

Felicia Caponigri

# Serious Artistic Interest in Michelangelo's David in Florida and in Florence: A Tale of Art Cultural Property between Two Places

(doi: 10.7390/108953)

Aedon (ISSN 1127-1345)

Fascicolo 2, maggio-agosto 2023

**Ente di afferenza:**

()

Copyright © by Società editrice il Mulino, Bologna. Tutti i diritti sono riservati.

Per altre informazioni si veda <https://www.rivisteweb.it>

## **Licenza d'uso**

Questo articolo è reso disponibile con licenza CC BY NC ND. Per altre informazioni si veda <https://www.rivisteweb.it/>



## L'immagine del bene culturale "fra i due mondi"

### Serious Artistic Interest in Michelangelo's *David* in Florida and in Florence: A Tale of Art & Cultural Property between Two Places

di [Felicia Caponigri](#) [\*]

**Sommario:** [1. Introduction: The complex role of Michelangelo's \*David\* in our cultural consciousness.](#) - [2. The \*David's\* Serious Artistic Value within Obscenity Law in the United States and its assessment with respect to at least one Parental Notification Policy.](#) - [3. Michelangelo's \*David\* and Warhol's \*David\*: U.S. copyright law as a proper restraint on the Freedom of Expression and the development of Serious Artistic Value.](#) - [4. Restraints on the development of the \*David's\* Serious Artistic Value in \*Decoro\* and its adjacent rights.](#) - [5. Conclusion: Reconciling the Development of Serious Artistic Interest between Italy and the United States.](#)

Evaluations of artistic value in Italy and in the United States today are dynamic, alive, and, as evidenced by the most recent Florida to Florence dialogue about Michelangelo's *David*, at times problematic because these evaluations require deploying a mix of academic, scientific knowledge and what seem to be gut-instinct feelings by different stakeholders in our communities. How do we respond to requests to mediate the appearance of a celebrated cultural symbol like Michelangelo's *David*, whether that request comes from a group of parents in Florida or the cultural institution in Italy which preserves the statue for posterity? This brief reflection seeks to go back to basics, as it were, and outlines the legal contours of, in Italian terms, artistic interest, and, in American terms, serious artistic value, especially for artworks that include artistic or compositional elements, like nakedness, that are increasingly at the edge of notions of decency or appropriateness in our complex contemporary times. It explores serious artistic value under First Amendment law in the United States, touches on how copyright law's constitutional restriction of expression in certain instances of artistic appropriation may presume that a work has several artistic meanings, and argues for a deeper consideration of how to apply *decoro* in instances when many different uses, both commercial and non-commercial, may appropriately build and reference a work's artistic value.

**Keywords:** first amendment; reproductions of cultural property; cultural heritage law; copyright law; *decoro*.

#### 1. Introduction: The complex role of Michelangelo's *David* in our cultural consciousness

In 1977, The New York Times reported on the problematic and contested installation by Lorenzo Amato, an immigrant from Palermo, Sicily, of "a five-foot copy of Michelangelo's *David* outside his pizza parlor" [1] in downtown Glenn Falls, New York. Amato had purchased the copy of the *David* while on vacation in Florida with his family the year before, and the copy had had pride of place in what the newspaper described as "an Italian garden... [with] columns, flowers, a bubbling fountain, two stone lions and statues of two women, one nude from the waist up and the other with a breast exposed" [2]. Amato soon received "protests over 'nudity'" accompanied by a loss in business [3]. In response, he painted "the bottom half of his copy of the *David* black to resemble trousers" [4]. But this only resulted in more complaints and further loss of business. Finally, after unsuccessfully trying to remedy the situation by replacing the copy of the *David* with a statue of the Virgin Mary [5], Amato put the copy of the *David* back up and had it blessed by a priest in the hopes of mollifying everyone, including customers and people outside of Glenn Falls who had called for the return of the copy of the *David* outside the pizza parlor [6]. In his remarks to The New York Times, Amato observed

"This would not have happened in Italy"... "In Italy, there are statues in the streets, in the piazzas, everywhere. In Italy, we consider it art." [7]

Anticipating a controversy which would also have Florida origins almost fifty years later, the controversy surrounding Amato's copy of the *David* raises questions about cultural property's translation into different cultural contexts. It spotlights the charged differences that surround how we decide what "art" represents our communities and, by extension, ourselves. This 1970s controversy also reveals the continuing cross-cutting nature of cultural symbols and icons like Michelangelo's *David*. A statue, and its copies, can, in fact, be used as a proxy for Italianity outside of Italy, even by Italians who might hail from regions different than those the statue most closely represents. In the process of this proxy making, the firmness of the foundation of a statue's cultural value and artistic interest, and its appropriateness in all cultural contexts, by extension, can be overestimated or, at the very least, left unnuanced. Statues' use of nakedness [8], often because of nakedness' proximity to definitions of what is appropriate or not, can be in the eye of a storm of decisions about cultural value and artistic interest.

And this leads us to the main questions that animate this brief reflection. How do we respond to requests to mediate the

appearance of a celebrated cultural symbol like Michelangelo's *David*, whether that request comes from a group of parents in Florida or the cultural institution in Italy which preserves the statue for posterity? We might take recourse, like Amato did, to the concept of "art" to explain why a statue's appearance in the public sphere is justified despite its nakedness, but how do we decide what is art anyway, and can art, and the artistic interest that underlies this notion, really be an escape clause for all naked statues? What do we do when art is not a reason to allow the image of a naked statue, but a reason to censor it instead?

The evaluations of artistic value with different levels of community input that are required to answer these questions are more than present on both sides of the Atlantic. Evaluations of artistic value in Italy and in the United States today are dynamic, alive, and, as evidenced by the most recent Florida to Florence dialogue about Michelangelo's *David*, at times problematic because these evaluations require deploying a mix of academic, scientific knowledge and what seem to be gut-instinct feelings by different stakeholders in our communities. In the following sections I outline three areas of law between the United States and Italy which now restrict freedom of expression: obscenity law and related regulations on certain displays of nudity, including parental notification policies; copyright law; and the application of *decoro*. While independent areas of law, I see a connection between the three in their relationships to the identification and development of artistic interest under the law, and the recognition of this artistic interest or artistic value as a trigger for legal rights. In Part 2, I outline the test for obscenity law in the United States, highlighting how the factor that an obscene work be of serious artistic value may remove it from government restrictions and into the category of protected speech. I highlight how the problematics of the merger of obscenity, nudity, and art for obscenity law become even more problematic for works that incorporate images of cultural properties that also display nudity, raising questions as to why one work is of serious artistic value, and another is not. I also call attention to how regulations of nudity, including nudity that is part of protected speech, like Michelangelo's *David*, may be regulated under the secondary effects doctrine and educational institutions' voluntary policies. I end this section by re-telling the story of the contested teaching of Michelangelo's *David* in Florida, seeking to correct the record for an Italian audience. Rather than characterizing the *David* as pornographic, the school sought to enforce its parental notification policy, giving some parents (who, granted, may have characterized the *David* as pornographic) a voice in the work's presentation. This in turn, as I see it, has ramifications for our collective recognition of the serious artistic value in Michelangelo's masterpiece. In Part 3, I turn to a second area of the law which constitutionally restricts freedom of expression: copyright law. Using the ruling in the recent U.S. Supreme Court case *Andy Warhol Foundation v. Lynn Goldsmith* case, I explore in particular how the *ex post* exception to this restraint - the fair use test - seems to have been applied, in this case, in a way which potentially undermines the constitutionality of copyright law's restraint on freedom of expression. As in the previous section, I center my critique on artistic values: by focusing on how the character and use of Warhol's work may be a market substitute for Goldsmith's photograph through licensing, the Court seems to extend an expansive artistic meaning to Goldsmith's photograph at the expense of Warhol's expression. In doing so, the Court does through the fair use test what obscenity law does through another standard: potentially frustrates our ability, as a community, to recognize what is of artistic value and of artistic interest to our community by limiting incentives to create and the related progress of the arts that is so beneficial to the public. This too should concern us in the context of Michelangelo's *David* because, although a work in the public domain, the myriad of artistic interests identified in contemporary uses of this cultural property risk being elided and lost when compared with each other. This concern may, in turn, present a further opportunity to rethink how copyright law mediates the appearance of a celebrated cultural symbol in contemporary artwork that may be, as a result, more or less future cultural property. In the last section, I turn to the Italian notion of *decoro*. I emphasize how some applications of restrictions on the use of and access to cultural properties and their images may seem irrational when based on shifting notions of appropriateness depending on the case at issue. I acknowledge that principles of reasonableness and proportionality may in fact make the notion of *decoro* more rational. The devil, however, is in the details of how museums and other administrative agencies in Italy conceive of what uses are or are not appropriate uses of images of serious artistic works that qualify as cultural properties as a first matter. Shifting notions of appropriateness put our collective artistic interest in Michelangelo's *David* at risk. Deeper considerations of how many different uses, both commercial and non-commercial, may appropriately build and reference a work's artistic value offer an opportunity to equitably balance conceptions of artistic value in the art-historical canon with at times opposing community perceptions of what may be of artistic value for the benefit of cultural dialogue.

