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**The contemporary artwork and restoration:
legal highlights.**

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1. Introduction.

This article originates from a conceptual challenge and from a legal challenge.

The conceptual challenge refers to how identifying the main characters' role when dealing with contemporary artwork: on one hand, the artist who creates or modifies it; on the other hand, the artwork itself, in constant evolution, also after being created. Contemporary art, as a matter of fact, appears as a torsion of the usual categories: not only the classical, such as painting, sculpture, opera...; but innovative categories appear: sculpted pictures, painted sculptures, performances, fractals¹, developing without a defined limit.

The other challenge refers to the law and its relations with contemporary art, i.e. the capacity of the former to comprehend new forms

* Attorey at law.

¹ The fractal is a geometric object, present in nature, which repeats its own structure in a constant and mathematic way, defining curves and figures generated from functions and algorithm. Studied in biology since last century, its characteristics (in Mandelbrot and Julian sets) influenced mathematicians and artists.

of expressions, conceptual and abstract, providing protection and rights in order to protect the artistic world's main characters, granting rules to administrate the relationships involved.

Restoration lies half way between the two challenges, by means of a specific person, the restorer, who plays a different role from that of the artist, and its creative activity, and from the purchaser of the artwork, and its contemplative (or speculative) action. This role is redefined, especially in its legal framework, when the target of such an activity is a contemporary artwork.

2. Legal nature of restoration.

The definition of restoration is provided by the Legislative Decree n. 42, dated 22 January 2004, "*Cultural goods and landscape Code*"² issued according to the provisions set by article 10 of Act n.137, dated 6 July 2002. Article 29 of the Code, under Section II concerning conservation measures, defines restoration as "... *the direct intervention in the good by means of complex operations finalized to the material integrity and to the recovery of the good, the protection and the transmission of its cultural values...*".

This decree indicates expressly what is the restoration's objective, i.e. the preservation of artwork/asset from two different points of view. Firstly, intrinsically, for the recovery and material conservation of the work of art/asset; secondly, extrinsically, to protect the cultural values of the artwork so to be able to communicate them. The target of the restoration is therefore the "artwork" or, for what interests here, the contemporary artwork, always being created with different elements. The definitions provided in the last fifty years for restoration activities imply application rules for artworks "*in their most extensive meaning*"³, nonetheless they have been applied mostly for pictorial and sculptural artworks.

² <http://www.camera.it/parlam/leggi/deleghe/testi/04042dl.htm>

³ Italian Restoration Chart, *Relation to Restoration Chart*, Circular n.117 dated 6 April 1972, Italian Education Department.

But art has no limitation, free from any form of cultural contamination. This is a fundamental statement, granted by articles 33 of the Italian Constitution which reminds us that *“the art and the science are free and free is their syllabi”*. Therefore, especially during the XX century, the artistic expression challenges the typical categories and the concept of “duration” used by the artwork to communicate in time and to the user of the same. Contemporary art, in particular, implies a change in materials to those used in classic arts and as a consequence, the type of conservative intervention changed as well.

Restoration is *“a critic act of “artwork identification” (C. Brandi, 1977), a textual reformulation of the artwork condensing multiple stratifications in artwork itself, with its own history, it’s expression. For this reason the relationship with contemporary art becomes problematic: the vocation to the ephemeral may entail the adoption of perishable materials; the restoration meant, for antic artwork, abrasions, color alterations, burns as unmistakable alteration signs, now we have to face critically with materials already time-worn”*⁴.

Thus, from the quoted definition according to article 29 of the Cultural goods and landscape Code, the restorer should obviously act from a material point of view, to preserve the artwork facing the most different materials⁵, nonetheless he is called to answer another question, i.e. restoring to communicate the message or the value expressed in the contemporary artwork, since this very message or value is less visible and, undoubtedly, more conceptual.

3. Artist’s rights.

A delicate subject is the one relating to the role of the artist during restoration, once the artwork has been realized and alienated. What rights does the artist have? May an artist oppose restoration?

⁴ V. GRILLO, *Conservare l’Arte Contemporanea*, in LuxFlux.net, 2004.

