope than art. 28-bis of Presidential Decree no. 602/73 (allowing the payment of direct taxes and VAT through the transfer of cultural assets to the State) because it does not apply only to goods qualifying as cultural assets (subject to public restrictions), but also applies to any "*works by living authors or those created no more than fifty years ago*". It is then clear that the tax payer may propose to the State to accept also works of contemporary art *in lieu* of the payment of inheritance tax.

C) Art dealers, art speculators and art collectors: different tax regimes for different categories

For tax law purposes, commercial transactions concerning artworks are not treated differently from transactions involving any other good. Nevertheless, the purchase of works of art could be extremely relevant in terms of tax revenues and might lead to disputes in certain cases, where the tax eligibility of the transaction is controversial because of the uncertain nature of the seller of the art-work.

In this respect the courts have remarked the distinction between different categories of art-work sellers and have reaffirmed that any category is subject to a different tax treatment.

Specifically, the courts have pointed out that "*in the peculiar field of the arts, one thing is the expert of the art-enthusiast, who carries out individual speculative transaction, another thing is the subject setting up businesses with a certain degree of complexity, for example with reference to the identification of potential buyers and sellers, to the negotiation, and so on*" (Commissione Tributaria Regionale Lombardia, sent. N. 5091/2018).

If the purchase/ sale of a work of art occurs as an act of business, then the revenue generated by the sale will be considered as part of the business revenues and shall be subject to Article 55 d.P.R. 917/1986 (TUIR). In this case the revenues deriving from the sale will be considered as taxable income of the business.

Any art-work seller is subject to the aforementioned regime when the activity of purchasing and selling works of art is habitual. In fact, it is the habituality of the activity which makes a subject an art dealer. The activity does not have to be exclusive, meaning that the business might include also activities different from art dealing. The law does not provide for any special organizational requirement; in fact, any business structure may be relevant.

In accordance with the case law: "*In a very niche where it is difficult to verify the purely occasional nature of the economic transaction, qualifying as entrepreneur requires a habitual and permanent business activity, implying the encounter of supply and demand and a certain duration and consistency*" (Commissione Tributaria Regionale Lombardia, sent. n. 5091/2018).

When the sale is made by a subject who cannot qualify as a professional art dealer, but who has nonetheless purchased and sold the art-work in order to speculate on an occasional basis, the revenue generated by the transaction is not taxed as an income of a business, but as a capital gain, in accordance with Article 67 d.P.R. 917/1986.
Instead, if the sale of the art-work has occurred occasionally and the seller does not qualify as a speculator, but as an art collector who decided to sell the art-work, then the revenues generated from such sale would be tax exempt.
Since the law does not provide for any presumption of the non-commercial nature of the sale of an artwork an art collector might resort to for being granted the tax exemption, it is paramount to consider a wide array of badges of trade identified by the settled case law for assessing whether a transaction is tax relevant (e.g. purpose of the sale; timeframe between the purchase and the sale of the artwork, number of the transactions carried out by the seller, number of the purchasers, complexity of the transaction, previous experiences in the sector, value of the investment, promotional activity).
It must be noted that the burden of proof with reference to the commercial nature of the transaction is borne by the Revenue Agency, in accordance with Article 42 d.P.R. 600/1973 and 7 L. 212/2000.

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I. INTRODUCTION

In conformity to the Berne Convention for the Protection of Literary and Artistic Works, artistic works are protected by the copyright act in Japan. In this article, I present a briefing about copyright restriction on artistic works placed in an outdoor public space.

II. PROTECTED ARTISTIC WORKS UNDER THE COPYRIGHT ACT

Under the Japanese practice, the primary requirement of works to be protected by the copyright act is creativity. The level of the creativity as the requirement is theoretically set low. As long as the author expressed any individuality of their artistic idea or emotion in their work, the work meets the requirement of creativity.

III. COPYRIGHTS AND MORAL RIGHTS AWARDED TO AN AUTHOR OF AN ARTISTIC WORK

In case of artistic works, the copyrights awarded to the author include the right to control reproduction, the right to control transmission to the public, the right to control exhibition of the original (exhibition right), the right to control assignment of the original or reproduced works to the public, and the right to control adaptation. The author also enjoys moral rights consisting of the right to control publication, the right to control representation of the author's name, and right to prohibit a modification to the work.

IV. A STATUTORY DISPLAY AUTHORIZATION AWARDED TO AN OWNER OF THE ORIGINAL OF AN ARTISTIC WORK

The copyright act allows an owner of the original of an artistic work to exhibit it to the public unless it is permanently placed in an outdoor public space even if the owner did not succeed the exhibition right. Also, in terms of the right to control publication (moral right), the copyright act presumes that the author authorized the owner to exhibit the original of the artistic work to the public. Thus, the copyright and moral right on an artistic work is restricted in order to ensure the practical use by the owner of the original of the artistic work.

V. BALANCE BETWEEN COPYRIGHTS AND FREE USE OF PUBLICLY ACCESSIBLE ARTISTIC WORKS

In case the original of an artistic work has been permanently placed in an outdoor public space, such as in a park, in the street, on the building wall, and on the exterior of a public transportation vehicle ("public space" in this context can be a movable object), use of such a publicly displayed artistic work is basically free from the copyrights according to the article 46 of the copyright act. "permanently" in this context means significantly long time. This provision respects the assumption by the general public that the copyright owner intends to allow anybody see an artistic work when it is permanently placed in an outdoor public space.

However, the article 46 of the copyright act excludes an act of creating reproductions for the sole purpose of selling them and an act of selling such reproductions from the free use of the artistic works. This exclusion from the free use of an artistic work whose original was permanently placed in an outdoor public space is not applied to such cases as followings (i.e. people can freely use the artistic work in the following cases):

- A case where the original of the artistic work is reproduced and the reproductions are given away as free gifts to the potential customers in the course of a business promotion activity (because the purpose of this activity is not selling, i.e. assigning for a price, the reproductions of the artistic work); and
- A case where a painting is drawn on the exterior of a city bus, a book which introduces various public transportation vehicles unique to each city features a photo of the city bus along with the painting, and copies of the books are sold to the public (because the purpose of this activity is not selling the reproductions of the artistic work).

Also, this exclusion may not be applied to such cases as followings:

- A case where the original of the artistic work is adapted, i.e. an additional creativity is introduced into the original artistic work, and copies of the adaptation are sold (because the copyright act distinguishes adaptation from reproduction) provided that this activity still violates the right to prohibit a modification to the work (moral right) and therefore is responsible for the emotional damage of the author; and
- A case where the original of the artistic work is reproduced in a magazine for the purpose of enhancing its commodity value (because selling the reproduction of the original of the artistic work is not the sole purpose).

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15 - LATVIA – Sorainen

SORAINEN

I. INTRODUCTION

In Latvia, art market is still a little known field for those who are not involved in the art deals. There is insufficient data or research on the actual size of the Latvian art market. However, it can be concluded that the art market in Latvia is developing and becoming more active. For example, in the recent decades several large art galleries were opened, as Daugavpils Mark Rothko Art Centre, Riga Gallery, gallery Bastejs, art gallery Laipa and others. These galleries promote successful contemporary Latvian artists both nationally and internationally.

Additionally, the publicly funded organization Latvian National Museum is the largest depository of professional art in Latvia and takes an important role in collecting, preserving and popularizing the cultural values in Latvia and foreign countries. In this year of 2021 the museum made the biggest purchase in 30 years as the response to the Covid-19 impact to the Latvian artists and art market. The procurement consisted of approximately 300 artworks, and it was the most ambitious procurement since the recovery of independence.[137]

Legislation

Firstly, rights of artists and artistic and other creative activity are recognised by the Latvian constitution *Satversme* providing that the state protects copyright.[138] *Satversme* covers two distinct aspects of artistic activity: freedom of creativity and protection of creative work. The constitutional court of Latvia has emphasised that the rights included in *Satversme* have constitutional value and they cannot be seen as only declarative or formal.[139] Therefore, the state must fulfil its obligation to ensure effective legal remedies in case of copyright infringement.

Secondly, Latvia is a member state of several international agreements on copyright protection. For example, Latvia has joined the Berne Convention for the Protection of Literary and Artistic Works of 1886, Convention establishing the World Intellectual Property Organization of 1967 and Geneva WIPO Copyright Treaty of 1996, as well as Latvia is bounded by the EU law.

Artworks qualified as culture heritage are protected under the Law On Protection of Cultural Monuments and Intangible Cultural Heritage Law. Latvia is a member state of the Convention on

[137] Strenga I. Latvian Art Museum makes biggest purchase of artwork in 30 years. Available: https://eng.lsm.lv/article/culture/art/latvian-art-museum-makes-biggest-purchase-of-artwork-in-30-years.a394031/.
[138] Constitution of Latvia *Satversme*, Section 113. Available: https://likumi.lv/ta/id/57980-latvijas-republikas-satversme.
[139] 2 May 2012 judgement No 2011-17-03 of the Constitutional court of Latvia, para. 12. Available (in Latvian): https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2011-17-03_Spriedums.pdf#search=autoru.

the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 as well.

Artworks as particular objects of copyright are covered by the general copyright legislation. The main legislative act is the Copyright Law,[140] passed on 6 April 2000, which covers general provisions, such as rights of authors and related (neighbouring) rights holders, term of copyright, restrictions on the economic rights, licencing and liability for copyright offences. Also several Cabinet of Ministers regulations pursuant to the Copyright Law are issued, as the Cabinet regulation No. 321 *Regulations Regarding the Amount of the Blank Tape Levy and the Levy of Equipment Used for Reproduction and the Procedures for the Collection, Repayment, Distribution and Payment Thereof* and the Cabinet regulation No. 565 *Procedures by which the Remuneration Regarding Public Lending shall be Calculated, Paid and Distributed*.

The collective management of copyright and related rights is regulated by the Law on Collective Management of Copyright. The law governs activity of collective management organisations, independent management entities, and dependent management entities and also prescribes the procedures for supervising the activity of collective management performers and special provisions for the settlement of disputes.

There are two collective management organisations regarding artworks in Latvia: the Copyright and Communications Consulting Agency/Authors' Union of Latvia (AKKA/LAA) managing resale of original works of visual art and association "Art. Copyright. Cultural Education." that manages the use of visual, visual plastic arts, design, audio-visual media arts and works of architects and art experts.

II. CONTRACTS

There are no special laws in terms of contracts relating to artwork. Latvian Civil Law[141] is applicable to all civil law contractual relationships, establishes the regulation on sales, loan and licensing contracts. General part of the Civil Law applies to all contracts, whereas the regulation on each of the named contract type is further specified under relevant chapters. Certain aspects of the contracts relating to artworks, including licensing and inalienable rights of authors to receive remuneration in the case of the public resale of original works of visual art, are covered also by the Copyright Law.

Immediate alienation of an artwork is the simplest and often the fastest way to alienate a work of art. In this case, the purchaser, such as an art dealer, treats the work obtained as its owner and, at its discretion, determines its resale price. In this case of alienation, it is important to respect the personal rights of the artist and to pay attention to the aspects of the transfer of the author's property rights.

An artist may not alienate his or her personal rights in the purchase agreement. In Latvia, the personal rights of the author are guaranteed by the Copyright Law, providing for the author's right to be recognized as an author and protection of rights that may harm the author's honour and dignity. Although in the case of an immediate purchase agreement the ownership of the work of

[140] Copyright Law. Available: https://likumi.lv/ta/en/en/id/5138.
[141] Civil Law. Available: https://likumi.lv/ta/en/en/id/225418.

art is transferred in full to the art dealer, the author retains his personal rights and may provide for the partial or full transfer of economic rights.

Upon alienation of the work, the artist may specify in the contract how his or her work may be exhibited publicly, lent or reproduced.

In a **licensing agreement**, provided in the Copyright Law, the grant of a licence for the use of a work in one or more specified ways may be provided for, as well as the right to grant a licence to third parties (sub-licence). The particular rights may be transferred completely or partially. If the agreement does not specify otherwise, a licence shall be limited to such actions as arise from the agreement and which are necessary for achieving the purpose of the agreement.

Another way in which works of art are traded is through a **commercial commission agreement**. Commercial commission agreement is a contract by which a merchant (commission agent), e.g., an art dealer undertakes in its name, however, according to another person's (committent) assignment to sell goods, e.g., an artwork to third parties, but the committent undertakes to pay the agreed commission. In case of alienation of the work, the artist receives the payment for the work of art from the commission agent. The artist in turn pays the specified remuneration to the art dealer, which may include also the costs for the storage of the work until its sale.

By concluding a **representation agreement**, the artist may transfer to the art dealer the right to sell his/her works, as well as impose an obligation to perform activities that would promote the artist's recognition. The representation agreement provides for greater protection of the parties regarding conflicts of interest, disclosure of information and non-compete compared to the commercial commission agreement. The legal status of an art dealer in this case precludes the self-acquisition of works of art without the artist's consent or in any other way to misuse the information provided by the artist. In addition, by including non-compete clauses in the agency agreement, the art dealers may protect themselves from cases where the artist wishes to switch to a competing art dealer after a longer period of cooperation.

One more method of disposing of works of art in the primary market is auctioning - usually organized by personal art galleries, both face-to-face and online.

For special conditions applicable to the public resale of original works of visual art please see the relevant section below.

The Civil Law also lays down general regulation for the conclusion of a loan agreement and sales contract and other contracts that may be concluded regarding the field of art.

III. COPYRIGHT

Copyright belongs to the author as soon as a work is created (regardless of whether it has been completed). Copyright applies to works of literature, science, art, and other works, also unfinished works, regardless of the purpose of the work and the value, form, or type of expression. Proof of copyright ownership does not require registration, special documentation for the work or conformity with any other formalities.

The author of a work has the inalienable moral rights of an author to the authorship, right to decide whether and when the work will be disclosed, right to revoke a work, that is, the right to request

that the use of a work be discontinued (subject to a requirement that the author compensates the losses, which have been incurred by the user due to the discontinuation). Also, the right to be named as the author on all copies and at any public event associated with their work, or to require the use of a pseudonym or anonymity, right to inviolability of a work - the right to permit or prohibit the making of any transformations, changes, or additions either to the work itself or to its title, right to bring legal action (also unilateral repudiation of a contract without compensation for losses) against any distortion, modification, or other transformation of their work, as well as against an infringement of the author's rights that may damage the honour or reputation of the author.

None of the moral rights mentioned above can be transferred to another person during the lifetime of the author.

Furthermore the author of a work has economic rights, which may be transferred to third parties. For example, author's economic rights include the right to communicate the work to the public, to publish the work, to distribute the work, to lease, rent or to publicly lend originals or copies of a work, except for three-dimensional architectural works and works of applied art, to directly or indirectly, temporarily or permanently reproduce the work, and other.

Accordingly violations of copyright and related rights are deemed to be activities by which the rights of the right-holders are infringed, including:

- Unauthorised fixation of copyright or the neighbouring right work, their publication, communicating them to the public, or their reproduction or distribution in any form.
- Unauthorised extinguishing, amending, or transforming of electronic information regarding the management of rights owned by the right-holders, and distribution, broadcasting or communicating to the public or publishing that electronic information.
- The destruction or circumvention of the technological measures used by the right-holder, which were intended to restrict or not allow any activity with the copyright and neighbouring right work.
- The destruction or circumvention of technological measures used by the right-holder intended to restrict or prohibit any activity with the copyright and neighbouring right work, or other unauthorised technological activities.
- The manufacture, importation, distribution, sale, lease, advertisement or use for other commercial purposes of devices (or the components of those devices), as well as the provision of services, directed towards the circumvention of the technological measures, or the destruction of the technological measures.
- Failure of the user of a work to provide information on the use of the work (its nature, form, extent, volume, purpose, frequency, geography, audience and so on) when requested by the right-holder, or providing insufficient information (for example, for the purpose of calculating and collecting the appropriate fees).

Regarding **street art**, it is possible to conclude from the legal regulation in Latvia that any object or phenomenon visible in the surrounding environment is an environmental object. But street drawings cannot be unequivocally called art or hooliganism, as the assessment should be made on case-by-case basis. Regardless of whether the drawing is considered art or not, any visual representations on residential and public buildings, outbuildings, fences, other structures and architectural elements must be agreed with the City Construction Board and the building owner.

If there is a non-compliance with rules when creating uncoordinated drawings in an urban environment, administrative **fines can be imposed.**

Inalienable Right of Authors to Receive Remuneration in the Case of the Public Resale of Original Works of Visual Art (*Droit de Suite*)

Under Latvian Copyright Law Authors shall retain inalienable rights to receive remuneration for alienated original works of visual art which have been transferred to the ownership of another person. An agreement in respect of which the author waives the right to remuneration in the future shall not be in effect. The transfer of ownership of the original work of visual art from the author to another person, with or without remuneration, shall be considered the first alienation of such a work.