The serious artistic nature of Michelangelo's *David*, an evaluation with legal relevance and import, is, in fact, not a foregone conclusion, despite the work's continuous celebration over centuries. Nor is the blind acceptance of the *David's* message without some mediation. Similarly, the appropriateness of copies of Michelangelo's *David* in certain spaces and contexts is also not a foregone conclusion. Indeed, the most recent case in which the Gallerie dell'Accademia successfully sued GQ magazine for superimposing the *David's* abdominals on a male model [9] shows how certain Italian institutions might, like some parents in a classical school, care about the context of the *David's* display and the messages which are conveyed about it. In making this equation, and in the initial thoughts shared in this brief reflection, I seek not to enter what have been termed the current culture wars of the United States [10], nor to wade into political party waters (although the *David's* origins are particularly political [11]). Nor do I seek to make an international case out of Florence's perception of Florida as a home to Philistines [12] when the very Florentine cultural institution which is home to the *David* polices the *David's* reproductions in a manner that encroaches on many of the public's rights related to culture [13]. Rather, I seek to go back to basics, as it were, and outline the legal contours of, in Italian terms, artistic interest [14], and, in American terms, serious artistic value [15], especially for artworks that include artistic or compositional elements, like nakedness, that are increasingly at the edge of notions of decency or appropriateness in our complex contemporary times. In going back to these basics my hope is that we might more fully appreciate just how precarious and precious the status of cultural heritage is and recognize that one culture's Philistine is another culture's intellectual.

## **2. The *David's* Serious Artistic Value within Obscenity Law in the United States and its assessment with respect to at least one Parental Notification Policy**

Like Italy, which has had laws on the books penalizing nudity at the beach (as memorialized in a famous image of a woman receiving a ticket for wearing a bikini in 1957 [16]) and fined women for wearing pants or shorts as late as 1941 [17], the United States has had several statutes regulating indecent exposure on its books [18]. The difference in treatment, however, between indecent exposure that is regulated and that which is permitted in the United States has much to do with the kind of activity in which the indecent exposure is embedded, particularly whether that is an activity of artistic expression or not [19]. At its most general level, under the First Amendment in the United States, freedom of expression allows individuals to claim a right to “say what they would like” in the face of State regulations or rules that might impede or alter their speech. Protected speech has been read broadly to include “political speech and verbal expression” but also entertainment, theater, music without words [20], marches [21], sit-ins, and more [22]. In terms of coverage, non-representational art has been one of the exemplars of protected speech [23]. Some authors have pointed out the poverty of the theory behind the reasons *why* we consider non-representational art to be covered by the First Amendment, especially since the actual content of non-representational art and its viewpoint that would be regulated is changeable, up-for-debate, and even evolves with the times [24]. Lewd and obscene speech is not covered by the First Amendment [25]. Under U.S. law, the government can regulate speech that is not protected, like lewd and obscene speech. Identifying what is and is not, therefore, protected speech is a first step before identifying whether the speech at issue can be impeded or halted. That is, identifying what is protected speech and what is, instead, obscene, is crucial. Moreover, saying what one would like is not an absolute right [26]. In certain circumstances, therefore, even verbal expression in the category of art might be limited if it is not obscene.

Under U.S. law [27], courts apply the following test to evaluate whether a work that depicts or describes sexual conduct [28] is obscene or falls into the protected speech category,

[whether] a work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value [29].

The U.S. Supreme Court articulated this test in *Miller v. California*, where it evaluated whether California’s criminal regulation of the mailing of unsolicited advertising brochures for adult books containing drawings of men and women engaging in “a variety of sexual activities” [30] was proper. As part of the articulation of the test and its application, the Court addressed nudity in particular:

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation...At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy [31].

In the Court’s test, serious artistic value and the depiction or description of sexual conduct are inextricably related. Indeed, while envisioning nudity as part of what might be first considered under review as obscene, the Court saw its role as “isolating ‘hard core’ pornography [32] from expression protected by the First Amendment” [33], thereby leaving many of the artistic depictions of nudity likely outside the purview of the test. At the same time, the Court emphasized the fact-based nature of the inquiry and the porous national and local spectrum of appealing to the prurient interest, the work’s portrayal of sexual conduct, and even of artistic value itself [34]. As a result, the Court recognized that jurors who are called to evaluate the fact of whether a work appeals to the prurient interest or depicts sexual conduct in a patently offensive way may indeed draw on their community standards; “obscenity itself is to be determined by applying contemporary community standards” [35]. This essentially means that jurors in Maine or Mississippi and jurors in Las Vegas or New York City might come to different conclusions about the same work, with the former finding it obscene and the latter not to be obscene [36].

As Amy Adler has noted in the context of contemporary art and community standards in the 1990s, the current obscenity test’s requirement that all three prongs of the test be met effectively allows a work, no matter how sexually explicit, to pass the test and be deemed *not* obscene if it has serious artistic value [37]. Artists’ and art world stakeholders’ justifications then, for works of art that are sexually explicit or even depict nudity which is, under the community standards of the jurisdiction, patently offensive or appealing to the prurient - or shameful or morbid [38] - interest, are funneled into the serious artistic value prong after a consideration of community standards. When these works of art are even prosecuted [39], jurors and prosecutors must face progressive slides of community standards towards visuals that previously would have been more easily classified as prurient or offensive, as well as the art world’s own embrace of a wide variety of compositions, styles, and contents that disrupt many previously identifiable differences with obscene material [40]. Of course, there are still works that scholars see as less likely to pass the obscenity test-works that seem to more easily appeal to the prurient interest in a patently offensive way, with no serious artistic value. Adler gives the example of Jeff Koons’ merger of porn and art in his 1989 *Made in Heaven* work, featuring his wife at the time Cicciolina [41]. Deeming the work less likely to survive an obscenity charge than Mapplethorpe’s *X* Portfolios, Adler emphasizes how “*Made in Heaven* used the vernacular of porn without any trappings of art.” [42] Moreover, Koons as an “artist” did not shoot the images himself, but rather used Cicciolina’s habitual photographer [43]. When the work was exhibited at the Whitney in 2014, the museum “displayed this series...in a separate room from the rest of the exhibition, complete with warning signs about its content” [44]. All of this points, despite Koons’ status as a contemporary artist, to a merger of the lewd, obscene, and art that might not pass the serious artistic value prong of the obscenity test. We might ask, however, whether the incorporation of another work of cemented serious artistic value, like the image of a cultural property, would have allowed *Made in Heaven* to pass the test.

The question is, in fact, a timely one. The elements of Koons’ *Made in Heaven* series have a counterpoint in a work with similar elements also featuring Cicciolina not produced by an artist: works contained in Pornhub’s now defunct *Classic Nudes* initiative [45], a self-described “interactive guide to some of the sexiest scenes in history at the world’s most famous museums.” [46] Seemingly self-aware of the fine line between obscene, unprotected expression and works of established serious artistic value classified as protected expression, the initiative exhorted viewers to the site to

Join us as we tour the most respected institutions in western art, guiding you past all the prude paintings and going directly to the good stuff: representations of the naked body in all its artistic glory. Because porn may not be considered art, but some art can definitely be considered porn [47].

Spotlighting works in six museum collections, including the Uffizi Gallery in Florence [48], Botticelli's *Birth of Venus* from 1485 took pride of place. The primary advertisement for *Classic Nudes* was, in fact, a safe for work video ad featuring Cicciolina posing in a tableau vivant which imitated the composition of the *Birth of Venus* [49]. Not to overlook the richness of American museums, the initiative also featured works in The Metropolitan Museum of Art [50].