⁵ Perhaps perishable themselves, e.g. *“L’uomo d’artista. La rinascita nell’Unità”*, Calcata (VT), 2011.

It is known that artists do not always appreciate interventions of third parties (the restorers) on their artworks: sometimes they are expressively contested⁶. Italian law provides that the author is granted specified rights indicated in Act n.633 dated 22 April 1941 “*Copyright and other rights connected to its practice*” (from now on, here, also “Lda”), in which the target of the protection is not the artwork considered as a universal artistic work, since the legal notion provided by article 17 Lda does not correspond to the concept of creation, originality and absolute novelty, nor even with the one of artwork⁸. The artist, creator and realizer of a contemporary artwork, acquires the copyright from the moment of the creation, according to article 6 Lda.

Moreover, the moral copyright remains with the creator. As a matter of facts, article 20 Lda provides that the author holds the right to claim the authorship and to challenge any deformation, mutilation or other modification that may damage the artwork, to protect his honor and reputation, regardless of current ownership. The author is therefore entitled to challenge the restoration of the artwork.

Law’s reflections are applicable to the use, or better the substitution of parts of the art work when they are common spare parts: please consider site specific installations where materials by the artist or others to transmit a specific concept⁹. The artwork is not therefore subject to the effect of “wear and tear”, but it regenerates itself continuously.

⁶ To that purpose, please consider GIUSEPPE CHIARI: “*l’opera sarà restaurata da un cretino. studi sul futuro. chiari 1977*”.

⁷ According to article 1, Act n.633 dated 22 April 1941, “*This act protects works of creative intelligence relating to literature, music, figurative arts, architectures, theater and cinematography, whatever the way or the forms of expression are*”.

⁸ A. S. GAUDENZI, *Il nuovo diritto d’autore*, Dogana (SM), pages 188 e ss. E. PIROLA CASELLI, *Codice del diritto d’autore*, Utet, Torino, 1943, pages 218 e ss.

⁹ E.g., *ex pluribus*, M. PISTOLETTO, *Venere degli stracci*, 1967. The artwork uses “poor” materials. The substitution is the possible condition for human products as well, as long as they are realized with interchangeable materials. Although rags (*stracci*) are precarious, they are always available, if only the fixation is repeated.

On the contrary the author can claim for the lack of restoration or “neglect” and ask that the artwork owner does not to show it until the restoration has been completed, and therefore limiting the its use.

Two different subjects may occur with subsequent rights: on one hand the author, entitled to a specific legal position such as the rights described above; on the other hand, the restorer’s rights, who may also be entitled of the same rights according the Lda. Aside from the figure of the artist itself, article 20 may therefore also applies to the restorer. Case Law, rarely, intervened on the subject matter and stated that “*An artwork restorer must be entitled to copyright when his work represents a complex activity implying technical, artistic and cultural knowledge with innovative and creative skills. Also when his final aim is to make an artwork visible and recognizable again, with a quid novi in respect of the situation before the restoration, according to article 4 Lda, granting protection to creative elaborations*”¹⁰.

4. Proprietor’s rights.

The Proprietor’s legal position changes with reference to the reference frame work. Excluding the case when the proprietor is the Government or the public administration¹¹, what rights remain to the proprietor-buyer of a contemporary artwork?

The artwork proprietor is free to restore his artwork/asset within the limits of Italian copyright law. Article 1¹² and 2¹³ of the Act, together with

¹⁰ E.g. Italian Tribunal of Bologna, judgment dated 23 December 1992.

¹¹ Whether the goods are property of the State, the legal discipline arises also from articles 4, 5 and 10 of the *Cultural goods and landscape Code*. This is not the subject of this article.

¹² *Supra*, note n. 7.

¹³ Art. 2 pursuant to Act n. 633/1941: “*In particolare sono comprese nella protezione:*
1) *le opere letterarie, drammatiche, scientifiche, didattiche, religiose, tanto se in forma scritta quanto se orale;*
2) *le opere e le composizioni musicali, con o senza parole, le opere drammatico-musicali e le variazioni musicali costituenti di per sé opera originale;*
3) *le opere coreografiche e pantomimiche, delle quali sia fissata la traccia per iscritto o altrimenti;*”

article 2575¹⁴ of the Italian Civil Code, establish the protection of the above. The subjective limits, on the contrary, establish that the author has the exclusive right to use and benefit from the artwork, in every way and form, originally as well as derivative¹⁵, and he is the sole proprietor of the moral rights.