After the first alienation of the original work of art, the further public resale (by auction, or through the mediation of an art gallery, an art salon, a store, an Internet store, an auction house, or similar enterprise) of the original work of visual art, the author has the right to receive a remuneration of the relevant monetary amount of percentage for the portion of the resale price as it is provided for by Latvian Copyright Law.

The owner of the original work of visual art has a duty to give the author of the alienated work a possibility to realise the right to reproduce the work, as well as to exhibit the work in a personal exhibition. The author has a duty himself or herself to ensure the preservation of the work in delivering it to and from the place of reproduction or exhibition, unless specified otherwise by contract.

IV. LITIGATION

Court decisions in civil disputes in the art sector

There is very limited case law regarding civil disputes over artwork related copyright infringements or fulfilment of contracts concerning artworks. Mostly civil disputes regarding copyrights concerning visual works are related to the photographer's claims whose photos have been published in mass media without a permit and renumeration, usually distorting the photo by cutting the copyright sign etc.

However, the most notorious case in artworks sector is the case No. C04126313 (2014) regarding authenticity of a painting. An art gallery offered for sale a painting to be said as an unknown piece of Karl Huhn, one of the most significant painters in Baltics in the 19th century. The buyer from Russia visited the art gallery to see the painting. The authenticity of the painting was verified by the conclusion of the Latvian Association of Art and Antique Experts, in which the experts acknowledged the painting as previously unknown piece of Karl Huhn. The buyer from Russia purchased the painting and transported it to Russia.

Contrary, the Russian experts doubted the authenticity of the painting. Scientific Research Institute of Restoration of the Russian Federation and Experts from the State Tretyakov Gallery disagreed that the signature on the painting was made by Karl Huhn. Laboratory experts of technological expertise found that the signature on the painting was made later than the painting itself. It was found that the painting does not correspond to the works of Karl Hun by performance time, stylistic

and technological nature and genre. The court of Russian Federation imposed criminal sanctions to the seller for fraud.

However, the seller declined allegations. Therefore, a civil case was brought before the Latvian court requesting to invalidate the contract regarding the sale of the painting. Based on the experts' findings, the court acknowledged that the painting was not made by Karl Huhn. This case was particularly interesting because the Latvian court had to evaluate, whether a mistake in author of the painting indeed invalided the contract. The court established that the mistake in author in the particular circumstances was an inexcusable mistake in substance that invalided the contract as the buyer wouldn't conclude the deal if he knew the truth about the author.

Court decisions administrative and criminal cases in the art sector

There is very limited case law regarding administrative or criminal offences related to artworks. Mostly these cases concern criminal offences in art sector in the form of illegal actions involving protected cultural monument or state-owned antiquities, for example, the destruction, damaging or desecration of a cultural monument protected by the state, also illegal export of cultural monuments protected by the state from the Republic of Latvia or their illegal alienation, as well as the illegal obtaining, storage, movement, forwarding, and alienation of state-owned antiquities. However, the most common criminal offences are related to the illegal archaeological excavations in ancient burials or in other cultural monument protection zones, looting archaeological objects, such as jewellery and weapons.

V. INTERNATIONAL TRADE

The Law On Protection of Cultural Monuments[142] and Cabinet Regulation No. 846 *Regulations Regarding Exportation of Cultural Monuments, Including State-owned Antiquities, Art and Antique Articles from Latvia and Importation Thereof* provides requirements applicable to exportation from Latvia and importation to Latvia of certain works of art.

Exportation of works of art which are deemed to be cultural monuments owned by the state may be only temporary exported and such temporary export is subject to obtaining a prior permit from the State Inspection for Heritage Protection and payment of state duty.

Exportation of non-state owned works of art is also subject to obtaining a prior permit from the State Inspection for Heritage Protection and payment of state duty in the following circumstances:

1) The work of art is a more than 100 years old art or antique article;
2) The work of art is a cultural object, which is between 50 and 100 years old and it has been created by persons or manufacturing units that have been referred to in arts and cultural records of Latvia.

When temporarily importing the cultural object into Latvia from countries other than the European Union member states, the owner (possessor) of such object is obliged to declare the object in the customs authority of Latvia. If such cultural object is not presented in the customs authority, it shall be regarded that the person has purchased the relevant cultural object in Latvia and the procedures for the exportation of the cultural objects set out above shall be applied to their exportation from Latvia.

[142] Law On Protection of Cultural Monuments. Available: https://likumi.lv/ta/en/en/id/72551.

VI. NEW TECHNOLOGIES

In the field of e-commerce, transactions with works of art in Latvia may be carried out in online auctions organised by private auction providers on their websites and works of art may also be auctioned via electronic auction system operated state bailiffs [143] within the scope of their managed debt collection proceedings. There are several private providers of online auction services on the Latvian market.

Legislation applicable to online trade of artworks consists of the general provisions of the Civil Law, Copyright Law and tax, consumer right protection and personal data processing regulations, where applicable.

VII. MANAGEMENT OF ART COLLECTIONS – TRUSTS AND FOUNDATIONS

In Latvia, usually private art galleries and public, autonomous or private museums take over the management of art collections. Operation of museums is subject to the Law on Museums.[144] There is no specific regulation applicable to management of non-state owned art collections. Different tax regimes may apply to private museums or private art galleries depending on the legal form in which they operate (e.g., as a limited liability company or as an association or a foundation).

If the works of art are resold, the inalienable rights to receive remuneration for resold original works of visual art is managed by collective management organisations in accordance with the Law on Collective Management of Copyright.[145] As mentioned above, there are two collective management organisations regarding artworks in Latvia, the Copyright and Communications Consulting Agency/Authors' Union of Latvia (AKKA/LAA) and association "Art. Copyright. Cultural Education.".

VIII. TAX

VAT and circulation of a work of art

A dealer of works of art (applies to a specific list of goods determined by the regulation of Cabinet of Ministers) is entitled to choose to apply the special tax application arrangement or the general tax application procedure in transactions with works of art. [146] The dealer shall be a registered taxable person the economic activity of which is the acquisition or importation of works of art in order for them to be sold, regardless of whether that person is acting in his or her interests or in the interests of another person according to a contract under which negotiation consideration is payable on purchase or sale.

The dealer has the right to choose to apply the special tax application arrangement laid to the supply of works of art by submitting a prior written submission to the State Revenue Service and complying with other requirements set out under the Value Added Tax Law in case of the following types of supplies:

1) the supply of such works of art which have been released for free circulation by the dealer himself;

[143] Available: https://izsoles.ta.gov.lv/.
[144] Law on Museums. Available: https://likumi.lv/ta/en/en/id/124955.
[145] Law on Collective Management of Copyright. Available: https://likumi.lv/ta/en/en/id/291146.
[146] Value Added Tax Law, Section 138 (1). Available: https://likumi.lv/ta/en/en/id/253451.

2) the supply of such works of art which have been supplied to the dealer by the creator of the works of art or the successor in title.

When application of the special tax application arrangement is possible, the difference between the sales value (amount of money) which a dealer has received for the works of art supplied to a purchase, and the procurement value shall be taxed, reducing such difference for the calculated tax value. If dealer decides to apply the special tax application, 21 % VAT is charged from the difference in price. If dealer decides to apply the general tax application procedure, dealers charge 21 % VAT on the sales value.

Income from the sale of works of art generally will be subject to personal income tax or company income tax (as the case may be), unless any exceptions under Latvian taxation laws apply. [147]

Inheritance and gift tax

Generally, there is no inheritance tax in Latvia and the receipt of inheritance is only subject to payment of the relevant state duties for processing the inheritance case in the amount of up to 7,5% depending on the circumstances. Personal income tax may, however, be applicable to the inherited author's fees (royalty) which is paid to the inheritors of the copyright.[148]

The personal income tax is not paid for gifts from natural persons if these persons are married or third-degree relatives. If a gift is received from a person who is registered as a performer of economic activity or from a merchant, the personal income tax is calculated and paid from the amount received. Upon receipt of a gift from a person (who is not a close relative), the tax is not paid from gifts in the value of up to EUR 1,425 from one natural person during the calendar year.

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[147] Law On Personal Income Tax, Available: https://likumi.lv/ta/en/en/id/56880. Enterprise Income Tax Law, Available: https://likumi.lv/ta/en/en/id/292700.

[148] Law On Personal Income Tax, Section 9(1) point 9. Available: https://likumi.lv/ta/en/en/id/56880.

16 - LITHUANIA – Sorainen

SORAINEN

I. Introduction

In Lithuania, the art market is still not an acknowledged area for those who are not genuinely involved in the art deals. There is no sufficient up-to-date data or research on the actual size of the Lithuanian art market.
However, it can be concluded that the art market in Lithuania is rapidly evolving. For example, in the recent decades several large publicly and privately funded art galleries and museums were opened, such as Mo Museum (which was even nominated as European Museum of the Year 2020), National Gallery of Art, Vilnius Picture gallery, gallery Arka, Contemporary art centre, gallery AV 17 and others. The largest event of visual arts in Eastern Europe – ArtVilnius[149] is organized each year in Lithuania. Around 60 international galleries participate in ArtVilnius and the event attracts about 23.1 thousand visitors.
Art auctions are being organized more and more often in Lithuania as they are attracting a lot of interest. The turnover of Lithuanian auctions reached a record in 2019 as works of art were sold for more than EUR 420,000.

Legislation

The Constitution of the Republic of Lithuania establishes that the state shall support culture and science and shall take care of the protection of Lithuanian historical, artistic and cultural monuments and other culturally valuable objects. The law shall protect and defend the spiritual and material interests of an author which are related to scientific, technical, cultural, and artistic work (§ 42).
Lithuanian Civil Code and Law on Copyright and Related Rights regulate the contractual and non-contractual aspects, rights, and obligations of all art and valuables.
Art monuments can be placed under the state protection under the procedure provided in the (i) Lithuanian Law on the Protection of Movable Cultural Property, (ii) Law on the Protection of Immovable Cultural Heritage, (iii) Approval of the rules for the export of movable cultural property and antiques from the Republic of Lithuania. The status of the art creator is established under the Law on the Status of Art Creator and Art Creator Organizations.
Lithuania has joined and ratified several UNESCO Conventions such as the Convention Concerning the Protection of the World Cultural and Natural Heritage and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.

[149] https://artvilnius.com

Lithuania has also joined the Berne Convention for the Protection of Literary and Artistic Works and the Hague Convention.

II. Contracts

There are no special laws in terms of contracts relating to artwork. Since the Lithuanian Civil Code identifies art as an object of civil rights, Civil Code applies to all civil law contractual relationships and establishes the regulation on sales, loans, and licensing contracts. As artwork in Lithuania is mostly sold through auctions, Civil Code sets rules for organizing auctions as well.
Certain aspects of the contracts relating to artworks are covered also by the Lithuanian Law on Copyright and Related Rights.
Under the Lithuanian Law on Copyright and Related Rights, copyright consists of the author's economic and moral rights. The economic rights of the author can be transferable, however, the moral rights of the author are inseparable from the author's persons and non-transferable.
Lithuanian Law on Copyright and Related Rights defines an author's contract as an agreement for use of a work concluded between the author, or author's successor, and the person seeking to acquire the right of use of the work. Based on the author's contract, the author transfers his or her economic rights to the other party or grants to the other party an authorisation (license) to use the work to the extent and according to the procedure prescribed by the respective conditions of the contract.
The law prescribes that, at minimum, the following needs to be recorded in the author's contract:

1) the title of a work (titles of the works by foreign authors shall be indicated in the original language), except the licences issued by associations of collective administration of rights;
2) description of work (type, title of a work, principal requirements for a work);
3) the authors' economic rights which are being transferred or granted (modes of the exploitation of a work), a type of the licence (an exclusive or nonexclusive licence);
4) the territory in which the transfer of the rights or the licence granting the right to exploit a work is valid;
5) the term of validity of the transfer of the rights or the licence;
6) the amount of remuneration, the procedure, and terms of payment;
7) dispute settlement procedure and liability of the parties;

Some of the art may be protected under the Law on the Protection of Movable Cultural Property. In the Register of Cultural Property, it is possible to find every artwork which is protected by the Law. In case of selling an artwork, which has a special protection status, it is necessary to warn the future owner about the status of this artwork and the applicable requirements of the regulation on the protection of movable cultural property. Also, after concluding the transaction, the former owner of the movable cultural property must notify the Cultural Heritage Department in writing within 15 days about the change of ownership. The former owner shall transmit to the new owner the passport of the movable cultural property. This special procedure is very important as any unproven ownership will cause inconvenience for the owner.

III. Copyright

Lithuanian Law on Copyright and Related Rights provides for, among others, the protection of specific rights (copyrights) of authors of literacy, artistic and scientific works for the results of their creative activity.

As mentioned above, copyright consists of the author's economic and moral rights. Concerning moral rights, the author of a work has the right to:

1) the right to claim authorship of the work, by prominently indicating the author's name on all the copies of a published work, and in connection with any other public use of the work (the right of authorship);
2) the right to claim or prevent the mention of the author's name in connection with any use of the work, or the right to claim that the work be disclosed to the public under a pseudonym (the right to the author's name);
3) the right to object to any distortion or other modification of work or the title thereof, as well as to any derogatory action in relation thereto which would be prejudicial to the author's honour or reputation (the right to the inviolability of a work).

Concerning the economic rights, the author of work enjoys the exclusive right to use its work in any manner, to authorise or prohibit the use of the work in a similar manner by other persons, and to receive income from such use of the work. Author's economic rights include the right to authorise or prohibit:

1) reproduction of a work in any form or by any means;
2) publication of a work;
3) translation of a work;
4) adaptation, arrangement, dramatization, or other transformation of a work;
5) distribution of the original or copies of a work to the public by sale, rental, lending, or by any other transfer of ownership or possession, as well as by exporting and importing;
6) public display of the original or copies of a work;
7) public performance of a work in any form or by any means;
8) broadcasting, retransmission of work, as well as communication to the public of a work in any other way, including the making available to the public of work via computer networks (on the Internet).

The author's copyrights are protected for the life of the author and seventy years after his or her death, irrespective of the date when the work is lawfully made available to the public, except in some specific cases prescribed by the law. The authorship of a certain work, the name of the author, and the honour and reputation of the author are protected without a term.
Specifically, concerning visual works of art, the Lithuanian Law on Copyright and Related Rights establishes that the author has the right to receive an additional remuneration (maximum of EUR 12,500) based on the sale price each time when the visual work of art is sold after the first transfer of the right of ownership in the work. This applies to all acts of resale which involve auctioneers, galleries, or dealers as seller, buyer, or intermediate:

1) 5 % for the portion of the sale price up to EUR 3,000;
2) 4 % for the portion of the sale price from EUR 30,00,01 to EUR 50,000;
3) 3 % for the portion of the sale price from EUR 50,000,01 to EUR 200,000;
4) 1 % for the portion of the sale price from EUR 200,000,01 to EUR 350,000;
5) 0,5 % for the portion of the sale price from EUR 350,000,01 to EUR 500,000;
6) 0,25 % for the portion of the sale price exceeding EUR 500,000.

One of the most important free use exceptions in the Lithuanian Law on Copyright and Related Rights stipulates the following. The owner of an original work of fine art must permit the author of the work to reproduce or display the work at his exhibition, if the author's right to reproduce the work or to publicly display it has not been transferred to the owner of the original work, provided that the owner's legitimate interests are not thereby prejudiced, and the safety of the work is ensured. Also, it is permitted to reproduce works of architecture and sculptures which are permanently located in places open to the public, without the authorisation of the author and payment of remuneration, by any means except for mechanical contact copying, and to communicate such reproductions of works to the public except if the work is the main subject of the reproduction and it is intended to be used for direct commercial purposes. If such work carries the name of its author, it is required to indicate the name in the communication of the reproduction to the public.

IV. Litigation

There were several cases concerning valuables status (whether art pieces shall be considered as a property of the other country) and remuneration for public display of sculptures.
However, the litigation has been more focused on the protection of intellectual property in terms of published literary works and musical pieces.

V. THE STATUS OF ART CREATOR

Under the Law on the Status of Art Creator and Art Creator Organizations, any person, who fulfils certain criteria established in the law can be awarded the status of Art Creator.
By granting the status of an art creator to a person, it is confirmed that the work of the artist meets the requirements of the law, has a lasting value, and is significant for society.
The status of an Art Creator provides many tax incentives, additional financial benefits, and other advantages.

