ling role in generating the work—these statements directly contradict the administrative record…. Plaintiff's effort to update and modify the facts for judicial review on an APA claim is too late. On the record designed by plaintiff from the outset of his application for copyright registration, this case presents only the question of whether a work generated autonomously by a computer system is eligible for copyright. In the absence of any human involvement in the creation of the work, the clear and straightforward answer is the one given by the Register: No."

Thaler's 2018 copyright registration application anticipated the extensive use of AI technology today, and the wide-ranging discussions currently underway about how copyright protects underlying works incorporated by AI programs into new works, as well as those new works themselves. Both the Copyright Office and the district court analyzed the past jurisprudence relating to works created only partly by humans. These cases ranged from an 1884 U.S. Supreme Court case ruling that photography involved enough human input to support copyright protection[3] to cases considering whether literary works based upon divine or other spiritual inspirations likewise involve human authorship. The district court even cited James Madison's statement in The Federalist that patent and copyright protection were useful because "[t]he public good fully coincides in both cases with the claims of individuals."[4] Traditional copyright thinking as reflected in the U.S. Constitution and copyright statutes presumes an individual "author" for whom copyright protections, and the concomitant economic rights, provide incentives for the time and efforts authorship entails. AI programs require no such incentives.

The court noted that Thaler made the case simple by stipulating that he had no direct role in the creation of "A Recent Entrance to Paradise", and that members of Congress were requesting the Copyright Office to consider more complicated AI-related issues. This is now happening. On August 30, 2023, the Copyright Office announced that it is "conducting a study regarding the copyright issues raised by generative artificial intelligence (AI). This study will collect factual information and policy views relevant to copyright law and policy. The Office will use this information to analyze the current state of the law, identify unresolved issues, and evaluate potential areas for congressional action." Written comments from members of the public are due on or before October 18, 2023. ♦

[1] Principal, Law Offices of Armen R. Vartian. Vartian is Editor of this Newsletter, but the views in this article are his alone and not necessarily those of the ABA Art & Cultural Heritage Law Committee.

[2] "Machines Can Make Art But Can't Copyright It – Copyright Review Board Decision Regarding 'A Recent Entrance to Paradise'", ABA Art & Culutral Heritage Law Newsletter (Winter 2021) at 3-4.

[3] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). The distrct judge stated: "[T]he Supreme Court reasoned that photographs amounted to copyrightable creations of "authors," despite issuing from a mechanical device that merely reproduced an image of what is in front of the device, because the photographic result nonetheless "represent[ed]" the "original intellectual conceptions of the author." *Sarony*, 111 U.S. at 59. A camera may generate only a "mechanical reproduction" of a scene, but does so only after the photographer develops a "mental conception" of the photograph, which is given its final form by that photographer's decisions like "posing the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation" crafting the overall image. *Id.* at 59–60.

[4] The Federalist No. 43 (James Madison).

New Course for Italy on Cultural Property?

By: Valentina Tarquini[1]

Following a court ruling, the Italian Ministry of Culture has issued a potentially groundbreaking statement[2] challenging current thinking on cultural heritage and patrimony and reinforcing private property rights.

Essentially the statement, which was issued to little fanfare, addresses conflicting priorities between private property rights and the Italian state's desire to protect its cultural heritage, and how this conflict addresses proof of ownership.

Recent years have seen a significant shift in attitudes among state authorities and law enforcement toward the idea of reversing the burden of proof regarding the legitimate ownership of antiquities and ancient coins. Typically, property owners faced with claims that their goods may have been illegally excavated or exported from their places of origin had the burden of proving legitimate provenance for their goods or losing them to law enforcement. This is despite private property rights being enshrined in all fundamental clauses of international human rights conventions and in both common law and natural justice. Guilty until proved innocent has almost become the new normal.

Now, however, comes evidence of a push back against this fundamentally undemocratic idea. This Ministry of Culture statement is one of them, and it has an additional welcome twist. It arose after Italy's Directorate-General of the Department of Archaeology, Fine Art and Landscape sought advice from the legal department on how to interpret Article 72 of the Cultural Property Act, the article that governs the import of archaeological (numismatic) objects originally from Italy and demands extensive proof of origin.[3]

The legal department's head, renowned professor of law Antonio Tarasco, came back with a surprising statement, acknowledging competing views on this issue. On the one hand, some lawyers argue for the current state of things, namely that protecting Italian cultural heritage is a priority that requires significant objects to become state property unless private ownership can be proved (reversal of the burden of proof). On the other hand, some lawyers argue that private ownership should take priority except in the most exceptional circumstances.