Each painting was presented differently and could include an image of the painting with the addition of text, an audio commentary or, for some, a video recreation of the painting. The Metropolitan Museum of Art's *Bathers* by Cezanne, for example, only received a textual treatment, with additional text that pointed out art historical facts in a contemporary tone in line with the value proposition of the initiative [51]. In contrast, Degas' *Male Nude* included additional text and a video re-creation of the painting, which imitated the formal composition and lighting of Degas' work while adding "what would have happened next." [52] While a definite merger of art and porn, like Adler's assessment of Koons' *Made in Heaven*, the use of the formal lighting and compositions of artwork in museums that have been independently assessed as having serious artistic value raises the question of how to parse the prongs of the obscenity test as applied to the videos on Pornhub's website. Depending on the applicable community standards [53], we might, factually, find that the works appeal to the prurient interest. While we might wonder whether a state statute would consider the composition of Degas' *Male Nude* as depicting sexual conduct [54], the video, with its imaginative additions, might fulfill the statute's definition and a jury might, moreover, find the video's depiction patently offensive. The classification of this pornography as obscene would then turn on whether the built in reference to Degas' *Male Nude* would make the work have serious artistic value. Given the art world's disdain for the *Classic Nudes* initiative as a whole, and The Metropolitan Museum of Art's own decision to not engage, either positively or negatively [55], with the online tour, the support of a serious artistic value from the art world that was so helpful in the Mapplethorpe trial seems to be lacking [56]. That having been said, some members of the public seem to have seen some artistic value (or a worthy political commentary) in *Classic Nudes*, contesting the hierarchical assessment of museums and other art world stakeholders [57]. Incorporating cultural properties with a cemented serious artistic interest into works and initiatives that might otherwise be deemed obscene reveals how nuanced decisions of serious artistic value can be. Overcoming the hurdles of the first two prongs of the obscenity test for works that do not depict sexual conduct or are not seen in a particular community as appealing to the prurient interest leads us to perennial questions in art and law. Who decides what is of serious artistic value? What role do art experts have over a community in outlining the boundaries of this artistic seriousness? Can we separate the seriousness of the artistic value of a cultural property from works that are linked to it and cite that artistic value in their own work to make a point?

The U.S. government can in some ways side-step these hard questions by regulating nudity as part of protected, expressive speech that is not classified as obscene. This might include the display of Michelangelo's *David* alone or the display of Botticelli's *Birth of Venus* outside of the *Classic Nudes* initiative. The government may do so first by applying regulations as part of the work's appearance in a regulated media, like television; by conditioning government funding on specific filters or viewing restrictions, as it has done in publicly funded libraries; or by regulating the "secondary effects", like crime, of the expressive display of nudity [58]. The government may also restrict displays of nudity in a content-neutral manner by restricting the time, place, and manner of protected speech in ways that are "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication", as in instances where expressive nude dancing is regulated in the name of public decency [59]. Following these precedents, we could imagine a state ordinance or regulation that generally prohibits billboard advertisements depicting nudity, which might include reproductions of Michelangelo's *David* [60]. If a law regulates speech in a targeted manner and is not characterized as targeting secondary effects or otherwise being a proper time, place, and manner restriction, then the law must pass the strict scrutiny test: "the government must show that the law is the 'least restrictive means' of advancing a 'compelling' governmental interest" [61].

One of the animating features of secondary effects, government funding, and even regulated media is the desire to prevent minors from being exposed to nudity [62] and similar concerns for public decency. There are also instances of educational institutions self-censoring to prevent "chilly climate[s]" in classrooms [63]. In 1991, for example, a reproduction of Francisco Goya's *Maja Desnuda* was removed from a classroom on one of Penn State's campuses' following its acquisition and display for an art history class [64]. A female English and womens studies instructor had complained that the display of the work constituted sexual harassment, given a court precedent in the Spring of 1991 finding women steelworkers were "sexually harassed because the traditionally male environment included in its locker room visuals of nude women" [65]. But central to a University committee's decision to remove the work was the "classroom climate"-

Sexually graphic images create a chilly classroom environment which makes female teachers and students embarrassed and uncomfortable and diverts students' attention from the subject matter. It is difficult to speak to a person whose attention is riveted to a picture of a female nude on a wall. Students and faculty are assigned to a classroom while those entering a gallery do so by voluntary choice [66].

Today it is indeed consent and parental notification policies and other education-related laws in the United States that mediate the display of artworks with nudity in schools. While obscenity law might have played a larger role in the prohibition of artworks with nudity prior to the Mapplethorpe case [67], today conversations about what works have sufficient artistic value to be taught are mediated by parents, school administrators and teachers, as well as by State officials when public schools or public-school curricula are at issue. And it is in this context that the controversy over the display of Michelangelo's *David* at the Tallahassee Classical School arose.

As shared in press reports, in the Spring of 2023, an image of Michelangelo's *David* was shown to sixth grade students at the charter school [68] as part of an annual art history lesson [69]. While press reports quoted at least one parent at the school as considering the *David* as "pornographic" (an assessment hotly contested by the Mayor of Florence and the

Director of the Galleria dell'Accademia [70]), the school strongly denied that it held this characterization in a statement about the institution's parting of the ways with the principal:

Our program is rooted in traditional principles of moral character and civic virtue, portrayed as part of Western Civilization. Studying the Renaissance, including the art of the period, is part of the curriculum. In fact, Michelangelo's Statue of David has been a celebrated and powerful part of our lessons. At no time have we viewed that work of art as pornographic. At no time have we considered removing the David statue from our curriculum, and Michelangelo's David will continue to be studied as part of our curriculum next year, as it has in years past... it is important to reiterate that at no time has Tallahassee Classical School characterized Michelangelo's Statue of David as pornography. Any suggestion otherwise is false and defamatory [71].

At issue then, in the reception of Michelangelo's *David* in Florida in this context is not obscenity law, nor state regulations on nudity, no matter how they are justified. Rather, it is parental consent and notification policies, and parents' right to be, as the school noted, "the ultimate decision-makers for their children", that so overshadowed the showing of this work of art and Italian cultural property in Florida [72]. While in the Italian cultural context, there may be no need to provide advance notice to parents regarding the display of Michelangelo's masterpiece, in Florida, at this school, advance parental notification was a crucial first step. And it is here that we return to serious artistic value and its identification, and to the slippery foundations on which we build artistic value and its degree of merit. Schools provide the fundamental laboratory for the teaching of art and the communication of artistic meaning. In the United States, a charter school like the Tallahassee Classical School may adopt its own curriculum [73], one which may be more advanced than those in the public school system and more focused on "Western civilization" [74]. Parents may participate in publicly funded scholarship voucher programs, tax credit incentives, or other educational savings programs to send their children to charter schools which given them a comparatively louder voice in how artistic meanings are taught to their children [75]. Of course, the ability to access a private education instead of a public one is not unique to the United States. Article 33 of the Italian Constitution guarantees private individuals and legal persons the right to institute schools and other educational institutions with full freedom under the law [76]. The central comparative Italo American concern in light of reports of Hope Carasquilla's separation from the Tallahassee Classical School in Florida, and her ensuing invitation to Florence, seems to be the margin of power afforded to parents to allow their children's education to derogate from predominantly accepted principles of which works of art are of serious artistic value and which are not. The reason this might be so concerning for an Italian audience is that the very foundation of the notion of cultural property is the recognition of a work's artistic interest by a community [77]. Communication and education are central to establishing and, later, maintaining that artistic interest. The more a slippery slope of deviation is allowed to permeate presentations of the *David*, even as part of well-established and increasingly expanding constitutional rights of parents to educate their children in non-public schools or schools that otherwise reflect their beliefs [78], the more the objective, historical artistic value of a cultural property may be at risk. Of course, in any pluralistic society that values the very freedom of expression at the heart of any work of art and the freedom of thought of its citizens, this is a necessary risk. Some community standards, supported and anchored by parents' perspectives and anchored by notions of public decency and the protection of minors, might be more likely to see an appeal to the prurient interest. And in some places serious artistic interest might be more or less evident for certain cultural properties and not for others. While decidedly separate from obscenity law, parental notification policies implemented by schools like the Tallahassee Classical School can reflect the nature of community standards while also shaping how future members of a community identify what is and what is not of serious artistic value.

### **3. Michelangelo's *David* and Warhol's *David*: U.S. copyright law as a proper restraint on the Freedom of Expression and the development of Serious Artistic Value**

The presentation of Michelangelo's *David* is, of course, not confined to a classroom and to the purposes of education. Outside the classroom, the image of the *David* may be used in new works - whether artistic and/or commercial. The *David* may even be given the Warhol treatment, like other Renaissance works before it [79]. In these instances, artists and businesses may play on the symbolism at the heart of Michelangelo's *David* referencing everything from the city of Florence to Italian culture to the strength at the heart of the David and Goliath story. The appearance of a celebrated cultural symbol like Michelangelo's *David* in contemporary works of art is facilitated by copyright law's robust public domain and by copyright law's *ex ante* thresholds and *ex post* exceptions. While copyright law is presented in the United States as the legal incentive driver for the creation of works of authorship [80], it is also, at the same time, a legal regime which leaves certain works outside of its purview on purpose. These negative spaces of copyright law [81] are, in fact, the justification for copyright law's constitutional restraint on freedom of expression. But, when these negative spaces and *ex post* exceptions to copyright law are denied, courts' decisions can raise questions about whether the restraint on freedom of expression is justified, especially when these restraints seem to come at the cost of recognizing the artistic value of swaths of art movements [82]. Of course, the recognition, especially for contemporary art movements that use celebrated cultural symbols like the *David* which are in the public domain, may also find other avenues beyond copyright law, using other norms from authenticity [83] to heritage narratives.