VI. International Trade

The Lithuanian Intra-Community Transport, Export, and Import of Cultural Objects Act cover taking a cultural object out of Lithuania into another Member State of the European Union (intra-community transport) and taking a cultural object out of Lithuania into a country outside of the customs territory of the European Union (export).
Movable cultural property and antiques included in lists approved by the Government may be exported only with a given permit. There are some occasions when a permit will not be given because of the item's value and importance to the people of Lithuania. For example, items that are considered extremely rare, closely linked with the valuable cultural environment, history, or famous Lithuanian historical figures count as cultural property and the permission to export it irretrievably will not be given. The only occasion, when such rules do not apply is due to exchange to other cultural property which has the same or higher value. If a permit for irrevocable removal of an antique from the Republic of Lithuania is not issued, an antique with cultural value may be offered for entry in the Register of Cultural Heritage or redeemed by the state within 2 years with the consent of the owner. As for the import of cultural property or antiques, no special requirements are needed.

VII. New Technologies

In the field of e-commerce, transactions with works of art in Lithuania may be carried out in online auctions organised by private auction providers on their websites, and works of art may also be auctioned via an electronic auction system operated by state bailiffs within the scope of their managed debt collection proceedings. There are several private providers of online auction services on the Lithuanian market.
Legislation applicable to the online trade of artworks consists of the general provisions of the Lithuanian Civil Code and Law on Consumer Protection and personal data processing and tax regulations, where applicable.

VIII. MANAGEMENT OF ART COLLECTIONS – ESTATES, TRUSTS AND FOUNDATIONS

In Lithuania, usually private art galleries and public, autonomous, or private museums take over the management of art collections. Operation of museums is subject to the Lithuanian Law on Museums. There is no specific regulation applicable to the management of non-state-owned art collections. Different tax regimes may apply to private museums or private art galleries depending on the legal form in which they operate (e.g., as a limited liability company or as an association or a foundation).

IX. Tax

Income taxes

According to the Lithuanian Law on Personal Income Tax, the income tax rate applied at 15 percent, unless otherwise stated. Exempt income is when the difference between the income from the sale or other transfer of ownership of non-individual assets and the purchase price does not exceed EUR 2500, during the tax period. In case this amount is exceeded, then it is subject to 15 percent income tax.
However, in the case of self-employed activities, the rate changes. Where the annual taxable income from individual activities does not exceed EUR 20.000, an annual income tax rate of 5 percent is applied. When the amount of EUR 20.000, is exceeded, the amount of income tax increases from 5 to 15 percent, respectively, and in the case when the annual profit of the individual activity reaches EUR 35.000., the rate of income tax is applied at the rate of 15 percent.

Inheritance taxes

The Inheritance Tax Act does not specify the exhaustive list of who is subject to this tax. It is said that the object of the tax is a movable object if it is subject to legal registration and this object is registered in Lithuania, as well as an immovable object located in the Republic of Lithuania. Thus, concerning artwork, they are included in the overall percentage calculation: if the value of the artwork does not exceed EUR 15.000 EUR - 5 percent, and if this amount is exceeded, 10 percent of the taxable value of the inheritance. This regulation does not apply to relatives as they do not pay inheritance taxes in Lithuania.

VAT

In general, a standard VAT rate of 21 percent is applied to a work of art purchased or sold domestically. However, there is a special scheme for the taxation of second-hand artwork, collectors' items, or antiques, which is subject to a special rate when these goods leave European Union territory.
The special scheme in this sense applies to VAT payers who, in the course of their economic activity, and regularly engaged in the supply of second-handed goods, works of art and collectables, and/or

antiques. It shall also apply where a taxable person supplies, free of VAT, second-hand goods, artwork, collectors' items, and/ or antiques that have been subject to this special taxation scheme. In addition, the VAT payer shall have the right to choose to apply the provisions to the following transactions:

1) the supply of artwork, collectors' items, and/ or antiques which has been imported and for which import VAT has been calculated in the accordance with the established procedure;
2) when supplies of artwork acquired from authors or their successors, for the supply of which these persons have calculated VAT;
3) in the case supplies of artwork acquired from taxable persons (persons not covered by this special tax scheme) who, at the time of supply, calculated VAT at the reduced rate applicable to works of art in any Member State;

In the case of supplies of the above-mentioned goods, the taxable amount is the seller's margin. The seller's margin is calculated as the difference between the consideration (excluding VAT itself) that the seller has received or is required to receive for the supplied goods and the amount (including VAT) he has paid or is required to pay to his supplier when purchasing the goods. In the case of a supply of goods imported by a VAT payer, the amount of import duty and import VAT calculated on that goods shall be additionally deducted. It is this special scheme that is subject to a 0 percent VAT rate.

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17 - NETHERLANDS – WOLFS Advocaten

I. Introduction

The different subjects that will be discussed here are contracts, copyright, litigation and tax. The legislation that is particularly relevant to the art sector is copyright law and criminal law. Copyright law is particularly relevant to contracts and copyright. Criminal law is mainly for the protection against copyright infringement. In addition, the Inheritance Tax Act, VAT and the Income Tax Act are also relevant to art in the area of tax law.

II. Contracts

The reason for a copyright contract right is the structurally weaker negotiating position in which many authors and performers find themselves vis-à-vis their counterparties. These counterparties are often media concentrations. The idea is that the principle of freedom of contract is not sufficient here and that a (legal) correction is necessary.

A separate chapter has been included in the Copyright Act about copyright contract law (art. 25b-25h Dutch Copyright Act, "AW"). This is a detailed regulation that basically boils down to the following. The maker is entitled to fair compensation for granting his exploitation rights (art. 25c Aw) and can receive a higher compensation for his work if it turns out to be an unexpected success (bestseller provision; art. 25d Aw). The maker can also recover his right if the operator fails to exploit his work (non-usus provision; art. 25e Aw).

Unreasonable provisions are voidable (art. 25f Aw) and a new regulation has been created for film copyright contract law (art. 45d Aw is being amended). All makers receive fair compensation from the producer (due to a presumption of transfer); although three makers also receive an extra bonus: the screenwriter, director and the lead actors are also entitled to a proportional, turnover-related compensation from the operator with whom the producer

The maker cannot waive his rights under the new regulation (Art. 25h Aw). It is not possible to circumvent the regulation by choosing the law for foreign law. By means of a linking provision in the WNR (art. 2b WNR (new)), the regulation is also declared applicable to exploitation contracts to which performing artists are parties.

Finally, this regulation provides a basis for a disputes committee to which makers can approach in a low-threshold manner in case of problems (art. 25g Aw).

III. Copyright

The Dutch Copyright Act applies to literature, science and art (art. 1 Aw). Art. 10 Aw lists eleven forms of copyrighted works. It follows from the conclusion of the provision that this list of works is not exhaustive.

Violation and protection

The maker of a work can largely oppose damage to that work. He has a 'droit au respect'. Art. 25 paragraph 1 under d Aw gives him the right to object to any other change in the work, unless the change is of such a nature that the opposition would be contrary to reasonableness. Paragraph 1 under d Aw gives 'the right to oppose any deformation, mutilation or other impairment of the work, which could harm the honor or the name of the maker or his value in this capacity'. It is not so much about making a change to a copy of the work, but about changing the representation of the spiritual creation. If there is only one copy of the work, then a change made to that one copy is of course relevant.

Art. 34 Aw forms the poenal counterpart of art. 25 Aw on personality rights. All acts mentioned in art. 25 paragraph 12 in art. 34, in so far as they are committed intentionally, are punishable as a crime. The maximum penalty is six months imprisonment or a fine of the fourth category. Falsely affixing or changing a name or sign on copies of a work, in order to demonstrate that the work was made by the person whose name or sign was affixed, is punishable as a crime in art. 326b Sr (Dutch criminal law). Paragraph 2 also criminalizes intentional distribution.

The inclusion in the Sr and the relatively high maximum penalty can be explained by the (primary) focus on fraud in the art trade. The article also applies to works on which the copyright has expired or never existed.

AI

The so-called copyright regulation of computer programs in art. 45h-n Aw is fundamentally different from that of other 'works'. The main rule is in art. 45h Aw: the permission of the rightholder is required for publication by means of rental and for any reproduction. This rental/lending right has the nature of a prohibition right. Art. 45i and 45j deal with duplication, the latter article not considering as copyright infringement the duplication necessary for the use intended with the work. Art. 45k Aw grants an exemption with regard to duplication that serves as a backup copy if this is necessary for the intended use of that work. It will be clear that the questions of what constitutes 'necessary' and what constitutes 'intended use' are open questions for the time being. Art. 45l Aw allows the legitimate user of a program to study and test that program in order to discover its underlying ideas and principles. Art. Finally, art. 45m Aw contains the important mandatory exception for reverse engineering, albeit that this exception is subject to a number of strict requirements. For example, one must be a lawful user, the aim of the reverse engineering must be to achieve the interoperability (compatibility) of an independently produced computer

program with other computer programs, and the data necessary for this must not already be readily and easily available . It is explicitly stated that the information thus obtained may not be used for any purpose other than interoperability, may not be unnecessarily disclosed to third parties and may not be used for copyright-infringing acts.

IV. Litigation

There are numerous cases in the Netherlands that explain, confirm or expand the articles in the law and questions which can arise about them. Take for example the case Jelles/Zwolle, in which the personality rights of the maker were subject of discussion, as well as the question what exactly constitutes "damage" in the sense of art. 25 Aw. Not every destruction of a protected work results in a legally relevant 'infringement'. The right to personality is not an absolute right and is always subject to a balancing of interests. The Supreme Court has ruled that the total destruction of a structure cannot be regarded as an impairment of the work within the meaning of art. 25 paragraph 1 opening words and part d Aw.

In these proceedings concerning the proposed demolition by the Municipality of Zwolle of the former Wavin head office designed by architect Jelles, the Supreme Court further ruled that the destruction of a copy of the work can under certain circumstances constitute a misuse of powers pursuant to art. 3:13 paragraph 2 of the Dutch Civil Code. This will be more likely to be the case the fewer copies of the work there are. In the case of a unique copy, the owner is in any case obliged to explicitly weigh up the legitimate interests of the maker (HR 6 February 2004, ECLI:NL:HR:2004:AN7830 (Jelles/Zwolle)).

Art is also an interesting subject in tax law. In this regard, the judgment of the Supreme Court of 6 June 2014 is interesting. In this judgment, the Supreme Court considered that making art objects profitable and thus holding them for investment was the case, because the taxpayer had to sell the art objects for a lease to a museum for a period of five years at a rent equal to 8% of their value and made no mention of eligible costs. According to the Supreme Court, this taxpayer mainly retained the art objects with a view to the – profitable – rental to the museum. If, for example, because of the desire to favor a museum for personal reasons, no loan fee is requested from a museum, there is no question of making assets profitable and therefore not of investing. If that were different, then art. 5.8 IB that – when read in conjunction with paragraphs 1 and 2 – determines that objects of art and science that have been made available to third parties for cultural and scientific purposes do not belong to the possessions unless they mainly serve as an investment, are a dead letter .

V. Tax

Art and VAT

When it comes to VAT, many countries have a more favorable regime for art objects, including:

– a reduced VAT rate for art imported from outside the EU, or supplied by the artist or his heirs. In that case, for example, in the Netherlands a VAT rate of 6% instead of 21% applies;

– a special VAT regime (margin scheme) for art sold by galleries. In that case, VAT is only due on the margin (sales price -/- purchase price) instead of on the full sales price; and

– a reduced customs tariff or an exemption for the import of art.

Because these special regimes only apply to art, it must be determined when art is involved. This question is difficult for art historians to answer. It is therefore remarkable that European tax specialists have had an exhaustive list of art since 1995, in Annex IX to the VAT Directive. The question is whether art can be captured in a definition or enumeration. For example, point 5 of the summary states: individual pieces of ceramics executed entirely by the artist and signed by him;

Art and Succession

This regulation is based on art. 67 paragraph 3 SW 1956. The scheme entails the option to pay the inheritance tax due by offering works of art that are part of the estate to the Dutch state. The inheritance tax is then waived up to the amount of 120% of the value of the art objects offered. However, in the event of a surplus, this cannot lead to a payment by the government. Not all art objects qualify for this scheme. It must concern movable objects of great national cultural-historical or art-historical importance. The aim of the scheme is to prevent Dutch cultural heritage from disappearing from the Netherlands because heirs are forced to sell the art at auction due to the inheritance tax debt. In addition, the aim of the scheme is to make art and culture visible to the widest possible audience. In order to prevent abuse of the scheme, it is of fundamental importance that the works of art are fully owned by the testator at the time of death. Art objects purchased later are not eligible for the scheme.

Art and income tax

Collecting art can have more or less complicated consequences depending on the tax identity of the collector. You can collect as a private person or as an entrepreneur. In most cases there is not much going on with collecting as a private person. If the art hangs or stands at home, it will generally not be regarded as a box 3 property (income tax is determined by the so called box that the income is in). After all, art. 5.3, paragraph 2, part c 2001 Income Tax Act (IB) de facto excludes movable property in personal use from the return base if these are not held for investment. If the private art is loaned to a museum, it will generally not be taxed either, because as long as this art is not held for investment, art. 5.8 IB exempts objects of art and science. Art. 5.8 paragraph 3 IB also expressly states that being part of a collection does not in itself mean that the objects are regarded as an investment. Apart from a very specific situation such as described under the litigation chapter, the private collector will generally do not have to devote tax thoughts to his art collection.

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18 - RUSSIA (I) - Gorodissky & Partners

GORODISSKY

I. INTRODUCTION

Art may be understood broadly. There are visual arts, such as painting, sculpture, other 3D articles. There are performing arts, music, literature and films. The list is not exhaustive. Other manifestations of human creativity are possible.

Without false modesty, we can say that Russia has a rich cultural heritage and the contribution of Russian artists into the world culture is significant. In particular, we may recall the names of such well-recognized painters of the 19th – 20th centuries as Karl Bryullov, Ivan Kramskoy, Wassily Kandinsky, Marc Chagall, Kazimir Malevich, Konstantin Korovin, Petr Konchalovsky, Natalia Goncharova and others. Their works are exhibited at auctions and many collectors want to buy them. Thus, in June 2020 the painting "The Bay of Naples" by Ivan Aivazovsky was the most expensive artwork sold online through Sotheby's (£2.3 million / $2.8 million).

Russia is a party to the main international conventions and treaties in the field of protection of works of art. Namely, our country is a signatory to the Bern Convention for the Protection of Literary and Artistic Works as well as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.

Being a member state of the Commonwealth of Independent States (CIS), Russia has adopted certain regional treaties and agreements including the Agreement of 15.04.1994 "On cooperation of customs services on the detention and return of illegally exported and imported cultural values" and the Agreement of 05.10.2007 on cooperation in the fight against theft of cultural values and ensuring their return.

All kinds of art are protected and regulated by the Civil Code of the Russian Federation. Part IV of the Code is exclusively dedicated to intellectual rights. Chapter 70 of the Civil Code is dedicated to the rights of authors. It sets forth that subject matters of copyright are: Literary works, dramatic and musical works, choreography, music with and without text, audiovisual works, paintings, sculptures, designs and other works, works of architecture including those represented in drawings and pictures, photographic works.

There is also a "Basic Law of the Russian Federation on Culture" which ensures the rights for creativity of people.

Also the Law "On Objects of Cultural Heritage (Historic and Cultural Property) of the Peoples of the Russian Federation" and the Law "On Export and Import of Cultural Values".

Aside from the above laws there are many subordinate acts that concern tangentially the issues of creation, protection and disposal of the works of art and cultural heritage.

II. CONTRACTS

The works/objects of art and the copyrights therein may belong to individuals or legal entities. They may be subjects of various contracts. The copyright owner holding the exclusive right to the work may assign/sell his right to another person. A copyright assignment should be explicitly provided in the sale agreement apart from the transfer of the property right to the work/object itself. They may also conclude a license agreement (exclusive or non-exclusive). In a paid license agreement, the parties must show the amount of remuneration or procedures for calculating remuneration by the licensee. Open and shrink-wrap licenses are also possible. Loan agreements are allowed. The parties may conclude a commissioning agreement.