LAW PROFESSOR ACKNOWLEDGES COURT OF CASSATION RULING AS PRECEDENT

This dichotomy led Professor Tarasco to look at the part documentation has played over the years in establishing ownership rights for coins in Italy. The first thing he noted was that as late as the 1980s, it was highly unusual for dealers or collectors to retain proofs of purchase. But he also noted that in 2009, his department declared that "proper documentation issued by the countries of origin" was essential in establishing the lawful circulation of cultural heritage objects. Importantly, this

meant that any certification issued at the time of importation had to be renewed at the appropriate time or the Italian State might take possession of the item in question.

Fast forward to 2021, however, and Italy's Court of Cassation – the highest appeal court which focuses only on how laws are interpreted – re-established the priority of private ownership without automatically having to provide supporting documentation (innocent until proven guilty).

In his new statement, Professor Tarasco points out that this meets the test of proportionality and reasonableness, which is what art industry trade associations such as the Art Dealers Association (ADA) and International Association of Dealers in Art and Antiquities (IADAA) have been arguing needs to happen as a result of EU import licensing regulation 2019/880. Of particular note is what Professor Tarasco has to say about this: "Forcing citizens (be they collectors or professional numismatists who buy abroad) to provide (almost fiendishly extensive) proof of the legitimate origin of the coins they buy, which must even date back to before 1909 [when Italy's patrimony law was passed], is ultimately making it more difficult to buy – and therefore import into Italy – significant numismatic material that may one day enter public collections."

The welcome twist Professor Tarasco adds at the end of his statement argues that making imports more difficult is actually damaging to Italian cultural heritage: "If we look closely, we can see that this approach – even if applied with good intentions – will not result in Italy protecting its national cultural property, but rather losing it."

This is fascinating, coming as it does from the head of the legal department of Italy's Ministry of Culture. With all this in mind, how does Professor Tarasco view Italy's application of Article 4 of the EU regulation 2019/880,[4] which takes effect in June 2025? That section insists on the sort of "fiendishly extensive" documentation and evidence that effectively reverses the burden of proof in the way he decries here. And how does he feel about Italy's Memorandum of Understanding with the United States,[5] which does exactly the same?

Professor Tarasco has highlighted the importance of proportionality and reasonableness here – qualities echoed in the 2019 European Commission President's guiding principles for policy.[6] If the Italian Government's leading legal authority on the issue, together with its highest court, acknowledges that private property rights have priority over what may be seen as the national interest in this way, how can Italy continue to move forward with either the new EU law or its MoU? ♦

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[1] Tarquini is an art consultant in Milan, Italy. She holds law and arts management degrees from Università Cattolica del Sacro Cuore in Milan

[2] https://cultura.gov.it/comunicato/24864

[3] https://new.coinsweekly.com/news/legal-statement-issued-on-italys-import-requirements-for-coins/

[4] "Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy"https://www.legislation.gov.uk/eur/2019/880/body#:~:text=This%20Regulation%20sets%20out%20the,illicit%20trade%20could%20contribute%20to

[5] https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/italy/us-italy#:~:text=D.-,Both%20Governments%20agree%20that%2C%20in%20order%20for%20United%20States%20import,patrimony%20of%20the%20region%2C%20recognizing

[6] https://issuu.com/dubravka.suica/docs/mission-letter-dubravka-suica_en

Controversial Murals Can Be Covered Up Without Violating Artist's VARA Rights, Second Circuit Says

By: Amelia Brankov[1]

The Visual Artists Rights Act ("VARA") poses no bar to Vermont Law School's concealment of controversial murals, per a recent Second Circuit Court of Appeals ruling.[2] The decision is a blow to the artist but is consistent with an earlier case from a sister circuit finding that mere concealment of artwork is not actionable under VARA.

Background

In 1993, Kerson painted two large murals on one of the law school's buildings, together entitled *The Underground Railroad, Vermont and the Fugitive Slave*. The first panel depicts the violent capture and forced sale of African people, slave labor, and a slave insurrection. The second panel depicts abolitionists arriving in Vermont, residents sheltering refugee slaves, and Vermonters aiding escaped slaves departing for the Canadian border.

For years, law students complained about the murals and the "cartoonish, almost animalistic" depictions of enslaved Africans. After George Floyd's death, the law school decided to cover the murals permanently. The law school notified Kerson of its plans to conceal the murals from public view.

Subsequently, the artist sued the school, claiming that the concealment of the murals would violate his right of integrity under the VARA. He claimed the concealment would mark his artwork as "offensive" and "unworthy to be viewed," and would damage his standing as an artist committed to progressive causes. He claimed that the proposed plan to cover his works would destroy, mutilate, or otherwise modify the murals in violation of VARA.