A central part of the constitutional justification that copyright law does not violate First Amendment freedom of expression principles lies in copyright law's *ex ante* thresholds and *ex post* exceptions [84]. U.S. copyright law extends authors of original works of authorship fixed in a tangible medium of expression [85] an exclusive bundle of rights over their works. These exclusive rights include the right to reproduce or, in other words, copy, the work [86]; the right to prepare derivative works [87], in other words, works based on the original work [88]; and the right to distribute copies of the work to the public [89]. Threshold *ex ante* requirements at the front end of copyright and *ex post* exceptions at its backend make these exclusive rights less onerous for the public in some circumstances. In addition, the robust public domain made up of works that have aged out of the copyright system (like, theoretically, Michelangelo's *David*) and works that do not satisfy these *ex ante* requirements, including originality and the idea/expression dichotomy, is crucial for understanding that copyright law's restrictions are not too onerous for expression: artists and any member of the public may, in fact, use works in the public domain.

At the front end, thresholds for what works even qualify as copyrightable subject matter allow ideas, for example, to remain in the public domain, a freely usable space from which the public, including other artists, can draw [90]. The

idea, for example, of the *Venus Pudica* form is not a copyrightable work, while the particular expression of a *Venus Pudica*, from Botticelli's *Birth of Venus* to Annie Leibovitz's portrait of an expectant Demi Moore, would be copyrightable subject matter [91]. This idea/expression dichotomy lessens the scope [92] of copyright law and its use for an artist: the strength of a copyright in a work will lessen the closer its expression is to the unprotectable idea. The scope of a copyright in the work will also lessen the closer a work's expression is to other works and the less original it is deemed to be [93]. At the back end, after works are classified as part of copyrightable subject matter, the fair use test allows members of the public to use a work in copyright for certain purposes, despite the recognition that the author has these exclusive rights [94]. These purposes include criticism, comment, news reporting, teaching scholarship, or research; copyright law provides a standard to be applied in each case to determine whether a use is fair [95]. This standard includes the following factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work [96].

The concept of *transformativeness* within the first factor was central to the application of this standard before the recent *Warhol* case. First proposed in a law review article by Judge Pierre Leval [97], transformativeness was understood as "a further purpose or different character" [98] of the second work in comparison to the original work that is used and/or referenced. The U.S. Supreme Court had found, for example, that the rap group 2 Live Crew's version of Roy Orbison's song "Pretty Woman" was a fair use because it was a parody and therefore "need[ed] to mimic [the] original to make its point" [99]. This use was distinct from the original use and point of Orbison's version of "Pretty Woman." 2 Live Crew's work, therefore, furthered copyright by promoting the creation of this rap song without diminishing Orbison's reason to create his song in the first place and was justified because, to make that point, 2 Live Crew needed to copy Orbison's song [100]. The Supreme Court's recent decision holding that the Andy Warhol Foundation's licensing of *Orange Prince* to Condé Nast was not a fair use of Lynn Goldsmith's photo of Prince, however, nuanced the importance of transformativeness and, by extension, the scope of Warhol's copyright. In this instance, the application of the fair use standard, while meant to be one that is not onerous to freedom of expression, restricts the expression of Warhol, and appropriation artists like him, effectively raising questions about whether such a restraint on freedom of expression is justified and to what extent the artistic value of Warhol and similar artists' work is jeopardized.

The fair use question in the case centered around Andy Warhol's use of the photographer, Lynn Goldsmith's, photograph of the musical artist Prince in one of his famous silk-screened works, *Orange Prince*. Goldsmith's photograph of Prince had originally been taken to accompany a story in *Newsweek*, but was unpublished with the story and remained a studio photograph in Goldsmith's collection [101]. While Warhol had legally made use of the work as a licensed artist's reference for another silk-screened work commissioned by Vanity Fair, Warhol later made *Orange Prince* and other series using Lynn Goldsmith's photograph without a license [102]. Instead, the Andy Warhol Foundation, following Warhol's death, had licensed the unlicensed *Orange Prince* image itself to Condé Nast, for use on the cover of a special edition magazine cover celebrating Prince's life following his death [103]. Other magazines licensed Goldsmith's photographs to run in their commemorative issues [104]. Was Warhol's *Orange Prince* a fair use of Goldsmith's photograph? More specifically at issue for the U.S. Supreme Court [105], was Warhol's use of "a further purpose or different character" [106] than Goldsmith's photograph? Rather than place great emphasis on "new expression" alone, seeing it as a proverbial get out of copyright infringement for free card, the U.S. Supreme Court characterized the inquiry as one of degree, which should also be weighed against considerations like commercialism [107]. Narrowing the use at issue to "[the Andy Warhol Foundation's] licensing of *Orange Prince* to Condé Nast" and not considering Andy Warhol's use of Goldsmith's photograph as an artistic practice generally, the Court emphasized that *Orange Prince* was put to the same use as Goldsmith's photograph. That is, they are both "portraits of Prince used to depict Prince in magazine stories about Prince" [108] and "the copying use is of a commercial nature" [109].

Recalling copyright law's structure of costs and benefits to the public - the cost of extending rights for limited terms to authors for the benefit of encouraging and rewarding creative works that the public will later be able to use as they wish [110] - the Court characterized the limit of fair use as a defense against infringement as reflective of "this balancing act between creativity and availability." [111] Of central concern for the first factor, the Court noted, was substitution: while most copying is socially useful after the fact, a fair copy is one that does not substitute for the original work or one that has enough differences to make it an unlikely substitute [112]. An unfair use that is too like the original and an effective substitute frustrates the goals of copyright law, the Court noted, because it provides the public with a substitute for the original work and derivatives of it, which are also in the purview of the author's right [113]. Although the Court did not spell out how this exactly frustrates the goals of copyright, we might infer that it does so by undermining the incentives of an author to create in the first place and extending substitutes to the public before the expiration of the copyright term.

In its opinion, the United States Supreme Court stood firm to the rule that "[a] court should not attempt to evaluate the artistic significance of a particular work" [114]. But this *Bleistein* rule, as it is known, did not preclude the majority from considering a reasonable perception of the meaning of the Warhol work in an objective sense [115], even as it sought to preclude reliance on Warhol's subjective intent and at times reliance on the opinion of art critics themselves [116]. This objective sense took into account the District Court's conclusion that Warhol's depiction of Prince portrayed the musician as iconic, while Goldsmith's photograph portrayed Prince in a photorealistic manner, but it did so in the context of the Andy Warhol Foundation's licensing use [117]. As the Court saw it, objectively, the degree of difference with which Warhol and Goldsmith portrayed Prince was not sufficiently different to alter the purpose of the use, even if that use was described with more detail "as illustrating a magazine about Prince with a portrait of Prince, one that portrays Prince somewhat differently from Goldsmith's photograph (yet has no critical bearing on her photograph)"

[118]. The majority saw the potential for a slippery slope were copyright law to see artists' applications of their own styles to other work as fair uses. An artist's characteristic style applied to another work to "bring out a particular meaning" might effectively permit a range of various interpretations of a work to substitute for the work or to be used for similar purposes as the original work could be [119]. The Court would seemingly rather reward differences that more critically engage with the original work and that, therefore, cannot be read as substitutive interpretations [120].

The author of a work in copyright might applaud the Court's majority opinion, while appropriation artists might decry it as focusing on a marketing decision, as the dissent did [121], at the expense of fostering creativity, the core of copyright law [122]. For Michelangelo's *David* the fair use debate frankly doesn't matter, because, as it is firmly in the public domain, the *David* may be used without any sort of license under U.S. copyright law for any purpose, with the application of any artistic style subject to any objective interpretation. But for the purposes of considering copyright law as a restriction on freedom of expression, like obscenity law or other regulations on nudity, and the accompanying justifications for such a restriction, the Court's emphasis on an objective reading of the meanings of Warhol's work in the context of a licensing use might be troubling. The essence of the *ex post* exception of fair use lies in recognizing the numerous creative works that cannot be created when copyright law restricts expression: second wave artists make works with first wave artists' output that would not be authorized or even created by these first wave artists. Concentrating on licensing uses to punt analyses of artistic meaning in the first factor presumes that there are several artistic meanings in the first work which could be licensed. In some senses, by focusing on commerciality and the marketability of a work of art, the Court seems to be reading meanings and artistic values into a work which may not be objectively seen by anyone other than the Court. In this case, a photorealistic image of Prince as also indicative of the artist's iconic value. While U.S. copyright law should not, under the law, "evaluate the artistic significance of a work of art", evaluations of licensing uses presume certain artistic significances that are commercially viable. And in a world where increasingly all images can be licensed in a variety of markets to a variety of stakeholders, artistic values of a work can easily multiply to expand the scope of copyright, a result that seems contrary and at odds with the use of the fair use test to constitutionally justify restrictions on expression.