III. COPYRIGHT

Copyright covers the works of science, literature and art regardless of the merits and purpose of the work, as well as the way of its expression.
The author of the work is a person who created it. Regardless who owns the work, the author reserves his moral rights to the work: the right of attribution, the right to author's name, the right of integrity, the right of promulgation and the right of withdrawal. The author's moral rights are perpetual and not transferrable. The author has the right, in the manner prescribed for the appointment of the executor of the will, to indicate a person to whom he entrusts the protection of authorship, the name of the author and the integrity of the work after his death. This person will exercise his powers for life. In the absence of such instructions or in the case of refusal of the person appointed by the author to exercise the relevant powers, as well as after the death of this person, the protection of authorship, the name of the author and the integrity of the work shall be carried out by the heirs of the author, their legal successors and other interested persons.
The term of duration of the copyright is life of an author plus 70 years thereafter. Upon expiration of the copyright the work moves into the public domain and any interested person may freely use it provided that the right of attribution, right to author's name and the right of integrity are respected.
Infringement of copyright may entail civil, administrative and criminal liability. Most of the cases involve civil liability. In this case a court action may be initiated by the copyright owner, by his exclusive licensee and by collective management organizations.
It is worth noting that instead of damages the copyright owner may demand a so called compensation in which case no proof of damages is required (but strongly recommended). The amount of compensation (up to five million rubles) shall be determined by court depending on the circumstances of the case. The plaintiff may also claim double the cost of copies of the infringing works or double the cost of a license.
Administrative and criminal liabilities are provided by the Code of the Russian Federation on Administrative Offences and the Criminal Code of the Russian Federation respectively.
Considering the appropriation in art, it should be noted that the law protects integrity of a work and provides the copyright owner with the exclusive right for adaptation of the work. Therefore, the

appropriation of protected works can constitute the infringement of the author's moral right and the copyright infringement. Resolution of the Plenum of the Supreme Court of the Russian Federation No. 10 of April 23,2019 sets forth that the right of integrity concerns such changes in a work that are not related to the creation of a new work on the basis of the existing one. Whereas, adaptation of a work involves the creation of a new (derivative) work on the basis of the existing one.
The law has no special regulations on street art, though sometimes such works appear on the streets. AI artworks are at its inception in Russia. The issue is discussed sometimes but there are no cases to discuss in connection with this kind of creative art.
The author of a work of fine art has the right to demand from the owner of the original of the work to provide a possibility to exercise the right of reproduction of his work (the right of access). In this case, the owner of the original of the work cannot be required to deliver the work to the author.
Authors of works of fine art have the right to receive remuneration in the form of a percentage of the resale price in case of each resale of the original work in which a legal entity or an individual entrepreneur participates as an intermediary, buyer or seller (in particular, an auction house, a gallery of fine art, an art salon, a store).
The law provides for certain fair use exceptions according to which the use of copyrighted works is allowed without copyright owners' consent and payment of royalties.

IV. LITIGATION

The Russian court practice includes many precedents related to disputes in the art sector. Below is a few examples thereof.
In case *"CD Land contact" LLC v. "Fortes" LLC* the commercial courts admitted the fact of the copyright infringement and awarded the compensation in the amount of 5 million rubles. The action was filed by the exclusive licensee of Dutch artist Margriet van Breevoort who is the author and the holder of the copyrights in the statue Homunculus Loxodontus. By satisfying the claim the courts recognized actions of the defendant on selling notebooks, bags, plates and other consumer products on which images of the copyrighted statue had been reproduced, as infringing. The compensation was calculated by the plaintiff on the basis of double the cost of his sub-license concluded with a Russian sub-licensee (Resolution of the Intellectual Property Rights Court dated November 11, 2019 on case No. A40-57804/2019).
In another case initiated by an individual entrepreneur Mr. Sergey Babenko against Mr. Maxim Ustinov the commercial courts dismissed the claim by recognizing the plaintiff's action as the abuse of rights.

The claim was grounded on the plaintiff's rights to the trademark  under Russian registration No. 606740 which the courts found as a reproduction of the Swedish cultural heritage Mjöllnir from the collection of the Swedish History Museum. Based on the provisions of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property the courts judged that the plaintiff's action on registration of such the trademark and his further enforcement actions should be qualified as knowingly bad faith exercise of the civil rights (Resolution of the Intellectual Property Rights Court dated April 07, 2021 on case No. A60-582/2020).

Considering civil court actions, it is worth noting that the law provides the limitation period which normally is three years from the moment when the plaintiff knew or should know about the infringement.
There is also a requirement related to the mandatory pre-trial stage with sending a warning letter in case the copyright owner claims damages or monetary compensation.
Speaking about criminal cases, we can mention a case in which by the verdict of the Tverskoy District Court of Moscow an individual B. acting by prior conspiracy with other persons, was recognized guilty in committing a crime – fraud and convicted to punishment in the form of imprisonment for a period of 3 years and 6 months. He sold a painting by an unknown artist passing it off as a painting by Karl Huhn "Gypsy with a child" for $620,000. There were several fine art expert reports collected during the police investigation, which confirmed that the painting was falsification. The court also ruled to reimburse to the victim the money paid for the imitation (Resolution of the Moscow City Court of March 31, 2011 No. 4u/5-2013).

V. INTERNATIONAL TRADE

Copyrighted artworks are protected by the Federal Law "On Customs Regulation in the Russian Federation" and the Customs Code of the Eurasian Economic Union. There is a Customs IP Register into which the copyright owner may include his work. The database of copyrighted works is available at all customs offices so that the customs will detain the work entered in the register and will inform the owner of the work who may decide to sue the infringer. There is also a Eurasian Economic Union (EAEU) which includes several post-Soviet countries (Russia, Armenia, Belarus, Kazakhstan and Kyrgyzstan). The member countries plan to introduce a Unified Customs Register, however, it is not yet in place.
In general, import and export of artworks is regulated by the CIS Agreement "On cooperation of customs services on the detention and return of illegally exported and imported cultural values" and the Law "On Export and Import of Cultural Values".
The work of art is an object having aesthetical value. There is no legal definition of the work of art. The work of art may be an IP subject matter or an object of cultural value. Cultural values can be movable objects of the material world, regardless of the time of their creation, that have historical, artistic, scientific or cultural significance. In order to recognize an object as an object of cultural value an expert on cultural values should draw a report. There are certain limitations on export of objects of cultural value having "special importance". There are cultural values that may be imported and exported without certificate of a cultural value. A certificate of cultural value may be issued on request of a physical or legal person.
Based on provisions of the Code of the Russian Federation on Administrative Offences providing the administrative responsibility for contraband and infringement of rules on prohibitions and(or) restrictions on the import/export of goods into/from the customs territory of the Eurasian Economic Union or the Russian Federation the Russian Customs authorities actively supress violations at the border.
Works of art may intersect with intellectual property. They are copyrighted works and may also be a design or a trademarks.
There are zones of free trade of Russia with CIS and other countries however there is no information specific to artworks in connection with free tradezones.

VI. NEW TECHNOLOGIES

Russia is aware of NFT opportunities however there are only scattered cases of NFT deals. E.g. one of the artists sold his work for $29,000.
Copyright law covers all kinds of works however augmented reality is making its first steps in Russia
E-commerce is developed in Russia and is regulated by the Civil Code (Article 497) and the Law "On Protection of Consumers' Rights" (Article 26.1) and by several subordinate acts which, among other things, also provide the legality of click-wrap-agreements. However these are general provisions and they do not concern specifically works of art.
For regulation of the rapidly developing sphere of blockchain and smart contracts the list of civil rights objects provided by the Civil Code of the Russian Federation has been amended with the digital rights which means digital financial assets. This sphere is also governed by the special Federal Law "On Digital Financial Assets and Digital Currency…" adopted in 2020.

VII. MANAGEMENT OF ART COLLECTIONS – ESTATES, TRUSTS AND FOUNDATIONS

Art collections may be managed by private investment funds. They may buy, manage and sell the works of art. Investment activities in general are regulated by the Law on Investment Activities in Russia. Article 3 of the law sets forth that any property, also proprietary rights and IP subject matters may be involved in investment activities.
There is the Federal Law "On attracting investments using investment platforms…" which regulates business activities for the organization of attracting investments.
It should be noted that the activities in connection with art foundations are regulated by the Civil Code of the Russian Federation and the special Federal Law "On non-commercial organizations".

VIII. TAX

The vendor acting as a physical person not conducting the business shall pay the tax in the amount of 13% of the income. If the amount of tax exceeds 650,000 rubles, the part of the tax that exceeds 650,000 rubles and concerns the tax base above 5 million rubles shall be paid independently of the tax paid on the amount not reaching 650,000 rubles referring to the tax base up to 5 million rubles. (Article 228 .4 of the Tax Code of the Russian Federation).
Russian and foreign organizations which sell artworks and are considered as tax residents in Russia, shall pay the tax in the amount of 20% of the income (Article 284.1 of the Tax Code of the Russian Federation).
The Tax Code of the Russian Federation also provides a range of official fees for issuance of a permission for the export of cultural values (Article 333.33 of the Tax Code of the Russian Federation).
If the vendor, e.g. museum sells a work of art and earns commission VAT is paid from the amount of the commission.

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19 - RUSSIA (II) – Astey Legal & Tax

Art and Law: Some Aspects of Legal Regulation of Cultural Heritage in Russia

Legal relations in the field of art are very versatile. They cover numerous branches of law and arise in connection with the creation of original works of authorship, transfer and protection of the copyright, use of copyright-protected works, as well as in connection with various actions performed in relation to tangible medium of expression of the works of literature, science and art.

This article deals with the legal relations regulated by special law provisions in the field of preservation, use, popularization and state protection of the art works of special value, specifically, the cultural heritage sites.

1. Concept of Cultural Heritage Sites in Russia

In Russia, the sphere of cultural heritage sites (hereinafter the "CHS") is governed by different legal provisions of national and international law.

The main source of law in this sphere is the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted in Paris, France on November 16, 1972 at the 17th session of the UNESCO General Conference meeting and ratified in USSR by the Decree of the Presidium of the Supreme Council of the USSR dated March 9, 1988 No. 8595-XI.

According to Article 1 of this Convention, the cultural heritage is defined as follows: "[…] *architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science*." Under this Article, the cultural heritage also includes the '*sites*', which mean "*works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view*."

The national laws governing the sphere of cultural heritage sites follow the logic of the Convention. For instance, the Federal Law of the Russian Federation dated June 25, 2002 No. 73 "On Cultural Heritage Sites (Historical and Cultural Monuments) of the People of the Russian Federation" defines that the CHS (historical and cultural monuments) of the People of the Russian Federation include "*real estate units (including objects of archaeological heritage) and other objects with historically related territories, works of painting, sculpture, arts and crafts, objects of science and technology and other objects of material culture which resulted from historical events, representing value from the point of view of history, archeology, architecture, town planning, art, science and technology, aesthetics, ethnology or anthropology, social culture and being the evidence of eras and civilizations, authentic sources of information on origin and cultural development*."

The CHS are further classified into several categories in the subsequent provisions of the Law, namely, monuments, groups of buildings and sites, each of which has its own definition.

There are also a number of government regulations, which establish precise rules applicable to various procedures, specify the criteria and requirements, for example, the Decree of the Russian Government dated February 20, 2014 No. 127 "On Approval of Rules of Issue, Suspension and Cancellation of Permits for archaeological excavations and surveys", the Order of the Russian Ministry of Culture dated October 03, 2011 No. 954 "On Approval of Regulations on the Unified State Register of the Cultural Heritage Sites (Historical and Cultural Monuments) of the People of the Russian Federation".

Thus, the above-mentioned legal acts specify the CHS, which can be considered as historical and cultural monuments, as well as establish the basic classification criterion for the cultural heritage sites, which implies a historical and cultural value of the monument, group of buildings or site.

As for the main national law, namely the Russian Constitution, Article 44 provides that everyone is obliged to care for the preservation of historical and cultural heritage and protect historical and cultural monuments.

A number of ministries, departments and organizations are responsible for supervision of accurate application and execution of the rules of the CHS protection laws. Since under Article 72 of the Constitution, the protection of historical and cultural monuments is under the joint jurisdiction of the Russian Federation and subjects of the Russian Federation, the bodies which are in charge of the CHS protection supervision exist both at the federal and regional level.

Specifically, according to the UNESCO Constitution, all member states of the Organization should have National Commissions. In Russia, it is the Commission of the Russian Federation for UNESCO. Its primary goals include promoting the participation of the Russian bodies, organisations, scientists and specialists in UNESCO events and programs, ensuring fulfillment of the international legal obligations arising from the Russian membership in UNESCO, as well as preparation of instructions for the official Russian delegations and representatives in the UNESCO bodies.

In terms of the national level, this is the Ministry of Culture of the Russian Federation, the federal enforcement authority in charge of culture and art, which is in charge of the CHS protection supervision. The Ministry of Culture elaborates legal regulations, as well as introduces draft regulations pertaining to the historical and cultural heritage issues.

At the regional level, there are corresponding departments and committees. For example, in Moscow, the competent authority in the sphere of the CHS protection is the Department of Cultural Heritage, and in St. Petersburg it is the Committee for the State Control, Use and Protection of Monuments of Historical and Cultural Monuments (*KGIOP*). In particular, the KGIOP

has the right to issue instructions under which the CHS owners or possessors are obliged to rectify the violations of the CHS protection legislation detected by the KGIOP within the specified term. If such instructions are not executed, the KGIOP has the right to apply to court seeking to enforce them.

The CHS are classified into the following categories: the CHS at the federal, regional, and municipal level. Accordingly, the Russian Federation, a subject of the Russian Federation, a municipal union can be the CHS owners, while other natural persons and legal entities can be the CHS owners or possessors depending on the origin of their title, for example, a rent or sales agreement, etc.

Currently, the CHS are divided into two groups: the sites registered in the Unified State Register of the Cultural Heritage Sites (historical and cultural monuments) of the People of the Russian Federation and the revealed CHS. The difference between these two groups of CHS is that the revealed ones are not yet entered into the State Register though the authority responsible for the CHS protection has already received an application for entry of such CHS into the Register. In practice, it is rather difficult to distinguish a revealed CHS from the registered one since there is no public access to the Unified State Register. In this context, unfortunately, it is quite frequent that certain CHS remain unprotected.

A notable example is the demolition of a fence around the former clinic of Dr. Usoltsev which began in 2006. The fence had been built in the 1910s as per design of a well-known Russian architect Fyodor Schechtel, while its sketches had been drawn by equally well-known Russian artist Mikhail Vrubel. About twenty fence sections consisting of stone columns and wooden sections with gates were destroyed in almost one week. As consequence, almost a half of the fence wooden sections were demolished and replaced with metal sheets.

Following this, a petition for the protection of the fence was submitted to the Department of Cultural Heritage of Moscow. Specialists of the Department of Cultural Heritage of Moscow responded immediately to this petition and stopped the fence demolition, which allowed to save the rest of the construction.

This case demonstrates clearly that many art objects which should be protected may still remain undetected by the government.

2. Transfer of the Ownership Right and Changing the Appearance of the Cultural Heritage Sites

The essential terms of the agreement on acquisition of a revealed CHS include the obligations of the person who acquires a CHS to fulfill the legal requirements. These requirements imply the following: bearing costs and expenses related to maintenance of such sites, prohibition to undertake works, which change the essential parts of such sites, or works, which change their appearance, space planning, layout and design concepts and interior. The agreement on acquisition of a revealed CHS must contain the abovementioned essential term as, otherwise, the transaction will be null and void.

It is also stipulated by the law that if by the moment of conclusion of an agreement on acquisition of a CHS entered into the State Register, there is a preservation order regarding its preservation, maintenance and use, such agreement must contain, *inter alia*, an essential term providing for the

obligation of the person who acquires, takes into possession or takes into use the CHS, to fulfill the requirements set out by this preservation order. If there is no such term in the agreement, the transaction will be null and void.

The abovementioned legal requirements on inclusion of such essential terms into the text of agreements on CHS (both revealed ones and those entered into the State Register) may lead to legal insecurity and instability of the corresponding civil transactions. This is to say that such agreements may be recognized as null and void due to the absence of the abovementioned essential terms regardless of the fact that these terms are binding since they are enshrined in the law. In other words, the obligation to maintain and preserve the CHS is imposed on the new owner of CHS (the buyer under the agreement) due to the imperative character of this undertaking regardless of whether it has been included into the agreement or not.

Therefore, inclusion of such requirements into the scope of essential terms of the agreement on CHS has no practical sense from the point of view of their protection. Moreover, this situation threatens the stability of civil transactions in respect to the CHS since failure to include such essential terms entails voidness of the agreement.

The situation is even more confused as a provision on the obligation to maintain and preserve the CHS entered into the State Register must be included not only in agreements on their acquisition, but in the agreements on their lease or use as well. Thus, even a lease agreement may be recognized as null and void due to non-insertion of this essential term.

The situation is aggravated by the fact that there is no public access to the CHS State Register. Thus, in practice, it is better to duplicate the legal requirements on the CHS maintenance and protection if there is any suspicion that the acquired (or rented) real estate unit may be a CHS.

