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Lisbon, 20-21 May 2021 [Online]

ARTISTS' LEGACIES

*Preservation, Study,
Dissemination, Institutionalisation*

Edited by Joana Baião

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ARTISTS' LEGACIES

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PRESERVATION, STUDY, DISSEMINATION, INSTITUTIONALISATION

Lisbon, 20-21 May 2021 [Online]

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Art or Artifice? Exploring Judicial approaches to Authorship and Authenticity in Copyright*

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Abstract

Attribution of authorship, namely an artist's right to claim authorship, be acknowledged as the author and object to false attribution, and authentication of their works are crucial to secure artistic legacy. These rights matter for the artist, their public, and the market. However, in the law, which pursues clarity and certainty, such concepts are blurred and contentious. Their often-ambiguous contextualisation exemplifies the complexity of the interaction between art and law challenged by evolving technologies that intensify their detachment and test the notions of authorship and authentication. In this context further complicated by the overlapping of multiple and disarranged normative layers, exclusive copyright arguments appear unsatisfactory, as this study aims to illustrate with reference to Italian law, which features a lack of coordination of copyright with cultural heritage legislation. This leads to diverging legal interpretations that the judiciary attempts to reconcile, rarely with deed, confirming the inadequate and divisive nature of current legislation as well as validating the need for discussion.

Keywords: Art; Authorship; Authenticity; Copyright; Judiciary.

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ART OR ARTIFICE?

EXPLORING JUDICIAL APPROACHES TO AUTHORSHIP AND AUTHENTICITY IN COPYRIGHT

Authorship and authenticity are concepts with specific, although not necessarily consistent, meanings in art contexts but with significant implications in the art market as they impact the economic value of a work. However, once they migrate into the discourse of the law, they often become blurred further. They become notions that are tricky to construe and apply appropriately, causing ambiguity that Courts, called to solve disputes over such concepts, find difficult to reconcile.

Indeed, to secure an artist's legacy from an artistic, economic, and legal perspective, attribution of authorship and authentication are crucial. Authorship defines the paternity of the work by its author, protecting both the artist and the public. On the other hand, authentication formally validates such acknowledgement for the purpose of the law and the market. Evidently, they are interconnected and need to be addressed jointly, especially when the lenses of the law focus on the inconsistencies and challenge their underlying mechanisms.

Their transplant into the legal domain exemplifies how challenging the relationship between law and art can be such that each pose difficulties of being understood by the other. In this already complicated dialogue between the two, the rise of sophisticated and ever-evolving technology plays a double-edged role. On the one hand, technology brings art and law closer together, such as by making it relatively easier to attribute and authenticate works. On the other hand, it creates challenges such as by facilitating misattribution or falsehood practices.

Additionally, the specificities of art, compared to other creative practices such as literature or music, along with the specificity of the technologies, from digital devices to artificial intelligence, visibly affect the legal interpretation of attribution and authenticity of works of art which can be disrupting in the copyright context. Digital technologies indisputably affect how a work of art is experienced and consumed and the manner in which it is created by the artist or perceived by the artistic community. The difficulties of the legal interpreter, for instance, towards computer-generated works and art forms that are clearly distanced from the traditional human-centred creativity validate this point. The concepts of authorship attribution and authenticity echo such ambiguous approaches in two primary ways. First, it is trickier to attribute a work to a machine only resorting to copyright norms that have traditionally showcased human authorship unless a fictitious legal element is applied. Second, following from the aforementioned, it is challenging to declare a work authentic by solely resorting to analysis by algorithms, and without it clashing with the established judicial appraisal of artistic phenomenon that has traditionally emphasised the role of the human *connoisseur*.

The illustrated arguments generally apply regardless of jurisdiction, but a better understanding of the problems and inconsistencies of the system entails a dedicated analysis of the specific legal system to which they belong. Therefore, this study is limited to Italian law where the statutory and judicial treatment offers an interesting basis for discussion. Similarly, copyright is not the only branch of law relevant for this study. Authorship attribution and authenticity also point to other legal grounds, e.g., constitutional law, administrative law, tax law and contracts which are not necessarily related to copyright. For the purpose of this work,

the analysis is focused on copyright and within it on moral rights. However, its interaction with other areas of the law, especially the law on the protection of cultural heritage are also considered.

Indeed, the often-challenging coexistence of norms under the Italian copyright act (*Legge sul Diritto d'Autore n. 633/1941*, hereinafter L.A.) and those from the Italian consolidated code on cultural heritage and landscape (*Codice dei beni culturali e del paesaggio, d.lgs. n. 42/2004*, hereinafter C.B.C.) lead to the consideration of the dynamics of authorship attribution and authenticity, which this work aims to demonstrate. A challenge is also posed by the judiciary that attempts to clarify the many grey areas in the field, for instance, determining who is entitled to authenticate an artwork for securing the artist's heritage is unsettled.