Copyright law's supposed separation from artistic value and its restrictions on freedom of expression might not be so evident or justifiable after all. How many meanings, after all, can we find in contemporary re-uses of Michelangelo's *David* that would limit other artists' similar uses of these works? As contemporary works continue to layer meanings on public domain works and we compare the universe of commentaries and parodies of cultural properties, how do we differentiate the degrees of difference between public domain works, works worthy of thin copyrights, and fair uses of these works that add an artist's characteristic style? In implicitly reading a number of different meanings into a work through its licensing market we risk underestimating the degrees of differences between works, and may potentially limit the development of artistic value, and the assessment of its seriousness.

#### **4. Restraints on the development of the *David's* Serious Artistic Value in *Decoro* and its adjacent rights**

Despite the perhaps challenging aspects of U.S. copyright law's constitutionally allowed restraints on our expression and the potential for an expanding scope of copyright as predicate artistic meanings that facilitate licensing uses are presumed in fair use tests, there is good news. The restraints and checks and balances offered to owners of works through copyright are, in the U.S. Constitution's own words, "for a limited time" [123]. Hence, at some point, copyrightable works of art, in their intangible compositions, age out of the copyright regime and into a rich public domain where members of the public can do what they will with the works' images and copy to their hearts' content. This does not mean, however, that other restraints on aspects of the work, including its material form(s), may not affect the perception of a work's serious artistic value or the public's artistic interest in it. In the United States, we see this possibility in the intersection between historic preservation law and contemporary art installations, where concerns to preserve a building's historic significance might affect, for example, a contemporary artist's ability to wrap the building [124]. In Italy these restraints on the serious artistic value of a work are built in *ex post* through Italian cultural property law in two ways. First, Italian cultural property law restricts the creation of new intangible works that build on a work of serious artistic value that has become a cultural property. Most of the scholarship exploring Italian cultural property law's regulation of the artistic value inherent in a cultural property has focused on its status as an improper extension of copyright law [125]. These restrictions are mainly applied to commercial uses of works of serious artistic value that have become cultural property. The Gallerie dell'Accademia, for example, recently successfully sued GQ for creating a cover on lenticular paper that allowed the male model Pietro Boselli's abdominals to be substituted with the *David's* when the cover was physically shifted [126]. In these instances, Italian cultural property law controls the commercial use of what would be called slavish copies of works in the United States [127]. There are potential exits from this control thanks to Italian cultural property law's interaction with Italian copyright law and the EU Copyright Directive [128]. In at least one case sufficiently imaginative additions to a simple reproduction of a cultural property have tipped the scales in favor of not requiring the author of such a creative re-elaboration to seek permission from the relative administrative agency and therefore to exit what we might call a cultural property licensing scheme [129]. Notwithstanding this possibility, however, recent case law in Italy has seemed to side with administrative actors who object to what might have been deemed creative reproductions of cultural properties used for commercial purposes [130]. And this brings us to the second and related point which I will concentrate on in this section, especially for the comparative purposes of the brief reflection.

Italian cultural property law also allows administrative agencies like the Italian Ministry of Culture and, in certain moments, their related institutions, like museums, an almost parental say in the maintenance of the serious artistic value of a cultural property through the notion of *decoro*, what we might translate as an indeterminate legal notion meaning appropriateness. The Ministry of Culture and museums might bring their legal claims under articles 107 and 108 of the Code of Cultural Property which contains the mutant copyright right, but the notion of *decoro* and its links to the proper uses, or *fruizione*, of cultural properties is an important concept which informs the reasons and needs for this very control of copies [131]. These links are also visible in comments by leading museum directors about the reasons to police images of works of serious artistic value that have become cultural properties. In Florence, the Gallerie dell'Accademia which holds the *David* in its collection has been open about its war on inappropriate, unapproved



reproductions of the *David*, calling the GQ use “debasement, obfuscating, mortifying, and humiliating the high symbolic and identity value of the work of art and subjugating it for advertising and editorial promotion purposes” [132]. Horror over uses of the *David* in advertisements for arms have emphasized the offensiveness of those uses and the idea of cultural dignity [133]. While criticizing the Tallahassee Classical School for facilitating parents’ characterization of the *David* as pornographic, the museum sees no reason to halt its own content-based restrictions on the uses of the work which it deems risqué.

There are closer similarities between Italian administrative agencies’ recourse to *decoro* and the United States’ characterization of obscenity as outside First Amendment protections and the U.S.’ regulation of nudity, not to mention similarities with certain Florida parents’ perceived need to frame the presentation of the nude *David* for their children. The first is that the restrictions embodied in cultural property law in Italy are also constitutionally sound in light of Article 9’s recognition that the Italian Republic “safeguards natural landscape and the historical and artistic heritage of the Nation” [134] while allowing “[i]n the cases provided for by the law and with provisions for compensation, [for] private property [to] be expropriated for reasons of general interest”, such as its preservation [135]. The notion of *decoro* is related to preserving the dignity and decency of the Italian identity that is rooted in the cultural property and most often results in prohibitions on use of and access to cultural properties [136]. Similar to a moral right to control the integrity of a work of visual art [137], the notion of *decoro* centers on the integrity of a cultural property. The term itself is namechecked in only a few articles, including the requirement that promoting sponsorships of restorations of cultural properties be compatible and appropriate with the cultural interest of the cultural property in question [138]. At the same time as these contours of the definition of *decoro* have been drawn, it has also been characterized as a vague notion whose contours are uncertain [139]. As Italian scholars have discussed, the idea of the integrity of a cultural property is fundamentally based in the notion of a cultural property as a relationship between an intangible cultural interest and a tangible property, the *unicum* as it were that is found in unique objects like the Colosseum [140]. These connections between integrity, a check that uses of works of art that qualify as cultural property are appropriate, and cultural property’s intangible cultural interest raise new cases and theories in our digital age. A conflict may exist between three things: artistic speech and expression, that is, under Italian law, allowed to freely use reproductions of cultural properties and, by extension, build on the messages within them [141]; commercial speech, which cannot freely use reproductions of cultural properties and connect cultural properties’ artistic interest to business activities [142]; and *decoro* which serves as an indeterminate legal concept meant to inform the valorization and, by extension, preservation regulations and decisions of the Italian administrative authorities [143]. Some scholars have begun to theorize how to remedy these conflicts based on the relationship between the intangible cultural interest and the tangible property.

These theories explore how images of cultural properties, and what in the U.S. we might call their derivative works, reproduce or do not reproduce, and are related to, the intangible cultural interest that is at the heart of the notion of cultural property. Pierpaolo Forte, for example, has in his work emphasized seeing a cultural property used in a reproduction as a “base property.” [144] This notion of base property can be used to inform theoretical conceptions of what kind of property and what kinds of public goods reproductions or images of a base property and other digitized versions of cultural property are [145]. There are ways to balance how we apply the notion of *decoro* to base cultural properties, in their tangible forms, and how we apply the notion of *decoro* to this new form of property, “digital cultural heritage” or “digital public goods.” [146] In Forte’s framework, the American rifle advertising campaign which used the image of Michelangelo’s *David* is contrary to the notion of *decoro* because the image is put solely to commercial use without the consent of the relevant administrative agency [147]. A different reasoning applies to photographs of the famous Riace bronzes dressed in feather boas and other accessories: this is not contrary to *decoro* because dressing the bronzes was for promotional ends, as part of an invitation to international photographers to showcase the bronzes outside of Italy [148]. Similarly, a different reasoning also applies to Duchamp’s drawing of a mustache on Da Vinci’s *Mona Lisa* - the L.H.O.O.Q. work does not violate *decoro* because the artist had

*precise and important artistic and cultural intents, using not just the reproduction [of the serious artistic work that is a cultural property] and not Leonardo’s canvas directly, but [the work’s] ideal aspects, its complex aesthetic, artistic, social, historic, and epistemic implications that the masterpiece brings along with it, [so as] to create a work that is not just indisputably different and original, but relevant in the history of modern art, without damaging the base [cultural] property and, moreover, contributing to its already enormous reputation [149].*

Forte goes on to note that there are plenty of digital works on the internet (we need only think of the plethora of memes we may use on a daily basis) which could also fulfill the facets he identifies in Duchamp’s work [150]. But, while Forte’s examples are helpful and certainly give much needed legal justification to the multitude of ironic works and commentary we create in our everyday discourse by building on parts of our common heritage, his helpful and insightful organization raises a central question. How do we decide which digital renderings do not attack the *decoro* of serious artistic works that are cultural property? What procedures are in place to differentiate between the rifle ad and Duchamp’s mustached *Mona Lisa*?