In any case, all restrictions (encumbrances) on rights on CHS are maintained in the event of transfer of the ownership right or other proprietary rights on them to any other person, including in case of transfer of the ownership right or other proprietary rights on the land plot within the borders of the CHS territory as such restrictions are established by the law.

It is also a common practice for the competent federal authority to issue a preservation order to the CHS proprietor, under which they will be obliged, for instance, not to rent out the CHS to other persons without a written permit of the competent authority and to rectify all the detected violations of the CHS protection legislation immediately and at their own expenses.

The Russian legislation strictly regulates the modification of the CHS. For example, it is prohibited to perform works, which change the essential parts of such sites or worsen the conditions necessary for their preservation. It is also worth noting that that the CHS preservation works (e.g., preservation, repair, restoration, reconstruction, adaptation) require a proper license issued by the Russian Ministry of Culture, and the licensed professionals should receive a permit to perform such works.

Taking into consideration the special legal regime of the CHS, it is also forbidden to carry out any town-planning activities in their regard, for instance, reconstruction and major repairs.

The current Russian legislation gives an opportunity to reconstruct ruinated or destroyed CHS. In certain cases, the destroyed CHS can be reconstructed if they have an outstanding historical, architectural, scientific, art, town-planning, aesthetic, or other importance and if there is enough scientific data necessary for the reconstruction.

In actual practice, a reconstruction of a CHS, which results in creation of a new object, leads to court claims made in order to have such object to be recognized as unauthorized structure and to have it demolished.

For instance, in the context of one court case, the KGIOP asked the court to oblige a CHS owner to dismantle the additional equipment which they had installed on the building facade without any authorization.

There are other similar examples, such as the court case which happened in Smolensk when a CHS owner changed the building facade and installed some additional equipment without any authorization. As a result, the Department of Architecture and Town-Planning of Smolensk sued the owner in order to oblige them to dismantle the equipment and to bring the facade to its original state.

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ODI . Law

I. INTRODUCTION

Article 73. of the Constitution Law of the Republic of Serbia guarantees that the scientific and artistic creativity shall be unrestricted. Constitution further prescribes that authors of scientific and artistic works shall be guaranteed moral and material rights in accordance with the law. Finally, Constitution also predicts that the Republic of Serbia shall assist and promote development of science, culture and art.

In accordance with the Constitution Law, National Assembly of Serbia adopted a number of laws regulating issues of importance for art and creativity. Those are:

- The Law on Culture ("Official Gazette of RS", No. 72/2009, 13/2016, 30/2016 correction, 6/2020 and 47/2021);
- The Law on Cultural Property ("Official Gazette of RS", No. 71/94, 52/2011 - other laws, 99/2011 - other law and 6/2020-other law);
- The Law on Copyright and Related Rights ("Official Gazette of RS", No. 104/2009, 99/2011, 119/2012, 29/2016 – CC decision and 66/2019);
- The Law on Special Competencies for Efficient Protection of Intellectual Property Rights ("Official Gazette of RS", No. 46/2006 and 104/2009 - other laws);
- The Law on Museum Activities ("Official Gazette of RS", No. No. 35 of April 8, 2021);
- The Law on Cinematography ("Official Gazette of RS", No. 99/2011, 2/2012 - correction and 46/2014 - CC decision);
- The Law on Endowment and Foundations ("Official Gazette of RS", No. 88/2010, 99/2011 - other law and 44/2018 - other law);
- The Law on Publishing ("Official Gazette of RS", No. 37/91, 53/93, 67/93, 48/94, 135/2004 and 101/2005 - other law);
- Law on Digital Assets ("Official Gazette of RS", No. 153/2020).

Also, in order to facilitate work in the field of art and culture, certain bylaws were adopted and those are:

- Regulation on the conditions which the deposited copies of copyright-protected works and subject matter of related rights need to fulfill, on the entry in the register and deposition of copyright-protected works and subject matter of related rights, and on the contents of the registration of deposited copyright-protected works and subject matter of related rights with the competent authority;

- Regulation enumerating a list of the technical devices and audio and visual carriers in relation to which levy is to be paid to owners of copyright and related rights;
- Regulation on remuneration of members of the Commission for Copyright and Related Rights;
- Regulation on Incentives for Investors to Produce Audiovisual Works in The Republic of Serbia ("Official Gazette of RS", No. 3/2021);
- Regulation on Republic Awards for Special Contribution to Cultural Development ("Official Gazette of RS", No. 91/10);
- Regulation on Criteria, Scale and Manner of Project Selection in Culture Which Are Financed and Co-Financed from Budget of the Republic of Serbia, Autonomous Province, or Local Self-Government Unit (Official Gazette of RS No. 105/16, 112/17);

Serbia's legislation is integrated into the international system for the protection of copyright and related rights, bearing in mind that Serbia is a signatory of all relevant international conventions on the protection of intellectual property. Also Serbia's national copyright and related rights system is ready for integration into the European Union system, given that Serbia is a candidate country awaiting accession to the EU.

In Serbia artists pursue their interests through various artistic associations. The interests of artists are also represented by the Coordination Board of Art Associations of the Republic of Serbia, formed by representatives of 18 art associations, who give their proposals, suggestions and remarks to the authorities. State institutions also stimulate the market by purchasing works of art. The City of Belgrade, the epicenter of all artistic market events, forms a certain annually budget for these purposes. The Secretariat for Culture announces a competition twice a year for the purchase of works of art in the field of fine and applied arts. Bids can be submitted by authors who are citizens of Serbia, and also members of The Association of Fine Artists of Serbia (hereinafter: ULUS) and/or The Association of Fine Artists of Applied Arts and Designers of Serbia (hereinafter: ULUPUDS), as well as artists with academic titles. The City of Belgrade makes purchases in order to fill the museum collections with works of contemporary production, but also in order to stimulate the work of artists. This system has been long known as a form of art support.

II. CONTRACTS

- **Sales Contract**

When it comes to the sale of works of art, it should be borne in mind that this means the sale of the object of the work of art itself. This legal relationship is regulated by the Law of Contracts and Torts. In that case, the buyer acquires the right of ownership exclusively on the object that represents the work of art, but not the right to reproduce or any other right by which the work of art is economically exploited. On the other hand, the transfer of property rights owned by the author is regulated by the Law on Copyright and Related Rights.

Works of art are most often sold in galleries or studios of artists, but also in exhibitions. There is a large number of different galleries on the Serbian market. There is also a number of public galleries, which are funded from the budget and are open to most artists. This is especially for the galleries of art associations, ULUS and ULUPUDS. However, most galleries today are privately owned. They differ in profile and character. Some are oriented only to a certain artistic direction or group of artists, while others are characterized by a very diverse range of offers. Recently, some galleries, especially due to the crisis caused by the Covid-19 pandemic, have started working on the principle of online

exhibitions and shops, so works of art are mostly available on both domestic and foreign markets. Artists are usually not bound by an exclusive contract with the gallery, but there is agreement on the right to place and sell works of art that regulates the business relationship between the artist and the gallery, and applies only to works of art that the artist wants to present in a particular gallery. Initial price is mostly determined by the artist himself. Selling price consists of three components: artist's fee, gallery commission + 20 % VAT. The commission for the sale of works of art ranges from 25-30%, but it can be lower for works of great value. A significant part of sales is made by auction sales.

- **Licensing Contract**

Licensing Contracts whose subject is a work of art is regulated by the Law on Copyright and Related Rights. This Law stipulates that the author or his successor may assign certain or all property rights of his/her work to another person. Assignment of property rights may be exclusive or non-exclusive. In the case of exclusive assignment of property rights, only the acquirer of rights is authorized to use the author's work in the manner prescribed by the contract, as well as to assign that right to others with the special permission of the author or his/her legal successor. The right that the acquirer assigns to others is a non-exclusive right, unless otherwise stipulated by the contract. In the case of non-exclusive assignment of property rights, the acquirer is not authorized to prohibit another from exploiting the copyright work, nor is he/she authorized to assign his/her right to another. If the contract does not state that it is an exclusive or non-exclusive assignment, it is considered that it is a non-exclusive assignment of property rights. Assignment of property rights may be subject, spatially and temporally limited. Licensing agreements have to be concluded in written form.

- The Law also predict that without the permission of the author, but with the obligation to pay royalties, it is allowed, in the form of a collection intended for teaching, exam or scientific research, to reproduce on paper or similar media individual works in science, literature and music or individual published works of photography, fine arts, architecture, applied arts, industrial and graphic design and cartography, unless the author expressly forbids it.

- **Loan Agreement**

The practice of borrowing works of art is not highly developed in Serbia. In a small number of cases, only a few galleries provide art rental services primarily for the purpose of making films or preparing theater performances, as well as for the temporary arrangement of a certain space, usually for a particular event, or at the request of government. In these cases, galleries require borrower to conclude insurance contract against damage to the borrowed artwork.

On the other hand, a large number of pawnshops accept art paintings for a pledging in order to provide a quick cash loan. By pledging art paintings, a quick and favorable loan is obtained, with the conclusion of contracts on monthly level. The pawnshop guarantees the safety and storage of art paintings. Upon expiration of the contract, the borrowed money is returned, increased by the storage costs, and the painting is returned. Pawnshops accept as a pledge art paintings of classical and contemporary art, domestic and foreign authors. The value of an art painting determines the amount of a possible loan. The assessment of value is performed by top experts in works of art, based on the technique with which the painting was made, the dimensions and the names of the authors of the painting. Immediately after evaluating the painting that is pledged, the pawnshop will offer the amount of the loan that is able to provide. The money received immediately after signing the contract.

III. COPYRIGHT

- **Copyright Violation and Protection**

In Serbian law, an author is a natural person who has created a work. The work of an author is an original intellectual creation, expressed in a certain form, regardless of its artistic, scientific or other value, its purpose, size, contents and way of manifestation, as well as the permissibility of public communication of its contents. Copyright protects expressions and not ideas, procedures and methods of operations, or mathematical concepts as such. Copyright does not protect concepts, principles and instructions included in a work either. The works protected by copyright are mentioned by way of example in The Law on Copyright and Related Rights:

- written works (books, brochures, articles, translations, computer programs in any form of their expression, including their preparatory design material and other);
- spoken works (lectures, speeches, orations, etc.);
- dramatic, dramatic-musical, choreographic and pantomime works, as well as works originating from folklore;
- music works, with or without words;
- films (cinematographic and television works);
- fine art works (paintings, drawings, sketches, graphics, sculptures, etc.);
- works of architecture, applied art and industrial design;
- cartographic works (geographic and topographic maps);
- drawings, sketches, dummies and photographs; and
- the direction of a theatre play.

The author of the work is the holder of the copyright. Apart from the author, the holder of the copyright may be a person who acquired the right in accordance with The Law on Copyright and Related Rights. A work may be the result of an intellectual effort undertaken by two or more natural persons (co-authors). According to The Law on Copyright and Related Rights, a co-author is a person who has created a work on the basis of creative work with another person. As a rule, co-authors are joint holders of the work's copyright, unless otherwise provided by the Law or a contract governing their mutual relations. The scriptwriter, director and chief cameraman are regarded as co-authors of a film. If music constitutes an essential component of a film and it has been composed for that film, the composer is also considered a co-author. In a cartoon and/or animated film, or in a film where drawings or animation are its essential elements, the main film-animator is considered to be a co-author of the film.

Copyright infringement occurs when someone unauthorized exercises one of the author's exclusive moral or property rights, and it is not one of the permissible exceptions when these rights can be exercised without the author's consent (e.g. use of copyrighted works for the purposes of a court proceeding). In that sense, the action that infringes someone's copyright is identical to the action that the author does using his rights, and the only difference is that the person who infringes the right commits this action without authorization. In addition to these so-called direct infringements there are also indirect copyright infringements. These violations represent the economic exploitation of unauthorized copies of author's works, actions to remove or alter electronic rights information or technological safeguards, as well as other actions related to the production and import of devices that can be used to remove or change technological protection measures.

In these cases, persons who believe that they have been harmed may claim their rights through a lawsuit in civil proceedings. It is important to emphasize that in case of violation of property rights, the plaintiff can be the author himself, as well as his heirs and a person who acquired one or more exclusive property rights through a legal transaction, while in case of violation of moral rights the plaintiff can be only the author, as well as his successors after his death. In addition to judicial protection in civil proceedings, copyright can also be protected from infringement in criminal proceedings.

- **Street Art**

Street art in Serbia is mostly illegal and unprotected, unless organizations, institutions or individuals hire an artist to draw a certain graffiti or mural on their object, otherwise drawing on state or private buildings without prior consent is an illegal activity. In the Republic of Serbia, the exclusive right of the author to reproduce and publicly announce graffiti is excluded, by the provisions of the Law which stipulate that two-dimensional reproduction, placing on the market of such reproduced copies, as well as other forms of public works are allowed without the author's permission and without payment which are permanently exposed on the streets, squares and other open public places.

Until the beginning of the 21st century, graffiti in Belgrade was primarily perceived as vandalism, and as such was subject to removal according to the "Decision on the general arrangement of the city" (1987). Even today, fines for writing and drawing graffiti are regularly charged on the basis of the Decision on the general arrangement of the city, which came into force in 1987.

IV. LITIGATION

Copyright litigation is within the jurisdiction of higher courts (exceptionally it may be within the jurisdiction of commercial courts). It is important to emphasize that copyright disputes do not include disputes over non-performance of copyright agreements (e.g. non-payment of royalties), but they fall under the law of obligations. In copyright disputes a lawsuit may be sought: 1) determination of violation of rights; 2) cessation of the violation of rights; 3) destruction or alteration of infringing objects, including copies of protection objects, their packaging etc.; 4) destruction or alteration of tools and equipment used to produce infringing items, if necessary to protect the rights; 5) compensation for property damage; 6) publication of the judgment at the defendant's expense.

In determining the amount of damages if the perpetrator knew or could have known that he was infringing, the court will take into account all the circumstances of the case, such as the negative economic consequences suffered by the injured party, including lost profits, profits made by the infringer and, in appropriate cases, circumstances of a non-economic nature, such as non-pecuniary damage. Instead of such compensation, when the circumstances of the case justify it, the court may award the injured party a lump sum compensation that cannot be lower than the usual compensation he would have received for a specific form of use of the object of protection, if that use was legal.

One of the frequent problems in practice is the issue of establishing copyright infringement on the designation of the author's name and the right to protection of the integrity of the work, as well as the issue of determining the amount of non-material and material damage caused by illegal publication of the author's work. In that regard, the Supreme Court took the position in one of its verdicts that there is a violation of copyright when someone unauthorized announces a copyright

work on the website without indicating the name or pseudonym of the author, and when the copyright work is incomplete. The court then, in respect of non-material damage, awarded the plaintiff per one author's work, specifically a photography, the amount of 10,000.00 dinars for not indicating the author's name, as well as 10,000.00 dinars for incomplete disclosures. Also, the acting court, in the name of compensation for material damage, given that the author has the right to economic exploitation of his work, decide that the author for each exploitation of the author's work by unauthorized person is entitled to compensation, and obliged the defendant to pay 45,000.00 dinars, in accordance with the review of the minimum prices of ULPUDUS's photographs.

Copyright can also be protected from infringement in criminal proceedings since Serbian Criminal Code prescribes three criminal offenses related to copyright infringement: 1) Violation of Moral Right of Author and Performer; 2) Unauthorized Use of Copyrighted Work or other Work Protected by Similar Right; 3) Unauthorized Removal or Altering of Electronic Information on Copyright and Similar Rights. Both fines and imprisonment are envisaged for these crimes. When it comes to the practice of courts acting in criminal matters in the field of protection of copyright and related rights, it is not common. By the verdict of the Basic Court, the defendant was found guilty of placing copies of copyright works on the market without authorization, in such a way that he sold 27 copies of the copyright work of foreign production without authorization, by which he committed the criminal offense of unauthorized exploitation of the copyright work. Also, the Decision of the Court of Appeals takes the position that if a certain person distributes a copyright work, he is obliged to prove that he has a copyright over that work, or that he is authorized to distribute it by contract, because otherwise he commits the crime of unauthorized use of a copyright work or subject matter, therefore the burden of proof in that case is shifted to the defendant.

V. INTERNATIONAL TRADE

If an object of cultural, artistic or historical significance is taken out of the country, in a quantity that has no commercial character and is intended for your own needs, it is necessary to have a permit from the Republic Institute for the Protection of Cultural Monuments of Serbia

The permit of the Republic Institute for the Protection of Cultural Monuments is required not only for the export of paintings, drawings, sculptures and other works of art made by known and unknown authors, but also for the export of all objects older than 50 years: furniture, dishes, money, cars.