The perspective of the court, which might be still considered the artifice fitting into the dimension of art (i.e., when imposing standards and rules that do not innately belong to the artistic world) is crucial. Therefore, an explicit focus on the judicial construal of authorship and authenticity is propitious to tackle the legal questions emerging from the analysis of authorship attribution and authenticity, especially in technology-driven contexts of art production and to discuss the everlasting but ultimate question as to which artifice is the most appropriate to comprehend and regulate art – the law (either of a statutory or judicial source), technology or art itself.

The history of the creation and the source of intellectual works has never been consistent. Over time, it has featured interludes of selfhood – with the idiosyncratic figure of a front-running individual author especially seen during the Romantic period and collectiveness – as a result of the cumulative convergence of prior knowledge. Both models if considered in isolation attract significant critique. However, the idea that authorship should be reduced to a solitary creator, demeaned as unfortunate and unrealistic appears more disproved. Meanwhile, emphasising the collective and cumulative nature of creation and accentuating the role of the public attracts more consensus (Zemer 2007).

Crucial to the essence of authorship is its attribution, which has been investigated extensively in the literature. From humanities to social sciences, from fine art to technical and applied sciences, and long before the invention of writing, an engaging discussion has attracted contested acknowledgement of authorship which, depending on the exact perspective, has either impaired or increased the value of the work.

Similar to authorship, the notion of the author, who died and resurged intermittently, also changed over time (Newbury 1997; Bennett 2005). Modern theories opposing the idea of a sole individual originator, some of them more influential than others, purported the death of the author (Barthes 1967), criticised the inconsistency of certain authorial categories (Foucault 1969), and accentuated the role of the reader (Burke 2010).

Over time, doctrines and claims over authorship attracted the attention of scholars (Barthes 1967) often with reference to literary studies (Long 2001), science (Biagioli and Galison 2002), and cognitive sciences (Still and d'Inverno 2019). A growing body of research has shown interest in the subject within the framework of intellectual property (Woodmansee et al. 2011), including copyright law (Rose 1993). Explicit interest in artistic authorship has featured in historical studies (Lincoln 2003), studies focusing the impact of technology (Zatarain 2017; Schweibenz 2018), and studies emphasising the individual perceptions of the artist (Silbey 2014).

In copyright law framework, the literature has primarily focused on the tension between authorship and the substance of copyright (Stokes 2012; McClean 2010), questioning whether new manifestations of copyright work should be protectable at all (Dickenson et al. 2017; Lambert 2017), assessing the likelihood and limits of co-authorship (Galenson 2009), debating over the opportunity and significance of moral rights for artists (Mucinskas 2005; Lewis 2016), and resorting to philosophy or art to reduce the distance between art and law (Biron and Cooper 2016).

Some of the tensions related to authorship attribution are the same that largely affect copyright such as the concepts of ownership, public domain, and fair use but with an emphasis on the strain between private exclusivity and public interest (Zemer 2006) and the idea that a copyright work is first a social product (Scafidi 2001) and the result of collaborative and joint authorship (Woodmansee and Jaszi 2006). However, the concept of authorship in terms of a social construct transcends the typical boundaries of copyright and expands to authorial ethics (Mason 1996; Burke 2010). In this context, authorship attribution also functions in terms of ethical accountability towards authors and readers (Hemmungs Wirtén 2004).

In the copyright framework, attribution and authenticity of artistic works are often associated with moral rights and particularly the right of attribution (*alias* right of paternity). This association indeed depends on the specific jurisdiction as moral rights in some countries might receive a high degree of protection while lower or even no protection in others.

In Italian law, moral rights receive maximum protection. Similar to other continental systems of civil law tradition (e.g., France, Germany, and Spain) where copyright is more accurately labelled *author's right*, moral rights are perpetual in duration, not transferable, and not waivable, regardless and independently of the author's economic rights.

The first and foremost moral right is the right of attribution, which comprises the right to be claimed and identified as the creator of a work. In its negative form, it is also the right to object false attribution, i.e., to be associated with a work that has not been created by the author. Other moral rights include the right of disclosure, which allows the author to decide whether to publish the work and where; the right of integrity, that is to object any modification that would prejudice the honour or reputation of the work; the right of repentance, i.e., to withdraw the work from the market.