Besides, economic rights are also granted by the law to the artist: they are exclusive and recognized as original rights. According to Italian law, they are:

- the right to reproduce the artwork in different exemplars (art. 13 Lda);
- the right to transcript the oral artwork (art. 14 Lda);
- the right to execute, represent and perform the artwork in public (art. 15 Lda);
- the right to communicate the artwork (art. 16 and 16 *bis* Lda);
- the right to distribute the artwork (art. 17 Lda);
- the right to elaborate, translate and publish the artwork in a collection (ex art. 18 Lda);

4) *le opere della scultura, della pittura, dell'arte del disegno, della incisione e delle arti figurative similari, compresa la scenografia;*

5) *i disegni e le opere dell'architettura;*

6) *le opere dell'arte cinematografica, muta o sonora, sempreché non si tratti di semplice documentazione protetta ai sensi delle norme del Capo V del Titolo II;*

7) *le opere fotografiche e quelle espresse con procedimento analogo a quello della fotografia sempre che non si tratti di semplice fotografia protetta ai sensi delle norme del Capo V del Titolo II;*

8) *i programmi per elaboratore, in qualsiasi forma espressi purché originali quale risultato di creazione intellettuale dell'autore. Restano esclusi dalla tutela accordata dalla presente legge le idee e i principi che stanno alla base di qualsiasi elemento di un programma, compresi quelli alla base delle sue interfacce. Il termine programma comprende anche il materiale preparatorio per la progettazione del programma stesso.*

9) *le banche di dati di cui al secondo comma dell'articolo 1, intese come raccolte di opere, dati o altri elementi indipendenti sistematicamente o metodicamente disposti ed individualmente accessibili mediante mezzi elettronici o in altro modo. La tutela delle banche di dati non si estende al loro contenuto e lascia impregiudicati diritti esistenti su tale contenuto.*

10) *Le opere del disegno industriale che presentino di per sé carattere creativo e valore artistico.”*

¹⁴ Art. 2575 Italian Civil Code “*Formano oggetto del diritto di autore le opere dell'ingegno di carattere creativo che appartengono alle scienze, alla letteratura, alla musica, alle arti figurative, all'architettura, al teatro e alla cinematografia qualunque ne sia il modo o la forma di espressione*”

¹⁵ Pursuant to article 12 Lda.

- the right to rent the artwork (ex art. 18 *bis* Lda).

Differently to moral rights, which have no time limit, economic rights that relate to the artwork can be transferred to third parties. According to articles 2581 of the Italian Civil Code and 107 Lda, they can be transferred by transaction¹⁶ or *mortis causa*.

As far as the duration is concerned, article 25 Lda states that economic rights can last the lifetime of the author and up until seventy years following his death¹⁷. The reason of the law is clear, i.e. providing the diffusion of the culture and shifting the legal positions of the artwork/asset for public use at the end of the time granted.

The artwork buyer may purchase all or only a part of the aforementioned rights pursuant to article 19¹⁸ Lda. They can therefore be sold and exerted separately or severally

Nonetheless, pragmatically, adequate legal instruments to protect persons involved are not very often executed in such types of transactions. Taken for granted the necessity to prove in writing the transfer of the economic use rights, the proprietor (and often the artist as well) does not care whether the legal instrument adopted is proper, frequently allowing the transaction to be executed orally. As it appears clear, acting this way, the rights of economic use of the artwork may also not be transferred, and, whether the author remained entitled to their use, the artwork could therefore be burdened of obligations related to those rights, limiting considerably its enjoyment.

¹⁶ In this case, articles 110 Lda and 2581 Italian Civil Code prescribe the written form *ad probationem*.

¹⁷ Art. 25, Lda, as modified by article 17 Act n.52, dated 6 February 1996. In case of posthumous artworks (out of the provisions set by articles 85 *ter* Lda), the duration of exclusive rights of economic use is seventy years from the death of the author according to article 31 Lda.