When exporting works of art, depending on the type of work of art in question, some of the following permits are required:

- permit for export of objects of cultural, artistic and historical significance issued by the Republic Institute for the Protection of Cultural Monuments (except for publications) and the National Library of Serbia (for publications);
- permit for export of the mentioned items from the area of Vojvodina is issued by the Provincial Secretariat for Culture;
- permit for temporary or permanent export of cultural goods from the territory of our entire country, issued by the Ministry of Culture of the Republic of Serbia.

When it comes to the entry of works of art, the usual import customs procedure is carried out, in an abbreviated or regular procedure, without the need for any permit or consent. Scientists, writers and artists are exempt from paying import duties on their own works that they import from abroad.

Museums and art galleries are exempt from import duties on collections, parts of collections and individual objects intended for them, as well as archives, for archival material.

VI. NEW TECHNOLOGIES

In Serbia there are companies that deal with blockchain and cryptocurrencies, and an increasing number of such companies has been noticed on the market. In 2020, an initiative was launched to enact legislation regarding this way of doing business in order to improve legal certainty in cryptocurrency transactions, protect cryptocurrency investments and improve Serbia's position in the international context in terms of the attractiveness of the business environment related to cryptocurrency trading. As a result of these efforts, the Law on Digital Assets was adopted, which will be implemented in June 2021.

The following terms are recognized in the law:

- a digital token defined as a type of digital asset that means any intangible property right that in digital form represents one or more other property rights, which may include the right of the user of the digital token to be provided with certain services.
- digital assets, i.e. virtual assets, means a digital value record that can be digitally bought, sold, exchanged or transferred and which can be used as a medium of exchange or for investment purposes, where digital assets do not include digital currency records that are legal tender and other financial assets regulated by other laws, except when otherwise regulated by this law;
- virtual currency is a type of digital assets that has not been issued and whose value is not guaranteed by the central bank or other public authority, which is not necessarily tied to legal tender and has no legal status of money or currency, but is accepted by persons or legal entities exchanges and can be bought, sold, exchanged, transmitted and stored electronically.

Equalization of digital assets with other forms of assets undoubtedly represents the possibility of constituting a pledge, which is acquired by entry in the register of pledge, kept by the provider of services related to digital assets.

The law specifically notes that a pledge agreement may also be enforced using a smart contract defined as a computer program or protocol based on distributed database technology or similar technologies that fully or partially automatically executes, controls, or documents legally relevant actions or events in accordance with the already concluded contract. In this way, in practice, the enforcement procedure could be significantly shortened and facilitated through automatic collection from the value of digital assets in case the debtor does not fulfill the obligation from the primary business due.

In addition to constituting a pledge, the law also defines fiduciary on digital assets as the strongest means of security for the creditor. What is specific about fiduciary is that the creditor, unless otherwise agreed, acquires the fiduciary right of ownership, i.e. has the right to use the digital assets that is the subject of the fiduciary agreement and to dispose of it, including the right to alienate it, which is not the case with a mortgage or pledges on movable property or rights.

Financial institutions under the supervision of the NBS are allowed to store and administer digital assets for the account of users of digital assets and related services (storage of cryptographic keys).

Digital assets are taxed from the aspect of income of persons, profit of legal entities, turnover taxable with VAT, as well as from the aspect of inheritance and gifts. Therefore, the tax treatment of digital assets concerns all persons and legal entities of tax residents of Serbia who have digital assets.

Tax treatment of digital assets in Serbia will begin with the application on June 29, 2021 in terms of taxation of personal income, corporate profits, as well as VAT treatment of digital assets transactions, with the beginning of the application of the Law on Digital Assets. The regime of taxation of digital assets acquired through inheritance and gifts came into force on January 1, 2021.

A person who makes a profit by selling or transferring digital assets for another type of assets then acquires the obligation to calculate, report and pay Capital Gains Tax. Capital gain arises only if a person sells digital assets or transfers them for monetary or non-monetary compensation. The capital gains tax rate is 15% and is calculated on the positive difference that a person realizes between the sale price of a digital asset and its purchase price.

A legal entity that makes a capital gain by selling digital assets then includes the amount of capital gain in the corporate income tax base. Capital gains arise if a digital asset is sold or transferred by a legal entity for a fee. Legal entities that deal exclusively with the resale of digital assets and for which they have been issued a license to provide services related to digital assets in accordance with the Law on Digital Assets, do not determine the capital gain from the sale of digital assets.

Legal entities may be released from the obligation to include the realized capital gain in the taxable profit tax base. A legal entity does not include capital gain in its income tax base if it invests funds generated from the sale of digital assets in the share capital of a company or investment fund whose center of business or investment activities is in Serbia. The condition is that the investment was made in the same tax period when the legal entity sold the digital assets.

Virtual currency transactions are exempt from VAT. The transfer and sale of cryptocurrencies (virtual currencies) are exempt from VAT, without the right to deduct the previous tax. The exemption applies only to cryptocurrencies, not to digital tokens.

In this way, the regulatory system of Serbia contains a systematically regulated tax treatment of digital assets. Now, taxpayers in Serbia know what kind of income they generate by disposing of digital assets, what tax liability arises in that case, as well as how much it will amount to. In addition to clear tax treatment, tax incentives additionally encourage owners of cryptocurrencies and other forms of digital assets to invest their income in the capital of the Serbian economy and thus achieve significant tax savings. In this way, it is possible for digital assets to become an additional source of financing for companies in Serbia and thus contribute to economic recovery and further growth of the Serbian economy.

VII. MANAGEMENT OF ART COLLECTIONS – ESTATES, TRUSTS AND FOUNDATIONS

Many collectors and creators (scientists and artists) want their valuable collections to remain intact and preserve the memory of the owner, so today in Serbia there are a large number of legacies. Regardless of the nature of the collections, the legacies formed from them function in different ways and with different efficiency, so their cultural and overall social significance also differs. Through a will, artists bequeath a large number of art collections to certain endowments, galleries or museums.

Art collections can have a specific treatment if they represent cultural goods. The trade of cultural goods is limited in accordance with the law, which means that their owners cannot offer or sell goods

at their discretion, without fulfilling the legal conditions or respecting the right of first refusal of cultural goods, which the competent protection institution has. This means that only if the competent institution confirms that it is not interested in taking over, i.e. buying up the cultural good, its owner is authorized to alienate it, but again under the conditions provided by law.

The state may also unilaterally decide to take over a certain good from its owner, in the process of expropriation, under the following conditions:

- if the owner, i.e. the user does not have the possibility or interest to ensure the implementation of protection measures, and that represent a danger that the cultural property will be destroyed;
- if archaeological excavations cannot be carried out in any other way, and to implement technical protection measures on the cultural property;
- if in another way it is not possible to ensure the availability to the public of a cultural good of great, i.e. remarkable importance.

The general interest in expropriation, i.e. administrative transfer of cultural property is determined by the Government of the Republic of Serbia.

VIII. TAX

According to The Law on Culture of the Republic of Serbia, artists are defined as independent artists, and these are those artists who are not employed, and for whom artistic activity is their main and basic occupation. They are entitled to pension, disability and health insurance. In order for an artist to use his "status of an independent artist", he should be recognized as such by a representative association, namely ULUS or ULUPUDS. Contributions to independent artists should be paid by local self-government bodies, and through associations of independent artists.

According to the valid tax regulations, companies can include their investments in culture, including cinematographic activity, as an expense in the amount of up to 5% of the total income.

- **VAT**

As regards value added tax, works of art are subject to a special taxation procedure. The basis for calculating value added tax is determined as the difference between the sale and purchase price of the good. A special rulebook determines what is considered works of art in terms of value added tax. As works of art are considered:

- paintings, drawings, collages and decorative panels, if made by hand by authors, other than plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, hand-decorated works, drawings for theatrical script, studio-painted fabrics or similar paintings canvas;
- original engravings, printed images and lithographs, if the author makes them by hand in a limited number in black and white or in the color of one or more plates, regardless of the procedure and material used, unless a mechanical or photomechanical procedure has been applied;
- original sculptures and statues of any material, if made by the author, as well as castings of sculptures whose production is limited to eight copies, if controlled by the author or his successors;

- tapestries and hand-woven textile wall objects based on an original work of art, provided that there are no more than eight copies of each;
- unique ceramic objects made exclusively by the author and with his signature;
- copper paintings made exclusively by hand, limited to eight numbered copies signed by the author or the studio;
- artistic photographs taken or printed by the author or taken under his supervision, if they are signed, numbered and limited to 30 copies in all sizes.

- **Inheritance Tax**

As far as inheritance taxes are concerned, works of art are no different from other property owned by the testator, and the heirs become liable on the day the inheritance decision becomes final. The heir of the first hereditary order, the spouse and the parent of the testator are exempt from paying inheritance tax. Taxpayers who, in relation to the testator, are in the second hereditary order pay inheritance tax at the rate of 1.5%. Taxpayers who are, in relation to the testator, in the third and further hereditary order, i.e. taxpayers who are not related to the testator, pay inheritance tax at the rate of 2.5%. Inheritance tax is not paid by the foundation, on inherited property that serves exclusively to achieve a public benefit purpose for which the foundation was established, as well as endowment, or association, established to achieve a public benefit purpose in terms of the law governing endowments and foundations, registered in accordance with law, on inherited property that serves exclusively for the purposes for which the endowment or association was established. The basis of inheritance tax is the market value of inherited property, reduced by the amount of debts, costs and other encumbrances that the taxpayer is obliged to pay or otherwise settle from inherited property, on the day the tax liability arises. Everything listed for inheritance tax applies to gift tax.

- **Copyright Income Tax**

The taxpayer of the tax on income from copyrights and rights related to copyright is a person who, as an author, holder of related rights, realizes compensation on the basis of copyright and related rights. The taxpayer of tax on income from copyright and related rights also is the heir of property copyright and related rights, as well as any other person who receives compensation on those grounds. Taxable income from copyright and related rights is the difference between gross income and costs incurred by the taxpayer in the realization and preservation of income, unless otherwise provided by law. Copyright and related income tax rate is 20%.

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I. INTRODUCTION

Article 59 of the Constitution of the Republic of Slovenia guarantees the freedom of scientific and artistic creation. In the case of art, the Constitution therefore guarantees every citizen not only to freely express but also to have equal access to the production and consumption of art. Furthermore, Slovenia has a rich and diverse cultural heritage, the protection of which is also constitutionally recognised in Article 73 of the Constitution.

Even though the Constitution emphasises the importance of artistic creation, and while Slovenia has a long tradition of protection of its cultural heritage, the art market in Slovenia is relatively small and quite closed within its borders. The Slovenian art market is therefore hardly comparable to the international art market, due to the works of art not being sold often and rare occurrences of any major public auction. The interest of buying art in Slovenia is unfortunately still oriented in the past and the buyers do not show enough support for contemporary artists. During the period of socialism, the Slovenian art market was blooming, due to the activity of central and local government authorities that purchased great amount of works of art from local artists. Despite the government's fondness for art, however, even then artists found it difficult to make a living.

Nowadays, the Slovenian art market faces the problem of non-transparency, as the prices of works of art are usually determined on the basis of the sales policy of each individual gallery or auction house, only taking into account the appraiser's own data archives and at his or her discretion. A characteristic of the Slovenian art market is also the intertwining of the primary and secondary art market. On the Slovenian art market, it is not clear who is the seller, who is the buyer, which works of art are being bought and what values or prices they are achieving. The consequences are reflected in the poor social position of artists, as they are often unable to survive on the profits from their sales.

Moreover, while in countries with developed art markets auctions play a tremendously important role in setting prices and global artistic trends, auctions have not yet taken root in Slovenia, with the exception of charity auctions. The fact that art auctions in Slovenia have not developed may also be due to the fact that there are not many bidders with the appropriate formal education and only individual galleries occasionally organize auctions. However, the Slovenian art market could be in for an overhaul, as two new private agencies have been founded in 2020 to improve transparency and interest in this field.

A list of Slovenian legislation that is most relevant with reference to artworks, art and culture heritage:

- Copyright and Related Rights Act[150]
- Collective Management of Copyright and Related Rights Act[151]
- Cultural Heritage Protection Act[152]
- Exercising of the Public Interest in Culture Act[153]
- Prevention of Money Laundering and Terrorist Financing Act[154]
- Return of Unlawfully Removed Objects of Cultural Heritage Act[155]

II. CONTRACTS

General contract law provisions are contained in the Obligations Code[156], whereas the special provisions regarding the transfer of rights are contained in the Copyright and Related Rights Act. Moreover, the Cultural Heritage Protection Act contains specific provisions for trade with works of art that pertain to cultural heritage of the Republic of Slovenia.

- **Sales Contract**

The transfer of ownership in a work of art is based on the general principles of transfer of ownership. It must be emphasized that the transfer of ownership and the transfer of copyright and other related rights are separate transactions. Legal transactions with individual material copyrights or other rights of the artist of the particular work of art do not affect the property right of the things on which this work of art is contained, unless otherwise provided by law or contract. Moreover, legal transactions with the property right of the things on which the work of art is contained do not affect individual material copyrights or other rights of the artist.

The secondary art market in Slovenia is mostly represented by galleries, which are rather small as well, in proportion to the market. The prices of works of art are usually determined on the basis of the sales policy of each individual gallery, which is the reason, why prices are not transparently designed. The prices are set on the basis of appraisals and evaluations by gallerists, art critics and curators. Unfortunately, there is also not enough public data for the sale of works of art in Slovenia. The art market and the method of setting prices are therefore rather non-transparent.

The majority of the sales of works of art in Slovenia occur under a consignment contract, the general provisions of which can be found in the Obligations Code. The consignor (i.e., the seller) hands over the work of art to the gallery or an auction house, who acts as the consignee, who receives possession of the goods and sells them upon instruction of the consignor. The commission of the galleries for sales under the consignment contract in Slovenia ranges from 30% for works of art sold at a price of up to EUR 5,000 to 17.5% for works of art sold at a price above EUR 50,000.

The overall sell process usually takes 6 or more months. Potential buyers submit their bid in the non-binding tender process. The process of collecting binding offers is much rarer, sometimes the art is even sold at an online auction. When the art is sold in at an auction, it is common in Slovenia,

[150] Official Gazette of the Republic of Slovenia nos. 16/07, 68/08, 110/13, 56/15, 63/16 and 59/19.
[151] Official Gazette of the Republic of Slovenia nos. 63/16 and 203/20.
[152] Official Gazette of the Republic of Slovenia nos. 16/08, 123/08, 8/11, 30/11, 90/12, 111/13, 32/16 and 21/18.
[153] Official Gazette of the Republic of Slovenia nos. 77/07, 65/07, 56/08, 4/10, 20/11, 100/11, 111/13, 68/16, 61/17, 21/18 and 49/20.
[154] Official Gazette of the Republic of Slovenia nos. 68/16, 81/19, 36/20, 49/20, 61/20, 91/20 and 2/21.
[155] Official Gazette of the Republic of Slovenia nos. 126/03 and 8/16.
[156] Official Gazette of the Republic of Slovenia nos. 97/07, 64/16 and 20/18.

as in other countries that galleries and auction houses charge between 25% and 30% commission on the work of art sold at an auction, which is added to the price for which the work of art was sold. The buyer must therefore pay VAT, the artist's copyright and a commission at the time of purchase. The seller must also pay his or her part of the commission, which is degressive according to the value of the work of art. However, compared to larger foreign auction houses, galleries and auction houses in Slovenia charge less commission for higher valued works of art. For example, in Slovenia the commission for works of art, valued at EUR 100,000 and higher, is set at 16%, while foreign auction houses (e.g. Christie's) set the commission at 25% for works of art, valued up to EUR 150,000. The percentage drops to 12.5% only for works of art, valued at EUR 2.000.001 or higher.

When acquiring works of art in Slovenia, special attention should be placed on whether a particular work of art is part of the collection, which has been awarded the status of a national treasure of the Republic of Slovenia by the Ministry of Culture. In such cases specific provisions of the Cultural Heritage Protection Act and accompanying legislation regarding the protection of cultural heritage need to be observed in order for the transaction to be validly concluded.

The Ministry of Culture has the power to limit the transactions with art that has been awarded the status of a national treasure. Usually, the status of a national treasure prevents the works of art from the collection of being sold separately, therefore only the entire collection as a whole may be purchased. Moreover, for the exit and export of such art from the territory of the Republic of Slovenia, the owner needs a special permit from the Ministry of Culture, according to Article 46 of the Cultural Heritage Protection Act. With obtaining the property right of the art collection that has been awarded the status of a national treasure, the owner also undertakes to comply with the minimal safety storage requirements of such art, determined by the Ministry of Culture. The Republic of Slovenia or an authorized museum have the right to check the adequacy of the preservation of the art collection that has been awarded the status of a national treasure, give its owners or possessors instructions and advice for protection and take care of its preservation.