Moral rights, which protect the non-economic aspects of copyright, are very often called into question by debates over authorship attribution and authenticity (Frezza 2019), accentuating the personal component of the creative process and to some extent, bringing the conflicts inherent to copyright law to extremes (Barengi 2019). In fact, as will be explained further, in the artistic framework, many copyright issues remain, perhaps deliberately, unsettled and this is particularly evident with respect to moral rights.

Even in the most simplified context of moral rights, both the attribution of authorship and authenticity are far from having a clear place in the law. The first contradiction is that there is no mention of the word plagiarism, which is essentially the usurpation of the moral right of attribution, in the copyright act but there is only a reference to this occurrence as an aggravated circumstance related to counterfeiting, which broadly subsists in the infringement of economic rights. Even before considering misattribution, of which plagiarism is one exemplary element, the affirmative dimension of authorship attribution remains vague.

Besides, apart from the acknowledgement of the work's paternity, its formal validation must also be included, especially when copyright norms are not the only ones to be considered. It has been anticipated that copyright provisions might need to be coordinated with the rules of a different milieu, e.g., those pertaining to the protection of cultural heritage. This is exactly the case in Italy, where the law it is still not clear about the process of certifying the authenticity of a work of art as will be illustrated in the following section.

The autonomy that moral rights enjoy from the other economic right lies in the fact that neither a mere transfer of the physical work nor a legal assignment of the exclusive exploitation rights of the work imply a consequent alienation of the non-economic rights or the faculty to add any modification that might harm the work's integrity (Caso 2002). This allows moral rights to exercise a balancing function against the otherwise preponderance of exclusive economic rights as well as to some extent against the risk of public deception through improper information regarding the work's authorship. This entanglement is reinforced by the letter of the copyright act, which clarifies that despite the autonomy of moral rights from economic ones, provisions concerning the latter will be applied wherever possible to the intellectual work.

Under Italian copyright law, in the absence of contrary proof, the author of an intellectual work is the individual who is shown or announced as such since any pseudonym, professional name, initials or customary sign, well-known as being equivalent to a true name, is deemed to have the same value as such true name.

More specific provisions regulate the more complex condition of collective and derivative works, establishing that regarding collective works, it is the author who organises and leads their construction. Meanwhile in the case of derivative works, it is the author who has, by their own effort, created that work from another work (the original one). If the requirements of joint authorship are satisfied, the work will be regulated as common property with the additional inference that each contributor is entitled, as an author, to assert their moral rights at any time.

Similar to what regarded attribution of authorship, scholars have always demonstrated interest for the concept of authenticity, especially given its peculiar nature and highly questioned assessment. Indeed, what lies behind the process of an artwork's authentication? What is its relevance under the law, how and to what extent does its judicial appraisal confirm or clash with the assessment provided by the connoisseur or more broadly by the market? These are only some of the persisting questions revolving around authenticity.

The answer to the first issue calls into question the methods and tools used to determine authenticity, which include, while not necessarily in this order and often concomitant, documentation that accompanies the work and explains its provenance (also through a chain of ownership), expert's evaluation that compares the work with the artist's manner and material, and scientific testing such as dating that aims at providing plausible evidence to support authentication. However, such methods are not entirely standardised, triggering uncertainty and disagreement.

The answer to the second question depends on the legal provisions that regulate the appraisal of authenticity and resolve any dispute that might arise, especially in case of diverging opinions (Spencer 2004) or of mistakes and deceptions that might, for instance, cause the

rescission of the sale agreement. In these cases, it becomes crucial to assess which of the different and probable authorities prevails: the law and the judge, the art, the expert and the artist, or the market and the dealers. Should the transaction be void, remedies such as judicial assessment of authenticity, request to terminate the contract, and request for damages will apply (Mastropietra 2017).

Italian copyright law does not expressly address the issue of authentication, which requires the combination of provisions from the Copyright Act (LA) and the Code of Cultural Heritage and Landscape (CBC). However, none of them expressly coordinate with the other, leaving the interpreter to combine their requirements without the appropriate guidance.

The Copyright Act includes norms that are aimed at identifying who is to claim authorship attribution over the work and corroborate its authenticity, whether the author is alive or deceased. The Code of Cultural Heritage and Landscape (under article 64 CBC) imposes a specific obligation on the professional seller to provide the work with a certificate of authenticity, such as the documentation to the buyer attesting the authenticity or at least the probable attribution and provenance of the work. Failing the same, a declaration containing all available information on the authenticity or probable attribution and provenance and possibly a photographic reproduction of the work must be provided.

In case the author is alive, the moral right of paternity (under art. 20 LA) vested in the authors in theory allows them to authenticate the work. After the author's death, the law allows their heirs to exercise *iure proprio*, the moral right of paternity, thus validating the authenticity of the work or even the State if required by public interest (art. 23 LA).