Recent decisions in Italy in which public cultural institutions have successfully enforced the right to authorize the commercial uses of images of cultural properties in their collections reveal how potentially restrictive the application of *decoro* can be on speech. This is so even if the foundations of the litigation are based on good faith attempts to assure the public use of the cultural identity at the heart of a cultural property for the Italian, and even wider global, community [151]. But there are principles which may help to make the application of *decoro* by administrative agencies more understandable or, at the very least, transparent. Like other indeterminate legal concepts [152] that are shaped by ethical and moral parameters - including good faith, public order, and public decency - *decoro* exists in an administrative space that is bounded by judicial review and an *ex post* evaluation, not of its merits, but of the reasonableness of its application [153]. The role given to the facts and information gathered as part of the agency’s technical discretion (*discrezionalità tecnica*) is central to an evaluation of the reasonableness of an Italian administrative agency’s application of *decoro* to a specific case in the cultural heritage realm [154]. Technical discretion refers to activities of interpretation that require the ascertainment of complex facts based on evaluations of the public interest and technical knowledge which may, at times be backed by empirical facts; artistic interest and art-historical interest

are two such examples [155]. Judicial review of administrative declarations that a third party use violates the *decoro* of that cultural property are evaluations of the legitimacy of the way the decision was made and of the steps made to gather the technical, complex facts; they are not evaluations on the merits [156].

While some general clauses used by an administrative agency like the Ministry of Culture lean on complex facts backed by empirical or scientific evidence, others lean on concepts of value that are connected to ethical judgments, like an action which an agency deems contrary to public morals [157]. These concepts of value, even if able to be reviewed for their reasonableness, are both dangerous but also potentially beneficial. While there might be legal reforms that allow stakeholders other than administrative agencies to be the final arbiters of moral and cultural order [158], continuing to allow administrative agencies the ability to weigh in on moral and cultural issues makes them, and the indeterminate clauses they deploy, "living organisms" of law [159]. This tension points to an opportunity to think more deeply about the application of *decoro* and how it is identified in practice, how it can be more reasonably implemented, and how it can be more firmly justified under the law.

Most recently, the Ministry of Culture has emphasized how any commercial use at all tips the scales in favor of a licensing fee to use the image, including academic publications of dubious commercial impact, in its fee guidelines [160]. But other examples of decisions to allow some uses of the images of cultural property with commercial impact by administrative agencies themselves indicate how content-based the application of *decoro* can seem to be. Consider the recent *Open to Meraviglia* campaign [161]. The Ministry of Tourism presented Botticelli's *Birth of Venus* in a manner deemed kitsch by many members of the Italian community. At the same time, Italian museums like the Gallerie dell'Accademia are in litigation to impede commercial uses of the *David* and other works which may have cultural justifications, like exploring a new contemporary Renaissance. How is the *Open to Meraviglia* campaign more appropriate and congruous with our cultural interest in Botticelli's *Birth of Venus* than an editorial choice to use Michelangelo's *David* to illustrate the challenges of a contemporary digital renaissance? Some Italian administrative agencies have differentiated the appropriateness of these uses with somewhat dubious references to non-commercial and commercial. The *Open to Meraviglia* campaign valorizes, or enhances, cultural property and Italy's attractiveness as a tourist destination abroad. GQ's use is, again, a commercial one which by

insidiously and maliciously [juxtaposing] the image of Michelangelo's *David* with that of a model [was] debasing, obfuscating, mortifying, and humiliating the high symbolic and identity value of the work of art and subjugating it for advertising and editorial promotion purposes [162].

But these differences may not be so clear or evident. This is especially so when one focuses on the facts that the *Open to Meraviglia* campaign is meant to have a commercial impact that benefits the Italian State, and that a fashion editorial can likewise raise the profile of an Italian cultural property just as much as it can supposedly humiliate it [163]. What is a reasonable application of *decoro* in these circumstances? What is a use that appropriately builds on a cultural property's artistic interest?

One use may in fact not be more appropriate than the other or, at the very least, it might be difficult to decide. Different parts of the Italian administration seem to already implicitly make different content determinations based on a shifting conception of appropriateness that is hard to outline or identify, much like notions of public decency in the United States. And, like the notion of public decency, the shifting Italian notion of appropriateness puts our artistic interest in the *David* as a cultural property in jeopardy. First, by identifying certain uses as appropriate despite or because of their commercial impact, different parts of the Italian State are undermining the very artistic interest in cultural property which they purport to protect through the justification of safeguarding the public's fruition, or "a qualified and complete process of knowledge of an object, of a reality that becomes a part and the heritage of the single and collective culture..." [164] How is one to understand what the artistic interest in a cultural property is, and come to learn of it coherently, if notions of what is appropriately done with it shift based on the stakeholder and at the whims of a government? Second, different agencies of the Italian State are, by extension of these shifting views of appropriate uses, prioritizing the artistic interest that one agency, at any given moment, may have in a cultural property. This is contrary to the very definition of cultural interest, which is tied to publicness and to the objective recognition of a community [165]. While the Italian State might, under the law, step into the shoes of a community for practical, administrative reasons, it cannot replace the community for whom cultural property is preserved and valorized. That community, and its cultural dialogue [166], is embodied as much in non-commercial academic uses as in magazine editorials, puzzle creation, and online marketing.

In characterizing certain uses of images of cultural property and not others in terms of debasement, obfuscation, mortification, and humiliation, the Italian State as a whole risks undermining the very development of artistic interest which made the *David* a cultural property in the first place. In doing so, certain organs of the Italian State, and its public museums, may not be that different from a parent who wishes to explain the *David* to their child before its presentation in school. Like parents, certain museums may also want to shape the message of the *David* before it is presented. The Florida parent's concern for the *David's* nakedness might be analogized to the Gallerie dell'Accademia's concern with a male model's bare-chested nakedness in close proximity to the *David*. Both actors feel the need to censor and pre-authorize in these circumstances in ways that impact their audiences' understanding of the *David's* serious artistic value and wider cultural interest.

## 5. Conclusion: Reconciling the Development of Serious Artistic Interest between Italy and the United States

Reports of Hope Carasquilla's separation from the Tallahassee Classical School in Florida were reported in Florence as evidence of a Philistine presentation of Michelangelo's *David*. Floridians should be punished for viewing the statue as pornographic - it is a masterpiece! But the story is more complex and, we might even say, closer to an Italian approach, than an Italian audience might at first think or wish to admit. First, far from being unrelated to legal assessments of pornography and restrictions on freedom of expression in the United States, serious artistic value - the comparative

sister of artistic interest - is a central get out of jail free card for otherwise potentially obscene works. Were community standards to slide so far as to argue for the classification of Michelangelo's *David* as obscene, the cultural property's serious artistic value would certainly save it. Serious artistic value is then, we might say, just as important on both sides of the Atlantic. At the same time as it is important, however, the identification of serious artistic value in a work of art depicting nakedness in an express way is rooted in our ability to see the work and learn about it. Regulations on secondary effects, like crime, in the United States and parental notification policies can shape the presence of nude works in our society and how they are taught to future members of a collective who are called to recognize the cultural interest of future cultural properties. And it is this point - the *ex ante* shaping of how future generations identify serious artistic value and artistic interest - that is at the heart of the Florida *David* case. It is this aspect that should grab Italian audiences' attention. Hope Carasquilla's separation from the Tallahassee Classical School was grounded in a supposed inability to follow the parental notification policy and, by extension, to give parents a role in shaping their children's perceptions of which expressive works are of serious artistic value.

Rather than cite the Floridian treatment of the *David* as an example of how enlightened Florentines are in comparison to these American counterparts, Italian audiences should take heed from the case and recognize it as a potential reflection of themselves. For parts of the Italian State may act similarly to a parent when they insist on preserving and safeguarding the *decoro* or appropriateness of a cultural property and mediating the presentations of the images of cultural properties. The Italian State acting in Florence through the Gallerie dell'Accademia may be no different from a parent in Florida when it seeks to get ahead of improperly contextualized uses and exhibitions of Michelangelo's *David*. Like a parent on the other side of the Atlantic, the museum is interested in framing how members of the community recognize the artistic interest of a work, and why. In this comparative Italo American context, the question then becomes, how do we respond to these power moves to shape our understanding of artistic interest? What margin of power should we afford Florentine museums and Floridian parents?