- **Loan Agreement**

The majority of galleries in Slovenia, national and private, offer enthusiasts the option of concluding a Loan Agreement for the works of art in their collection. The amount of loan fees ranges from EUR 80,00 per month and higher, depending on the value of the lent work of art. Usually, the galleries require the borrower to take appropriate insurance to cover the risk of possible damage to the art. The general provisions of the Obligations Code apply to such Loan Agreements.

- **Licensing Contract**

If the particular Licensing Contract does not specify, which rights are transferred and to what extent, the Copyright and Related Rights Act provides for legal presumptions on the transfer of copyrights and related rights (e.g. non-exclusive transfer, the transfer only for the territory of the Republic of Slovenia, the transfer only for those individual rights and to the extent that it is essential to achieve the purpose of the contract…).

The general provisions of the Obligations Code also apply to the Licensing Contract. However, Copyright and Related Rights Act also contains specific provisions, where the Act itself grants license for certain use of copyright work, e.g. for the use of photographs of fine art in school textbooks.

III. COPYRIGHT

Copyright and related rights are one of the constitutional and fundamental human rights and under Slovenian law belong to the author or creator or artist on the basis of the creation of his or her work, i.e. no registration of the copyright is required. In Slovenia, the field of copyright and related rights and their protection is regulated mainly by the Copyright and Related Rights Act.

The copyright of the artist entails moral and economic rights. In Slovenia, the copyright of the artists lasts for the entire duration of his or her lifetime and 70 years after the death of the artist. Moral rights protect the artist regarding his or her spiritual and personal ties to the work of art and provide the artist the right of first publication or presentation of the work, the right to proper attribution of authorship of the work of art, the right to demand respect of his or her work of art and the right to revoke the transfer of economic rights to another person, if he or she has a serious moral reason for doing so and if he or she has reimbursed the rights holder for the damaged caused by the revocation. Economic rights protect the property interests of the artist by giving the artist the right to exclusively allow or prohibit the use of his or her work of art. Economic rights of the artist entail the right of the author to allow or prohibit the reproduction of his or her work of art, the right to allow or prohibit the viewing of his or her work to the public, the right to allow or prohibit the adaptation of his or her work of art, the right of distribution of his or her work of art and the right of renting and lending his or her work of art. Other rights of the artists entail the right to access the original of his work of art, which is in possession of another person, if that is necessary to exercise the artists' right of reproduction or adaptation of his or her work of art. The Copyright and Related Rights Act also grants the artist the right to be informed if the original work of art is being resold and the right to compensation, provided that the seller, buyer or broker is engaged in the marketing of works of art, such as galleries and auction houses.

- **Copyright Violation and Protection**

In case of the copyright violation, the violation leads to civil liability of the infringer, and, in case of the violation of authors moral rights, also the criminal liability of the infringer is established under the Criminal Code[157]. The beneficiary, which may bring the claim before the court is a person, whose right have been violated. Under the mentioned Act the same protection may also be requested by a person, whose rights have not been violated but the violation, yet there exists a real threat that the right under the Act will be violated.

In case of violation of the exclusive rights under the Copyright and Related Rights Act, the beneficiary may bring various claims before the Court. The beneficiary may request the Court:

- to prohibit all existent and future violations of their rights;
- to recall the objects, created by the violation of rights from channels of commerce, taking into account the interests of *bona fide* third parties;
- to remedy the situation created by the violation;
- to irrevocably remove the objects, created by the violation of rights from the channels of commerce;
- to destroy the objects, created by the violation of rights;
- to destroy the means, with which the violation of rights occurred, which are exclusively or predominantly intended or used for the violation and which are the property of the infringer;

[157] Official Gazette of the Republic of Slovenia nos. 50/12, 6/16, 54/15, 38/16, 27/17, 23/20, 91/20, 175/20 and 195/20.

- to leave the objects, created by the violation of rights to the beneficiary against payment of production costs;
- that the judgment be published.

In addition to the above-mentioned claims, the beneficiary can claim appropriate compensation for the incurred damage and in some cases also the payment of a penalty.

Copyright and related rights are usually managed by artists individually (when they sell their work), but in some areas of application, individual enforcement of rights is impossible, as it would be too complicated and uneconomical. These areas are determined by the Collective Management of Copyright and Related Rights Act and European directives [158] (e.g. resale right, cable retransmission, private and other own reproduction...). Collective rights management is a special feature of copyright that allows authors and other rights holders to manage their rights more easily and efficiently in conditions of mass and widespread use of their works, and allows users easy access to the lawful use of many works. Collective management is also essential to provide different and new tasks in the digital environment.

Collective management of copyright may only be carried out by collective organizations (as a rule, these are national associations of authors for a specific field) that have the permission of the Intellectual Property Office of the Republic of Slovenia. The control over the operation of a collective organization is left to its members and authors or artists, and the state also has certain competences through the Intellectual Property Office of the Republic of Slovenia, which controls the compliance of the collective organization with the Collective Management of Copyright and Related Rights Act. Despite the legal requirement to establish an appropriate legal entity, artists in Slovenia have not yet formally established such a collective organization of rights holders of works of art. In 2017, the Association of Slovenian Visual Authors was established. However, it has not yet collected all the relevant documentation for obtaining the status of a collective organization, so the field of collective protection of the rights of authors of visual arts is still not properly established.

- **Street Art**

Street Art in Slovenia is mainly not protected. Protection of Public Order Act[159] provides that the making of graffiti is determined as a misdemeanor. Moreover, much of the Street Art that exists is often removed if it is not commissioned by the municipal authority. However, in Ljubljana, the capital of Slovenia, the municipal authority tried to fight against graffiti with partially legalizing it, in the spirit of which thirteen locations were determined, where graffiti is allowed, therefore bringing this street art closer to legal surfaces of creation. However, most street artists view the legality as part of the art, and therefore the graffiti is not limited only to specified areas of the city.

IV. LITIGATION

The majority of case-law of the Slovenian courts in this field revolves around copyright violations.

[158] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, Official Journal of the European Union L 84/72.
[159] Official Gazette of the Republic of Slovenia nos. 70/06 and 139/20.

As already established, the beneficiary or rights holder may bring various claims before the court under the Copyright and Related Rights Act. The rulings, which should be emphasized regard the irrelevance of good faith of the infringer of copyright when establishing his or her accountability for the violation. From the analysis of relevant case-law, it can be concluded that the courts, when identifying certain individual actions as copyright violations stem from the basic premise, that the subject of violation (which may be threatening or actual) can exclusively be only material and/or moral copyrights. It has been established, that the good faith of the infringer i.e., the fact of whether the infringer knew that the work is protected by copyright, does not play a role in establishing the accountability of the infringer. Therefore, it does not matter for the existence of the violation of copyright, whether the infringer knew about it, pursued it or whether he or she was at fault in any connection in that regard.[160]

In general, Slovenian courts deal with a very limited number of art crimes. The empirical research shows that there are one hundred art crimes a year on average in Slovenia. The information collected by artists, gallery owners and certified appraisers reveals that many of them have already encountered forgeries, but only a few of the informed the authorities of their suspicions. Another problem in Slovenia that the investigators face is online trading: a vast amount of art is now offered online, making it hard to determine authenticity and originality of each piece. Moreover, even when criminal proceedings are initiated, final judgements and convictions of art crime perpetrators are extremely rare in Slovenia. Nevertheless, the findings show that the state-of-play of art crime in Slovenia is not alarming.

Most of the case law on the protection of copyright in criminal law relates to the criminal offense of unjustified exploitation of a copyright work. It can be established that courts, when assessing criminal offenses in the field of copyright protection, as a rule do not deal with the specifics of copyright law, but deal mainly or exclusively with the rules of criminal law. Cases of offenses involving copyright violations are few. Criminal law decisions of courts do not represent important novelties in case law, but they are an indicator that copyright violations can be successfully prosecuted and sanctioned.

V. INTERNATIONAL TRADE

For customs clearance of works of art in Slovenia, it is necessary to have a sales note, which can be presented in the form of a confirmation of payment of the charged royalties to the artist or any other confirmation of payment.

Special attention should be put on the legislation of export of works of art with the status of a national treasure of the Republic of Slovenia. Legislation in the field of export and import determines the method of protection of cultural heritage, competences in its protection for the purpose of integrated heritage preservation, general export and import requirements. It also contains provisions on exit and export permits, categories of cultural heritage objects and the procedures for retention of movable cultural heritage and customs control.

Exports of cultural heritage outside the customs territory of the European Union and export to EU Member States require a permit on the basis of the Cultural Heritage Protection Act. The permit can be obtained for the exit or export of cultural heritage from the Ministry of Culture.

[160] Judgement of the Supreme Court of the Republic of Slovenia of 15 January 2009, case no. II Ips 966/2008.

The permits from the Ministry of Culture must be obtained for:

- export of cultural heritage objects from Slovenia to another Member State of the European Union,
- export of cultural heritage objects from a Member State of the European Union to a non-EU country.

Under the Cultural Heritage Protection Act the owner or possessor must ensure the safe transport of the art with the status of a national treasure. The Act provides that such transport may only be performed by the Republic of Slovenia or an authorized museum or a person who meets the conditions for such transport on the basis of regulations governing private security. The minimum professional, technical and spatial requirements that must be met by the owners or possessors in the transport of art with the status of a national treasure are determined by the Ministry of Culture.

Regarding the import of cultural heritage objects no import permit is required. If the country of origin prescribes export licenses, they must be presented to the competent authorities at import. If cultural heritage objects are imported by an institution in the field of cultural heritage protection to supplement its collections, it may be exempted from import customs duties at the proposal of the Ministry of Culture.

In case of a suspicion of a violation of the rules for the management of cultural heritage, the customs authorities must check with the competent authority (i.e., Ministry of Culture) whether the objects have the status of cultural heritage or not. The goods remain under customs control for the duration of the verification process, pending the elimination of the grounds for detention.

VI. NEW TECHNOLOGIES

If bitcoin and other cryptocurrencies are a digital alternative to traditional currencies, NFT is, or will potentially become, an alternative to traditional collecting art in Slovenia as well. As in the rest of the world, in Slovenia the platform based on the block chain technology or data chain, and NFT electronic identifiers that enables a kind of digital collecting also became popular in the last year. The platform is definitely something traditional collectors in Slovenia do not approve, however it shows promise, since the younger generations started showing more interests in art and may start supporting new age digital artists.

In the field of E-Commerce, transactions with works of art in Slovenia are also carried out via e-auctions or online auctions, which have been present in Slovenia for some time. There are many providers of online auction services on the Slovenian market, and due to having more experience with online shopping, people also do not have prejudice for online auctions. Relevant legislation on online trade of artworks complies of the general provisions of the Obligations Code, as well as the Consumer Protection Act[161], the Electronic Business and Electronic Signature Act[162], and the Personal Data Protection Act[163].

[161] Official Gazette of the Republic of Slovenia nos. 98/04, 117/04, 46/06, 114/06, 126/07, 86/09, 78/11, 38/14, 19/15, 55/17, 31/18, 61/20 and 80/20.
[162] Official Gazette of the Republic of Slovenia nos. 98/04, 73/04 - ZN-C, 61/06 and 46/14.
[163] Official Gazette of the Republic of Slovenia no. 94/07.

VII. MANAGEMENT OF ART COLLECTIONS – ESTATES, TRUSTS AND FOUNDATIONS

In Slovenia, usually galleries and auction houses take over the management of art collections. In particular, their services of managing art collections are needed in the event of inheritance of collections of works of art. Collections of works of art belonging to the cultural heritage are kept by national museums and galleries.

It should be emphasized, however, that the Cultural Heritage Protection Act also determines the conditions for the management of an art collection with the status of a national treasure, for cases where such an art collection is privately owned. The Act requires the owner or possessor of a collection with the status of a national treasure to meet the minimum requirements for its storage. It also stipulates that the national museum or an authorized museum checks the adequacy of the preservation of the national treasure, gives its owners or possessors instructions and advice for its protection and takes care of its preservation. In accordance with the Act, the owner or possessor must also ensure the safe transport of national treasure. Such transport may only be performed by a national or authorized museum or a person who meets the conditions for such transport on the basis of regulations governing private security. The minimum professional, technical and spatial requirements that must be met by owners or possessors in the storage and transport of national wealth are determined by the Ministry of Culture. With this act, the Ministry also determines the standards of protection and storage of museum material in national and authorized museums.

VIII. TAX

- **VAT and the circulation of a work of art**

The Slovenian taxation system of the sale of art is quite complex, since it is necessary to take into account many intertwined specifications. Taxation of the sale of art may follow the general principle of VAT or it can undergo a special regime of taxation. VAT payers who sell their fixed assets, including works of art, charge VAT according to the general principle. Taxpayers who are by law identified as taxable dealers, however, may apply special arrangements in the event that they have received works of art from final consumers (natural persons) or from other sellers of works of art, if they have not been able to deduct VAT on the purchase.

A taxable dealer is defined in Article 101 of the Slovenian Value Added Tax Act[164] as any taxable person who, in the course of his or her economic activity and for the purpose of resale, buys or imports second-hand goods, works of art, collections or antiques, regardless of whether this taxable person acts, in his or her own name or on behalf of another person, in accordance with the contract under which the commission on the purchase or sale is paid. Dealers charge 22% VAT on the sale of works of art. They can do this from the difference in price (special regime of taxation) or they can decide to charge VAT on the sales value. However, they can always use the general regime of taxation.

The special regime of taxation therefore allows VAT to be levied on the difference in price and applies to taxable dealers. The reseller may charge VAT under special arrangements from:

- supplies from works of art, collections or antiques imported by himself or herself;

[164] Official Gazette of the Republic of Slovenia nos. 13/11, 18/11, 78/11, 38/12, 40/12, 83/12, 14/13, 46/13, 101/13, 86/14, 90/15, 77/18, 59/19, 72/19, 61/20, 175/20 and 203/20.

- supply of works of art obtained directly from the authors or their legal successors; and
- supplies of works of art obtained from other taxable persons, who are not taxable dealers, if their supplies were at a reduced rate of VAT.

At the reduced rate of 9.5%, VAT may be charged on imports of works of art, collections and antiques referred to in the second, third and fourth points of the first paragraph of Article 101 of the Slovenian Value Added Tax Act in accordance with point 9 of Annex I. The reduced rate may also be applied in accordance with point 10 of Annex I to works of art referred to in the second point of the first paragraph of Article 101, if this works are being sold by:

- The author or his or her legal or legal successors;
- A taxable person who is not a reseller if he or she sells occasionally and if he or she imported the items himself or herself or was sold to him or her by artists or his or her legal or legal successors or if he or she had the right to a full deduction of input VAT.

There is no need to pay additional income tax or tax on the incidental sale of a work of art through a consignment contract, and therefore it is only necessary to pay a commission determined by the gallery. However, a sale through a consignment contract is only appropriate if it is an incidental sale of a work of art and not selling of works of art as a business activity. In the event that a natural person sells a work of art to another natural person, it makes sense to transfer the ownership right through a sale and purchase contract, as the works of art are, after all, of greater value.

With regard to the legal regulation of corporate income tax under Slovenian legislation, there is also an investment relief, which is applied for investments in equipment and intangible assets. However, companies cannot claim this relief for works of art, as a more detailed description of the investment relief explains that the purchase of a collection of art and works of art of greater value that do not serve a functional use or are used only for furnishing office and other business premises or as investment property does not fall under the equipment which is the subject of the relief.

- **Inheritance tax**

The inheritance tax is regulated by Inheritance and Gift Tax Act[165]. The tax liability of the taxable person arises on the day the decision on inheritance becomes final. The basis for inheritance tax is the value of the inherited property at the time, when the tax liability has arisen, after deduction of debts, costs and burdens that fall on the property from which this tax is paid. The value of the objects of movable inheritance, i.e. the works of art, is determined according to the market value of the works of art, and the taxable amount is reduced by EUR 5,000. A taxpayer who inherits property from which inheritance and gift tax is paid does not need to file a tax return. The assessment of inheritance tax is made on the basis of the data of the final decision on inheritance.

The following persons are exempted from the payment of the inheritance tax:

- the heir of the first hereditary order and persons equated with him or her;
- a legal person governed by private law established by law for the exercise of a religious, humanitarian, charitable, health, social welfare, educational, research or cultural activity or for the performance of protection and rescue activities, but only in cases, when inheritance is intended for the use in the activity of such a legal person.

[165] Official Gazette of the Republic of Slovenia nos. 117/06 and 36/16.

The taxable person must pay the inheritance tax within 30 days of the effected service of the final decision. The decision is deemed to have been served on the 15th day from the day of dispatch of the decision.