For a long time, Italian courts have interpreted these provisions in the sense that they constrained authentication to the artists themselves or their heirs (e.g., Court of Milan, 1 July 2004) on whose behalf foundations or archives often acted, through authentication boards, despite lacking formal recognition. A more recent approach (e.g., Court of Rome, 16 February 2010; Court of Rome, 14 June 2016) opens it to anyone else, regardless of any permission by the rightholder, highlighting their expertise on the work instead of their biological connection with the artist, with a clear constitutional link with the freedom of expression (art. 21 Cost.). However, in case of dissenting opinions, the law does not explain whether and to what extent one opinion should be deemed more qualified (e.g., there is no formal registry of qualified authenticators) nor does it instruct on which should predominate in case of dispute.

In a fairly recent judgment, the Court of Rome (15 May 2017) decreed that a right to judicial verification of the authorship of a work of art cannot be configured despite the discrepancy of the opinions of the experts. This would also give rise to a merely probabilistic opinion on the traceability of the that artist. In the case in question, the court rejected the request for assessment and compensation proposed by a gallery owner who complained that a painting allegedly by Mario Schifano and signed by him.

Simultaneously, the Supreme Court (26 May 2016, n. 10937) anticipated that the judgment of the authenticity of a work of art is strictly technical such that unless the judge has specific skills in this regard, it must be referred to an official technical consultant whose conclusions, if shared, can be acknowledged without the need for further clarification as well as with reference to the topics of the party's technical consultancy.

When it comes to the authentication of works of art, the dichotomy between the practices of the art market and of the court judges is particularly evident (Bandle 2013). Controversies

over authenticity have in fact considerable repercussions for the work's value and commerciality. Further nuance of complexity appears to be brought by contemporary art that, by its nature, easily introduces tensions, complexities, and contradictions that might easily impact the process of authentication (Donati 2017a). The establishment of a clear legal framework might indeed be, in the landscape of contemporary art, like a chimera (Brown 2016) and not necessarily desirable. However, the absolute fragmentation and uncertainty that characterises the authentication process is equally objectionable.

Even more complexity lies in the eventuality that the artist disowns the work (Donati 2017b), by exercising full their moral right, in which case the possibility to call for the remedies illustrated above, e.g., the collector who bought an allegedly authentic work pursuing judicial declaration of authenticity contrarily to the artist that instead insists on the non-authenticity of the same, contradicts the idea of the individual and the highly private dimension of moral rights, leading to further ambiguity.

The concepts of authorship attribution and authenticity are constantly challenged by the art, the technology, and the law. This is conspicuous in copyright law, which is expected to be adjusted following unpredictable artistic progress and evolving technologies. These challenges cause uncertainty, especially before the court, called to solve contentious issues pertaining to the work of art without necessarily having the knowledge of a *connoisseur* or an art dealer.

From engravings to digital art, it is one small step, and humans appear more and more assisted, if not substituted, by machines. Artistic instances driven by machine authorship are many, such as the *Selfie Monkey* or *The Next Rembrandt*. These present merely two examples of the many challenges featuring copyright law and art discussions, posing questions such as who the author of an artwork created by an algorithm is and how this eventually affects, among others, the conventional rules of authorship, attribution, and authenticity.

It is even more crucial to compare and distinguish the approaches and interpretation provided by the judiciary about art whose rulings might become estranged from the construal provided by the artistic community in which the art is born. Given the controversial nature of artistic authorship under copyright law, it is therefore essential to explore it through case law, in which the artistic perception is often equivocally recalled.

Such considerations are not confined to alleged authorship by means of artificial intelligence but apply to the broader context. Is the authority of the legislator, the judge, the artist, the expert, the dealer, or the collector that attributes authorship and certify authenticity only an artifice?

The value of a work significantly depends on the accuracy of the processes of attribution and authenticity. The former should assess the identity of the artist, and the latter should prove it and validate it for the law and, in some instances, for the market. And yet, despite the resilience of the law, there remains uncertainty and room for challenge. Such challenges, echoed in the efforts to safeguard the artist's heirloom, reverberate in the limited interpretation of the concepts by the legal interpreter and especially by the judiciary that is asked to address and resolve disputes over authorship and authenticity.

The perspective of the court is crucial although in some cases, it fails to grasp the processes of art-making that are not made to easily fit the concepts of the law. Legal protection

is inconsistent and many grey areas remain. Clearer criteria should be defined to guide the interpreter. However, courts' rulings risk imposing standards and rules that do not innately belong to the artistic world. Consequently, a more proactive involvement of the artistic community in the legal construal of authorship and authenticity would be beneficial.

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