Communication and education are central to establishing and, later, maintaining a work of art and a cultural property's artistic interest. The more a slippery slope of deviation is allowed to permeate presentations of the *David*, the more the objective, historical artistic value of a cultural property may be at risk, the argument goes. At times this might seem concerning, but at other times it need not be so. While the morphing of objective, historical artistic values might jeopardize the recognition of a cultural property's importance, this morphing can just as easily translate artistic values of and the artistic interests in cultural properties across time and communities. And this evolution of artistic interest is also why we might be skeptical of interpretations of the artistic meanings of works which seek to emphasize market share, like the licensing power at the heart of the *Warhol* opinion. Contemporary re-uses of Michelangelo's *David* may embody many different meanings and be susceptible to many different artistic values. As contemporary, commercial works continue to layer meanings on public domain works and we encounter the universe of commentaries and parodies of cultural properties, we cannot risk underestimating the degrees of differences between works, and, by extension, potentially limiting the development of artistic value, and the assessment of its seriousness.

For Italian and American audiences, whether in Florence or in Florida, the serious artistic value and artistic interest in Michelangelo's *David* is paramount. It is paramount because it allows us to see cultural symbolism instead of just nakedness, to allow nudity to enter otherwise hallowed spaces, and to see a cultural masterpiece in lieu of a naked statue. At the same time, the serious artistic value and artistic interest in Michelangelo's *David* is not a foregone conclusion or an unchangeable characteristic. Depending on the weight schools give parental notification policies, the authority extended to parts of the Italian State and its public museums, and the importance of market uses of works of art, serious artistic value and artistic interest may be more, or less, identifiable. We may all just need to be a Lorenzo Amato, mediating the art and cultural property on our streets, from Florida to Florence.

## Note

[\*] Guest Scholar, IMT School for Advanced Studies Lucca and Founder, Fashion by Felicia LLC, Piazza S. Ponziano 6, 55100 Lucca, [felicia.caponigri@alumni.imtlucca.it](mailto:felicia.caponigri@alumni.imtlucca.it). Special thanks to Francesca Procaccini for comments on an earlier draft of this paper and to participants of the 2023 Michigan Junior Scholars Conference at Michigan Law School for their comments on another piece of my scholarship that explored some of the themes analyzed in this article. Thanks also to the editors of *Aedon*, especially Antonella Sau. Any errors are my own.

[1] Robert D. McFadden, *A Pizza Parlor's 'David' is Snub to Philistines*, N.Y. Times, July 5, 1977 at 31.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] A proposal which was met with even more protests. Amato received "a petition from 66 Brooklyn residents who had heard, about his plan and wrote: 'We, the undersigned, take great exception to your placing our Holy Mother as you propose to do. Our dear Lord will certainly hold you accountable for this.'" *Id.*

[6] *Id.*

[7] *Id.*

[8] In this article I use the English term nakedness to refer to the predominantly undressed state of the *David*. I also use nakedness, and not nudity - an English word which has come to represent invented ideas of "the 'naturalness' of nakedness" and a representation of nudity that, in art, has an "idealizing function" to symbolize in part "longings for a primal virtue." See Anne Hollander, *Seeing through clothes*, 83-84 (1993) (especially the chapter on *Nudity*). I also use the term nakedness because the Italian language does not differentiate between nakedness and nudity as the English language does. John T. Paoletti, *Michelangelo's David 175* (Cambridge University Press, 2015) (referring to the *David* - "And naked he is, since in Italian there is

no distinction between “nude” and “naked.” Thus the false aestheticism verging on prudery that normally attached to the term ‘nude’ cannot enter the arguments for sculpture of this period.”).

[9] Giuditta Giardini, *Il David spacca l'Italia: new medioevo o neo-nazionalismo delle immagini?*, in *IISole 24 ore*, [https://www.ilsole24ore.com/art/il-david-spacca-l-italia-new-medioevo-o-neo-nazionalismo-immagini-AEpXcVUD?refresh\\_ce=1](https://www.ilsole24ore.com/art/il-david-spacca-l-italia-new-medioevo-o-neo-nazionalismo-immagini-AEpXcVUD?refresh_ce=1).

[10] Jamelle Bouie, *Democrats, You Can't Ignore the Culture Wars Any Longer*, N.Y. TIMES, April 22, 2022, <https://www.nytimes.com/2022/04/22/opinion/red-scare-culture-wars.html>.

[11] See John T. Paoletti, *Michelangelo's David 175* (Cambridge University Press, 2015) (especially the chapter *Naked Men in Piazza*, discussed *infra*).

[12] As implied by comments by both the mayor of Florence, Dario Nardella, and Cecile Hollberg, the Director of the Gallerie dell'Accademia. See Torey Ackers, *Florida educator ousted for showing students Michelangelo's David visits sculpture in Florence*, *The Art Newspaper*, April 28, 2023, <https://www.theartnewspaper.com/2023/04/28/florida-teacher-ousted-michelangelo-david-visits-florence>; Torey Ackers, *Florence's mayor invites Florida students and their former principal to experience the 'purity' of Michelangelo's David*, *The Art Newspaper*, March 27, 2023; @DarioNardella, Twitter, March 25, 2023, <https://twitter.com/DarioNardella/status/1639630558165626880>.

[13] Daniele Manacorda, *Prof. Manacorda: "Sentenza sul David è grottesca. Stop a divieto di usare immagini del patrimonio culturale pubblico"*, *Archeoreporter*, September 30, 2022, <https://www.archeoreporter.com/2022/09/30/prof-manacorda-sentenza-sul-david-e-grottesca-stop-a-divieto-di-usare-immagini-del-patrimonio-culturale-pubblico/>.

[14] Art. 2 (2), Codice d.lg. n. 42/2004 (“Sono beni culturali le cose immobili e mobili che, ai sensi degli articoli 10 e 11, presentano interesse artistico...”)

[15] *Miller v. California*, 413 U.S. 15 (1973) (defining a work as obscene if it, with regards to the third prong of the obscenity standard, “taken as a whole, lacks serious literary, artistic, political, or scientific value”).

[16] Alissa Rubin, *From Bikinis to Burkinis, Regulating What Women Wear*, N.Y. Times, August 27, 2016, <https://www.nytimes.com/2016/08/28/world/europe/france-burkini-bikini-ban.html> (with an image from ullstein bild, via Akg-Images captioned as “A police officer issuing a woman a ticket for wearing a bikini on a beach at Rimini, Italy, in 1957.”).

[17] Kimberly Chrisman-Campbell, *Introduction in Skirts 7* (St. Martins Press, 2022).

[18] For an extensive overview see generally the chapters *Dressing Barely, Dressing Sexily, and Dressing Disruptively* in Ruth Ann Robson, *Dressing constitutionally: hierarchy, sexuality, and democracy from our hairstyles to our shoes* (Cambridge, 2013).

[19] Robson *supra* at 46 (“Jim Morrison, waving his shirt in ‘bullfighter tradition’ in front of his crotch, and Jeffrey Ross, pulling up his extremely short-shorts, were convicted, thirty years apart, of violating the same Florida indecent exposure statute. But a stage occupies a more privileged place in the hierarchy of First Amendment venues than a Wal-Mart”).

[20] Discussed in *Instrumental Music and the First Amendment in Free Speech beyond words* (Mark V. Tushnet, Alan K. Chen, and Joseph Blocher, eds.) 70 (New York University Press, 2017).

[21] *Art and the First Amendment in Free Speech beyond words* (Mark V. Tushnet, Alan K. Chen, and Joseph Blocher, eds.) 103-104 (New York University Press, 2017).

[22] *Bery v. New York*, 97 F.3d 689 (2nd. Cir. 1996). See also Francesca L. Procaccini, *Equal Speech Protection*, 108 Virginia L. Rev. 353 (2022) (arguing that the hierarchy of speech protection in the United States is a myth and showing instances where cultural speech, “the body of artistic, social, and cultural production that includes everything from a Jackson Pollack painting to a restaurant review to a diatribe about a flailing sports team” is just as “fully and equally protected” (*Id.* at 410-413)).

[23] *Id.* “If the First Amendment reached only “expressions conveying a ‘particularized message,’” its “protection would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” *Id.* at 2345 (quoting from *Spence v. Washington*, 418 U.S.405, 411 (1974) (per curiam)).

[24] *Art and the First Amendment in Free Speech beyond words* (Mark V. Tushnet, Alan K. Chen, and Joseph Blocher, eds.) 70 (New York University Press, 2017). Compare to theorizations in legal opinions like *Bery*: “Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. Indeed, written language is far more constricting because of its many variants - English, Japanese, Arabic, Hebrew, Wolof,4 Guarani,5 etc. - among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate... Furthermore, written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. As appellants point out, Chinese characters are both narrative and pictorial representations. Nahuatl, a language used by Aztec peoples in Central America, also incorporates pictures in its written language. Visual artwork is as much an embodiment of the artist’s expression as is a written text, and the two cannot always be readily distinguished.” *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

[25] “... There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality...” (Emphasis by Court in Roth opinion.) “We hold that obscenity is not within the area of constitutionally protected speech or press.” 354 U.S., at 484-485, 77 S.Ct., 1309 (footnotes omitted). *Miller v. California*, 413 U.S. 15, 20-21, 93 S. Ct. 2607, 2613, 37 L. Ed. 2d 419 (1973).