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22 – UNITED ARAB EMIRATES – Proriented Executive Advisory

PRORIENTED Executive Advisory

[IN COLLABORATION WITH BIN HAIDER ADVOCATES AND LEGAL CONSULTANTS]

I. Introduction

There is not a strict and precise legal definition of art law as such. Under this broad denomination we can include many different areas of law such as contracts, corporate, IP, data protections, taxation and inheritance. We could say art law is a broad umbrella covering legal aspects related to the purchase or sale, protection and asset organisation of works of art.
It should also be noted that when dealing with art law in the region, especially if there is an international element, than local legal laws and regulations must be read in conjunction with international ones and they become part of a more comprehensive set of norms to apply.

II. Contracts

➢ Sale Purchase Contract

Artwork in physical form is considered personal property, and therefore a transfer of title will be necessary in the form of a sale purchase contract. This also functions as a record of the transaction for both the artist and the buyer of the artwork.

The sale purchase Agreement does not need to be in writing, however; executing the Purchase Agreement in writing is recommendable. The sale contract provides you the opportunity to set some terms about the ownership of your work.
Despite slight variations in local requirements, the sale contract should include the following information:

- date of sale and invoice number
- contact information for both artist and buyer with both a physical address as well as a phone number or email
- an itemized list that includes artwork sold with a description of the artwork, including the title, medium, and dimensions, as well as any extra costs such as framing, delivery, and installation. If you are selling multiple works at once, itemize each artwork individually
- billing should be divided in a subtotal, which is the cost of work and services before taxes, in accordance with state requirements and the total sale

- Copyright and reproduction rights information

Although not a requirement, it's a good idea to have proper documentation of copyright and reproduction rights in your sale contract to protect against legal issues that could pop up in the future. Include information about the copyright and reproduction rights of the work sold to inform buyers that they are only purchasing the rights to the physical piece of artwork.

➢ **Licensing Contract**

Art licensing is a quickly expanding industry, growing exponentially every day because it covers a diversity of products focused on brands, and well-known artists occupied by style and name. Art licensing involves any imaging likeness that can be bound by a license and can appear on any entertainment medium or manufactured product. The main objective for the artist to have a licensing agreement is so they can look forward to receiving reasonably large advances and a big royalty percentage for their creations and the time they put into creating.
The Terms Covered to be covered in an Artist Licensing Agreement:

- Who the artist is and who the client is
- The duration of time that the licensing agreement will last
- The products that the artist's images will appear on
- The distribution and the selling of the products that have the artist's artwork on them
- The artist will have approval in how the client treats the artwork
- How much the client will agree to pay the artist in advance and in royalties
- The frequency that the client will pay the artist for the use of their work
- How the artist can exit the licensing agreement if they no longer want to be apart of it

Artist Licensing Agreements fall under Intellectual Property Protection, which is protection for artistic works because they are created by the mind. Copyrights protect the original works of art, the authorship, and the production of the art.

➢ **Contract with Social Media Influencers in the art sector**

There are no statutory requirements which a contract with a Social Media Influencer should meet.

III. Copyright

In the UAE, under the Federal law no.7 of 2002 Concerning copyrights and neighbouring rights, a diverse array of original and tangible works such as books, lectures, musicals, architectural drawings, photographs, computer software, and other similar creations are subject to copyright protection.
"the very minute your creative work manifests an actual form; it is automatically protected without any formal procedure. However, there are umpteen perks in obtaining a copyright certificate".
Copyright denotes the representation of the labor put in by an artist or an author to express an original idea through craft. To hold a "copyright" basically means to legitimately secure the rights to produce, adapt, disseminate, and create copies of the original work.
The UAE copyright law protects two kinds of rights – moral rights and economic rights. Moral rights denote the inherent rights an owner has over his intellectual work and for being identified as the originator of the masterwork. The law also takes into consideration his right to hinder alteration, distortion, or mutilation of the same. As per the law, exclusive rights are granted to the creator to

withhold his creation from being circulated, to take up a pseudonym, or to maintain anonymity. The right of divulgation, under the moral rights, guarantees the owner rights to control the time and location of the work being publicized. The perpetual nature of the moral rights makes it infeasible to transfer to another individual and thus the author or creator continues to hold the rights.
Economic Rights in the UAE encompass a set of rights that permits copyright holders to retain ownership but allows authorized reproduction and dissemination of their work in return for remuneration. In addition to the right to reproduction and distribution of the work, this set of rights also permits adaptations, public communication of the work, broadcasting over airwaves, and propagation on digital media. Economic rights cannot be transferred or assigned to another even if the item as a whole is sold to the person.

IV. Litigation

Most of the cases comes under the copyright law other than that there is not much jurisprudence in this area of law.

V. International Trade

- **Customs legislation and duty policies with reference to import and export of artworks**

The UAE charges a duty upon import of fine art of 5%. Often, VAT of an additional 5% is charged, even where the art is imported solely for personal use or public exposition and there is no intent to resell. This means that there is a 10% premium based upon the value of the art upon its entry, which on pieces of high value can run into very high numbers.
Duty can be avoided in cases where an ATA Carnet – that being a temporary transit permit - is obtained, but this only applies for art intended for exposition for a limited period and may require leaving a deposit representing a percentage of the art's value in the country where the art "resides", so that its return is guaranteed, and the Carnet is not misused to circumvent import duties.
The recent enactment of VAT in 2018 has complicated the importation of art as well. For example, the DIFC as a free zone used to have free passage, but now VAT is chargeable, often without respect to whether the art is imported on consignment, for exposition, or otherwise.
Calculation of import duty on art which has not recently been sold is also a challenge, as fine art has valuation often only ascertainable once the art is brough to market, and then often not disclosed for various factors. Thus, the private importer of already owned art into the UAE may be quite reluctant to expose the art to a variable valuation risk.
And while certain free zones do have art storage facilities where duty is not charged, this does not benefit the collector, as these facilities do not offer display but merely serve as a closed depository, albeit with some limited viewing and inspection capacity.
In summary, the import cost often does not justify the benefit. This is particularly true in cases where the intent is for exhibition only, the availability of a Carnet notwithstanding, and creates a disincentive against promoting the cultural benefits of public education and immersion into fine arts.

VI. New Technologies

There are no Innovative Technologies in the Art Sector in the UAE nor legislation applicable to this specific sector, as far as we know.
Several start-up projects have kickstarted in the Dubai International Financial Centre using Blockchain and Smart Contracts to provide traceability in the art world, including auctions, art collection, wine

collections , vintage automobiles and valuables arena. The concepts are quite similar – such start-ups have been funded partially by semi governmental entities like Dubai Future Foundation and are in an early seed phase.

VII. Management of Art Collections – Estates, Trusts and Foundations

The three regimes which provides the basis for Foundations in UAE are: DIFC - Dubai International Financial Centre, ADGM - Abu Dhabi Global Market and RAKICC - Ras Al Khaimah International Corporate Centre.
Foundations are established in the UAE to provide families with a local solution to managing their wealth, protecting their assets and for succession planning. However, foundations are often lesser known than trusts.

UAE Foundation

A foundation originates from civil law and is an independent legal entity sharing features with both a corporation and a trust. It is similar to a corporation as it is a legal entity that can enter into contracts, can have bank accounts and can be used for a wide range of investment. The foundation is similar to a trust in that it offers excellent asset protection, as legal ownership of assets is passed onto the foundation and can be used for efficient estate planning. The foundation has no shareholders, instead, there is a management body (the Council).
A foundation is established when a founder (the person who gives the assets) registers the particulars of the foundation charter at the public registry. Unlike the trust, there is no immediate requirement to transfer the assets to the foundation for it to be valid.

UAE Trust

A trust is a legal obligation or relationship between the settlor (the person who creates the trust) and the trustee (the person in charge of the trust) and the beneficiary (the person who receives benefits from the trust)
The trust is established when the settlor (the person creating the trust) prepares a trust deed also known as a Deed of Trust or Declaration of Trust, and transfers assets (of any kind) to the trustee for the benefit of the beneficiary. In order for the trust to be valid, the assets must be transferred to the trust.
The enactment of the UAE's 2020 Trust Law is a significant development in the scope of trust jurisprudence in the UAE. By introducing Anglo-American trust arrangements into the UAE's civil legal environment, the UAE legislature has reformed the concept of beneficial property interests in a manner that is essentially alien to the civil law.UAE Trust Law is wholly different to trust laws of the financial free zones in the UAE that have imported and transplanted the common law legal system.
Prior to the UAE Trust Law, free zone trust arrangements could not effectively govern dealings or enforce or establish ownership rights over UAE onshore assets, whether these comprise cash, securities, land, moveable assets or legal rights. Rather, trust arrangements and their offshore business structures could be implemented only through changes to onshore law.

UAE inheritance laws

This is an area where we require the advice of the specialist local lawyers to ensure the issues in relation to UAE inheritance laws - mainly referring to certain key provisions of the UAE Personal Status Law No. 28 of 2005 - are identified and the corresponding risks are mitigated to the extent allowed under applicable UAE laws. The approach taken will often depend on the religion of the founder and of his or her family, as the laws apply differently to Muslims and non-Muslims.

VIII. Taxes

VAT

Services offered by artists and social media influencers (SMIs) are subject to Value Added Tax.
In respect of supplies made by artists, the normal rules apply for the applicability of VAT. However, services supplied by SMIs are generally subject to VAT, including but not limited to:

- Any online promotional activities performed on behalf of other businesses for a consideration, such as promoting a product in a blog, featuring a product in a video or otherwise promoting a business on a social media post;
- Any physical appearances, marketing and advertising related activities;
- Providing access to any SMIs' network on social media etc; and
- Any other services that the SMIs may provide for a consideration.

If an artist or SMI incurs any cost to make a supply and subsequently recovers the cost from its client, such reimbursement also falls within the scope of VAT in the UAE. Artists include individuals who make supplies in their personal capacity as performers, singers, dancers, stage artists, make-up artists, DJs, poets, song writers or any other individuals carrying out other activities, the bulletin read. "UAE-based artists and SMIs who make taxable supplies (which include zero-rated supplies) in the UAE are required to register for VAT provided the value of their taxable supplies and imports in the last 12 months exceeded, or is expected to exceed in the next 30 days, the mandatory registration threshold of Dhs375,000,".

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23 - UNITED STATES OF AMERICA - Polsinelli

I. INTRODUCTION

- The United States constitutes an active art market, especially in the context of visual art purchases, and creation of music and movies.
- Law making around art specifically has been steadily developing at the state and federal level since the 1970s. Regulation of art has been motivated by tax law (specifically attempting to prevent use of art as a tax shelter and scrutinizing valuation of art), cultural preservation (state sponsored desire to preserve works of art), and ownership (ensuring valid transfers, preventing misappropriation, preventing fraud, etc.).
- Art Law generally in the United States is a complicated blend of many legal disciplines including at least intellectual property, contract, constitutional, tort, tax, and the uniform commercial code. While some of these disciplines such as intellectual property and constitutional law are US Federal Law, much of the law surrounding art transactions are based in state law. Since each state has its own body of law, some doctrines may similar from state to state, while many doctrines will have nuances that differ from other states.

II. CONTRACTS

- Most art transfers are governed by contracts at the state level. The Uniform Commercial Code (UCC) provides some common legal principles across states. Some common issues are chain of title and authenticity of the work.
- Some art transfers require an assignment of copyright. As addressed below, copyright provides an artist with rights over the use, reproduction, display, and derivatives created from a work of art. It is possible to lawfully own a work of art, but to not own the copyright. If one owns a work of art but not the copyright, they might not have full rights on how the work of art is used, displayed, or whether the art may be copied, among other rights that are governed by copyright.

III. COPYRIGHT

- The U.S. Constitution provides the foundation for copyright law in the United States – Article 1, Section 8, Clause 8 gives the United States Congress the authority "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"

- This section is widely viewed to create certain requirements on a work to be copyrightable. Specifically, this section is sometimes viewed as the basis for the originality requirement and the fixed requirement found in the copyright statute. In otherwords, a copyright can only be granted to an orignal author and can only be granted for a work of art that is fixed on a reproducible medium. Most artwork fits these basic requirements.

- Title 17 United State Code covers copyright. Specifically, section 102 defines the basis requirements of a copyrightable work: "(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

    - Note that a copyright is only valid for a limited duration such that many of the most valuable works of art are no longer subject to copyright. The duration of a copyright depends on several factors such as the law that was in effect at the time the work was created and whether the work was published. The basic term for works created in 1978 or after is the life of the author plus seventy (70 years).

IV. NEW TECHNOLOGIES

- One common issue in art transfers is validating a chain of title. Non-Fungible Tokens (NFTs) are new technology that can be used to track chain of title for a work of art using block-chain technology. An NFT is solely a digital fingerprint for artwork. It can be registered in a blockchain, which is a publicly agreed upon record of transfers of the NFT. Only the true holder of an NFT can transfer the NFT. NFTs
- NFT are non-fungible; this doesn't mean that the subject of the NFT cannot be reproduced or replaced. Rather, it means that the NFT itself cannot be replicated. In some ways this is like a certificate of authenticity. Because of the immutable and open source nature of blockchain, everyone is able to see exactly who the owner is and the entire chain of title since the inception of the NFT. While many blockchain-enabled tokens are designed to be anonymous, NFTs typically have some level of attribution so the world can know the creator and the owner.
- NFTs are blockchain-enabled smart contracts, otherwise known as tokens, that are permanently on a blockchain and always able to be tracked.
- The most common use cases for NFTs have been artwork. NFTs, at their most basic they are a digital representation of a real, unique asset.
- There are several important legal considerations when considering using NFTs to buy or sell art.
    - Avoid turning your NFT into a security. While much progress has been made in determining whether a digital asset would be viewed as a security, this is still an area of regulatory uncertainty and the SEC has yet to specifically address NFTs. The SEC and the courts generally have used the "Howey test" to determine whether or not a digital asset is a security. Under the Howey test, a contract is deemed to be a security if it involves an investment of money in a common enterprise with an expectation of profits from the efforts of others. An NFT is a smart contract and its sale in the auction will involve an investment of money, so minimizing ties to a common enterprise (such as a trading platform) and not making reference to the potential for

profits decreases the chances that the NFT would be viewed as a security. An NFT that is solely a digital fingerprint for artwork, with nothing more, is unlikely to be a security. However, NFTs could be created in a way that they might be viewed as investment products that would be securities, such as if they can be transferred in part or fractionalized.

- Comply with Money Transmitter Laws. Because an NFT is a store of value, there is also a possibility an NFT might be viewed as a currency under federal and state money transmitter laws. The Department of Treasury Financial Crimes Enforcement Network (FinCEN) defines "money transmission services" very broadly as the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means. Rather than attempt to determine whether the NFT might be subject to these laws, we believe it is prudent for the Sponsor to avoid handling funds, including cryptocurrencies, such that it would not be viewed as having custody or control over such funds which could lead regulators to deem the Sponsor as performing money transmission services. Thus, payment for the NFT should also be effected through a regulated third party to prevent the application of these rules to the Sponsor. In addition, assuming the token is formed as an ETH-721 token (presently the most common standard for NFTs), the "minting" of the NFT itself requires the use of Ethereum – which is regulated by FinCEN as a currency – as "gas" to form the token. For this reason among others, the Sponsor itself should not create the NFT and should have a reputable third-party technology provider partner that can serve this function. Any provider serving that function should be appropriately licensed/registered under state and federal law or should be able to provide assurances to the Sponsor's satisfaction that licensure or registration is not necessary.
- Anti-money-laundering compliance. Even if the NFT is not currency or a security, it is still a store of value that has the potential to be sold anywhere via the applicable blockchain. Further, even if the sale is made in US Dollars or another fiat currency, that currency will need to be converted into some form of cryptocurrency to effect the actual sale of the NFT, and then likely will need to be converted back into fiat currency to be paid to the Sponsor. Thus, any purchaser of the NFT should be thoroughly vetted through anti-money laundering and OFAC protocols. The Sponsor should expect any third-party technology provider conducting the auction to perform, or itself retain service providers who can perform, the necessary procedures on auction participants.
- Differentiate between owning the art and owning the copyright. An NFT and the artwork underlying the NFT are not one and the same. The NFT is similar to a cryptographic certificate of authenticity associated with the piece of artwork. More often than not, the actual artist retains the copyright to the artwork associated with the NFT. This means there is the potential for further reproduction of the artwork by the artist outside the context of that specific NFT. That said, the copyright could be transferred as well as a matter of contract, which would give the holder of the NFT the ability to enforce infringement claims. The terms of a content development or work for hire agreement with the artist would need to be determined.

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