

Key News - Art

IP, TMT and Data Protection Department
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I THE DECISION OF THE MILAN COURT OF APPEAL ON THE ADMISSIBILITY OF AN ACTION TO ASCERTAIN THE AUTHENTICITY OF AN ARTWORK

Judgment no. 1238 of April, 28 2021 of the Court of Appeal of Milan (the "**Court**") deals once again with a rather debated and controversial matter, *i.e.* whether Italian law provides for an action of mere declaration of the authenticity of an artwork.

In the case at hand, the owner of an artwork sued the Lucio Fontana Foundation ("**Foundation**"), requesting the restitution of the work "*Attese-Co. Spaziale - che bel vento di marzo*" (the "**Artwork**"). The Artwork had been delivered by the owner to the Foundation for its examination to request to be declared authentic and consequently included in the archive of Lucio Fontana's artworks. At the end of the examination of the Artwork, the Foundation had, however, deemed it not authentic, requesting the plaintiff not to put it into circulation, reserving the right, to refer to the judicial authorities to request its seizure.

The plaintiff therefore sued the Foundation in order to obtain: (i) the restitution of the Artwork, and (ii) the confirmation of the paternity of the Artwork and the consequent issue of the certificate of authenticity by the Foundation.

In the decision of first instance - following witness evidences and two technical consultations - the Court had accepted the plaintiff's request, declaring the Artwork authentic whereas rejecting the procedural objection raised by the Foundation regarding the plaintiff's lack of interest in bringing proceedings. The Court had, in fact, considered the plaintiff's interest in bringing proceedings to be legitimate as "*whether or not a work of art can be traced back to the painter Fontana (as well as to any other artist of considerable fame) - by representing a characteristic capable of substantially affecting the nature of the good - reflects a different configuration of the right of ownership of the asset itself, so that the owner of an artwork must certainly have an interest in bringing an action to ascertain its authenticity*".

The Foundation appealed against this decision, claiming once again the inadmissibility of the request made by the owner of the artwork, asserting that the Italian legal system does not recognize a general action of mere ascertainment aimed at verifying the paternity of an artwork.

The Court, unlike a recent decision (Court of Appeal of Milan, April, 24 2020), upheld the Foundation's objection, stating that such general action of mere ascertainment does not exist and that such specific protection can be exercised only by the persons who can claim a moral right on the work, *i.e.* the author pursuant to Art. 20 para. 1 of Law no. 633/1941 (Italian law on the protection of copyright and other rights related to its exercise, hereinafter "CL") and his relatives pursuant Art. 23 of CL.

The Court highlighted how the ascertainment of the authenticity of a work of art can be requested before a court when it is necessary for the recognition of other rights protected by the law - for example, in case of purchase and sale of artworks which have been subsequently assessed as inauthentic by third parties - rather than when merely ascertaining the authorship of the work at stake.

Moreover, the Court pointed out that any judgment could not have *erga omnes* effect, given that the judgment would bind only the parties of the proceedings and that the desired ruling would in any case be able of forcing the Foundation to change its opinions, since opinions on authenticity shall be free constituting the exercise of the constitutional right of freedom of expression.

Lastly, the Court noted that the judgment regarding the authenticity of an artwork cannot be objective and indisputable and, therefore, any ruling in favour of the plaintiff's request would not grant any additional advantage to the latter and, therefore, the Court declared the plaintiff's absence of interest in the action.

II THE ORDER OF THE CAGLIARI COURT ON THE TRANSFER OF THE ECONOMIC RIGHTS ON AN ARTWORK

As to copyright, with an order issued on 19 January 2021, the Court of Cagliari upheld the claims brought by the daughter and sole heir of the famous Sardinian artist, Maria Lai (the "**Artist**"), in the precautionary proceedings she brought against the *Fondazione Stazione dell'Arte* (the "**Foundation**"), to which the Artist had donated fifty of her works.