¹⁸ Art. 19 Lda “ *I diritti esclusivi previsti dagli articoli precedenti sono fra loro indipendenti. L'esercizio di uno di essi non esclude l'esercizio esclusivo di ciascuno degli altri diritti. Essi hanno per oggetto l'opera nel suo insieme ed in ciascuno delle sue parti?*”.

5. The artwork evaluation.

The proprietor who desires his art work restored is moved, *inter alia*, both by aesthetic and economic reasons. In order to insure the artwork during this period it might be advisable to adopt an insurance policy to protect the artwork.

The policy, in particular, should allow for the damages that the artwork might occur during restoration, including the reparation, the renovation and the replacement phase for the damaged part, also indicating the sum granting the depreciation of the insured artwork.

In particular, the policy should indicate which damages to insure: whether the artwork is an installation, the policy should indicate a sum also in case of theft for the period under the restorer's activity. Precisely, the restorer is burdened obligations arising from the deposit of goods, and the custody arising from it. Case law on merits stated that *"the deposit of paintings by the author for the restoration, without perverting the nature of the agreement, implies the custody and the application of the deposit rules. The author that, after having been subject to robbery, omits to report immediately to the bailor is responsible for the damages for the whole value pursuant article 1780 of the Italian Civil Code"*¹⁹.

The insurance policy should always be negotiated in order to avoid total covering policies which eventually do not identify the losses nor the amount to reimburse in the event of damages.

Furthermore, the art work's appraisal is imperative when entering an insurance policy. It represents a relevant contractual solution since artwork evaluations, especially in the case of contemporary art, may fluctuate considerably as a consequence of the restoration itself.

According to Italian law, the aforementioned appraisal has a contractual nature given by the parties and it is substantially different from the declaration of valuation, according to article 1908 of the Italian Civil Code. The latter is a mere scientific statement in which the indemnity principle for loss insurances is utterly affirmed, i.e. it is not possible to assess to perished things a higher value in respect to what they had at the moment of casualty.

¹⁹ E.g. Tribunal of Venice, judgment dated 23 January 1974.

6. Art gallery relationships.

Relationships with art galleries deserve a final consideration. Whether the proprietor desires to exhibit his contemporary artwork in order to increase its value, what happens when the artwork is damaged during these exhibitions? May it be restored by the gallery during the time of the exhibition?

Executing written contracts with is always advisable. A priori, the parties may establish the right or the obligation to intervene in order to preserve the artwork, also specifying which operations are permissible in case of emergency.

If the artwork in peril, when no written contract is adopted or no insurance policy has been agreed, the gallery may, without being obliged, assume the management of the preservation and conservative restoration (at least in the first phases), in case the proprietor is not in the situation to adopt the proper measures for himself. The protocol provided for this situation is described by articles 2028 to 2032 of the Italian Civil Code, providing rules for the spontaneous agency.

In this case, if the proprietor is unable to intervene²⁰, the gallery may act as an agent to preserve the artwork and, once the activity has started, it is burdened to continue it until the proprietor is able to provide adequate measures himself.

The proprietor shall accomplish the obligations assumed by the gallery in his name and pay an indemnity, inclusive of costs and interests, both for useful actions and also whether no advantages occur provided the agency has been started usefully²¹. These rules do not apply if the proprietor forbid third parties to act as agents.

²⁰ Consider the cases when the artwork is abroad or only in case the proprietor is not available for whatever reason.

²¹ Pursuant to art. 2031 Italian Civil Code.

7. Final considerations.

Restoration is an extremely relevant activity since it allows art work to survive for perpetuity, communicating its original message.

Nonetheless, restoration is an activity ontologically different from the creative one of the artist, who with difficulty may intervene as restorer. Many artists are aware of that, like Bill Viola who often affirmed “*artists cannot be involved in preservation*” or Mario Schifano who, following to the fire which damaged some of his artworks in the Jacorossi collection, decided not to restore them.

Artist and restorer (and proprietor) may share the best interest of the artwork at heart, but often their roles regarding the artwork are incompatible: the artist who creates and innovates, and the restorer, whose specific skills repair and preserve.

Two different roles inevitably provide two different legal positions.

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