The Artist's daughter (the "Heir"), pursuant to art. 156 of Law 633/1941 (Italian law on the protection of copyright and other rights related to its exercise, hereinafter "CL"), claimed infringement of her rights - acquired *iure hereditatis* - on the Artist's works, following the unlawful distribution and marketing, by the Foundation, of a series of books as well as studies, films and audiovisual works, all containing images of the works donated by the Artist. The Heir pointed out that the Artist, in donating her works to the Foundation, had not transferred the rights to use, publish and commercialize the images of the artworks, which would have remained with the Artist and, subsequently, transferred with the will to her daughter, as sole heir.

The Heir therefore believed that the Foundation had infringed her right for the publication, reproduction, communication, and distribution of the artworks, as provided for by Articles 12, 13, 16 and 17 of the CL and therefore requested the Foundation to be prevented from carrying on the distribution and marketing of such materials.

The Foundation, on the contrary, argued that the Artist in making the donation of her works to the Foundation, did not want to transfer only the physical property of such works, but even the economic rights in relation thereto, claiming that the donation was strictly functional to a project of dissemination and enhancement of the works themselves which all the activities of the Foundation was institutionally and exclusively aimed at.

In its order, the Court of Cagliari referred to the provision contained in Article 109 of the CL, according to which the transfer of one or more copies of the work does not imply, unless otherwise agreed by the parties, the transfer of the rights of use.

In the opinion of the Court, Art. 109 of the CL, by highlighting the need for an "*explicit agreement*" specifically concerning such rights, seems to prevent from inferring the transfer at stake from the interpretation of the transfer agreement (in this case, the deed of donation) which did not include any explicit reference to the copyrights transfer.

With reference to the reproductions in the catalogs the Court highlighted the role that the Foundation had taken, as promoter of the publication, and therefore the Court considered that such conduct could entail irreparable damage if not promptly prevented. The Foundation was therefore prevented from further marketing and distributing, in any form or for any reason whatsoever, the books and other materials and was ordered to withdraw them from the market.

III

THE APPEAL FILED BY THE CY TWOMBLY FOUNDATION AGAINST THE LOUVRE MUSEUM

As to authors' moral rights, it is interesting to mention the appeal filed last March by the CY Twombly foundation against the Musée du Louvre ("Louvre") before the Court of Paris.

The dispute, still pending, stems from the recent renovation of the "Hall of Bronzes" of the Louvre, carried out during the museum closing due to the COVID-19 emergency. On the ceiling of the Hall of Bronzes, in 2010, the American artist Cy Twombly created the "*Ceiling*" mural. Following the restructuring and renovation decided by the museum's management, the walls of the Hall of Bronzes were painted brown and the floor was replaced with a wooden *parquet*, thus changing the context in which the artist's work is now located.

Following the failure of Louvre's President Jean-Luc Martinez to respond to the request of the Foundation and the artist's son to restore the Hall of Bronzes to its original condition, the latter filed an appeal before the Court of Paris, claiming violation of their moral rights to the integrity

of the work, as the new presentation of the Hall of Bronzes modifies and alters the perception of the artist's work, damaging his reputation.

In Italy, similarly to what is provided for by French law, Art. 20 of Law 633/1941 (Italian law on the protection of copyright and other rights connected to its exercise, hereinafter "CL") establishes that, without prejudice to the economic rights *"even after the transfer of the rights themselves, the author 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 honor or reputation"*. This provision therefore gives the author the power to oppose any modification and any act detrimental to the work, which may be prejudicial to the reputation of the artist. After the death of the artist, the moral rights under Art. 23 of the CL can be exercised by the author's relatives, who can oppose any modification of the work or any act prejudicial to the artist's honor and reputation.

Some decisions of the Italian courts have recognized an infringement of the right to the integrity of the work even in case of acts which do not affect the work itself but rather its presentation to the public so as to alter the correct perception of the same by the persons who enjoy it, so affecting the author's reputation (Trib. Milan, July 6, 2004, available in Darts-IP). However, the damage must be objective (beyond the subjective sensitivity of the author or the person entitled to moral protection) and the illicit event must, however, be related to the work and not simply to the context in which it is presented (Trib. Milan, August, 26 2008, available in Darts-IP).

Even if the dispute under examination is subject to French law, the issues is interesting because it deals with the perimeter of the protection of the moral right of the artists and of their heirs on the works, also considering that, in the case at stake, the work remained unchanged while the context in which it is exhibited was altered.

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