[26] “The First and Fourteenth Amendments have never been treated as absolutes (footnote omitted)”. *Miller v. California*, 413 U.S. 15, 23, 93 S. Ct. 2607, 2614, 37 L. Ed. 2d 419 (1973)

[27] In using the term “U.S. law” I refer to both federal and state law. As the U.S. Supreme Court noted in *Miller v. California*, States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles... [but States must so regulate] without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.” *Miller v. California*, 413 U.S. 15, 18-19, 20 (1973).

[28] *Miller v. California*, 413 U.S. 15, 24 (1973).

[29] *Miller v. California*, 413 U.S. 15, 15 (1973).

[30] *Miller v. California*, 413 U.S. 15, 18 (1973).

[31] *Miller v. California*, 413 U.S. 15, 25-26 (1973).

[32] Criticized in the *Miller* dissent as being subject to the famed "I know it when I see it" test and definition. Some condemn only 'hardcore pornography'; but even then a true definition is lacking. It has indeed been said of that definition, 'I could never succeed in (defining it) intelligibly,' but 'I know it when I see it.' *Miller v. California*, 413 U.S. 15, 39 (1973) (citing to *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (Stewart, J., concurring).)

[33] *Miller v. California*, 413 U.S. 15, 29 (1973).

[34] "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility." *Miller v. California*, 413 U.S. 15, 30 (1973).

[35] *Id.* "In sum, we (a) reaffirm the Roth holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is "utterly without redeeming social value"; and (c) hold that obscenity is to be determined by applying "contemporary community standards,"...not "national standards.'" *Miller v. California*, 413 U.S. 15, 36-37 (1973).

[36] "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. ... People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Miller v. California*, 413 U.S. 15, 32-33, 93 S. Ct. 2607, 2619, 37 L. Ed. 2d 419 (1973).

[37] Amy Adler, *The Shifting Law of Sexual Speech*, 2 University of Chicago Legal Forum 1, 16-17 (2020).

[38] *Id.* at 16.

[39] As Adler has noted, writing in 2020, obscenity trials in the U.S. are all but extinct today, as "in our porn-soaked contemporary culture, a pornographer's defense is built in to obscenity law's reliance on community standards: the government in an obscenity case must prove that the material exceeds contemporary community standards. Yet given the sea of pornography in which we live (a condition created in part by the decline of obscenity law), it is now much harder for a prosecutor to prove that material on trial deviates in its prurience and patent offensiveness from the kind of stuff everyone else in the community has been watching." *Id.* at 25, see also 26-27.

[40] Adler emphasizes this in her analysis of the Mapplethorpe trial, modern art's rebellion against 'seriousness', and her observation of the absurdity of the art experts' descriptions of Mapplethorpe's works to satisfy the serious artistic value standard. *Id.* at 18 and at 24.

[41] *Id.* at 20-21.

[42] *Id.* at 20.

[43] *Id.*

[44] *Id.* at 24. Adler also emphasizes the differences between Mapplethorpe's images and Koons' work in light of the culture wars present in the late 1980s and the 1990s at the time of the Mapplethorpe trial, pointing to one of perhaps the only comparatively redeeming aspects of Koons' work at the time that might have insulated him from prosecution and conviction if he had been put on trial: that "he was engaging in heterosexual acts - with his wife no less." *Id.*

[45] *Not Safe For (Art) Work: Pornhub creates 'Classic Nudes' tours of museum collections*, The Art Newspaper, July 13, 2021, <https://www.theartnewspaper.com/2021/07/14/not-safe-for-art-work-pornhub-creates-classic-nudes-tours-of-museum-collections> (last accessed January 8, 2021); Museums, Pornhub, <https://www.pornhub.com/art/classic-nudes/museums> (last accessed January 8, 2022).

[46] Classic Nudes as preserved through The Wayback Machine at <https://web.archive.org/web/20210713170210/https://pornhub.com/art/classic-nudes>.

[47] *Id.*

[48] For a full list of these museums see Internet Archive's list through the Wayback Machine. Museums, Pornhub, <https://web.archive.org/web/20210714083503/https://www.pornhub.com/art/classic-nudes/museums> (last accessed January 8, 2022).

[49] The video was previously available at Pornhub-Classic Nudes, Youtube, [https://youtu.be/DR7gO\\_Ifto](https://youtu.be/DR7gO_Ifto) (posted by The Ad Show, last accessed January 8, 2022), but has now been removed.

[50] The page dedicated to The Met is available through The Wayback Machine at <https://web.archive.org/web/20210818100647/https://www.pornhub.com/art/classic-nudes/museums/the-met>.

[51] For example, "The assortment of poses in this painting are said to offer the viewer different POV's of the female physique. According to art experts, their naked bodies allow us to picture ourselves in a kind of paradise where women unleash their every desire and satisfy them with one another (which leads us to believe that these experts have dirty imaginations on par with the artist's)." *Id.*

[52] See The Wayback Machine's archival page, available at

<https://web.archive.org/web/20210722124544/https://www.pornhub.com/art/classic-nudes/paintings/male-nude>.

[53] Deciding whether the works that are part of Classic Nudes are obscene, even on the internet, is an important threshold question because “Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles. See 18 U.S.C. §§ 1464-1465 (criminalizing obscenity).” *Reno v. Am. C.L. Union*, 521 U.S. 844, 878 (1997).

[54] As Ruth Ann Robson has written “the *Miller* test does uncouple nudity from obscenity...[g]enerally there must be some sexual element for expressive nudity to become capable of being regulated as obscene.” ROBSON *supra* note 18 at 47.

[55] Helen Stoilas, *Pornhub removes videos and online tours based on works in Louvre, Uffizi and Prado collections*, *The Art Newspaper*, August 13, 2021, <https://www.theartnewspaper.com/2021/08/13/pornhub-removes-videos-and-online-tours-based-on-works-in-louvre-uffizi-and-prado-collections> (“a spokesman for the Met told *The Art Newspaper*: “The museum’s Open Access program provides public access to hundreds of thousands of images of works in our collection, and we generally do not seek to regulate the wide range of uses of these images.”).

[56] Adler, *The Shifting Law of Sexual Speech*, *supra* note 37 at 24-25 (“The old-fashioned formalism of Mapplethorpe’s work, coupled with obscenity law’s requirement of “serious... artistic... value” explains the sometimes-laughable testimony that emerged at the trial. In my experience, contemporary art world professionals sometimes seem perplexed by the tenor taken by some experts for the defense in 1990... But Kardon’s peculiar testimony was rooted directly in the requirements of the *Miller* test, and in the truth of Mapplethorpe’s classicized work. That classicism, plus Mapplethorpe’s rising fame and emerging blue-chip museum status, made his case relatively easy to defend under *Miller*, at least compared to many of his peers, who were defying the standard of serious artistic value in a way that made their work seem almost unrecognizable as “art.””).

[57] Matt Wille, *I took Pornhub’s tour of The Metropolitan Museum of Art’s nudes*, INPUT, July 17, 2021, <https://www.inverse.com/input/culture/pornhub-classic-nudes-tour-metropolitan-met-museum-art> (“Curation issues aside, I genuinely enjoyed the Classic Nudes tour. The Met, which I’ve always viewed as a pretty conservative space, came alive with fresh, horned-up feeling as I ran around looking for all the best nudes it could offer. The descriptions Pornhub’s written for each piece are genuinely laugh-out-loud funny... I had thought I might feel a little pervy visiting The Met just for nudes; instead it made the museum’s collection come alive in ways I’d forgotten it could.”); Charlene K. Lau, *Pornhub’s Failed Attempt to Enter the Art World*, *Frieze*, August 17, 2021, <https://www.frieze.com/article/pornhubs-failed-attempt-enter-art-world> (“*Classic Nudes* injects life into fusty art history - a discipline famously resistant to change, which could frankly benefit from Pornhub’s irreverent and surprisingly insightful take on the dominant narrative... However, the guide also repeats the inordinate issues that museums, galleries and art history face as a whole. Looking at this grouping of work through the filter of feminism and institutional critique, it’s not difficult to see these depictions of the nude female form as the result of male artists venting their sexual frustration through paint or stone. Further, *Classic Nudes* highlights the longstanding problems in art production and art history regarding gender parity and the (white) male gaze. Art has always been an old boys’ club; the Pornhub guides are no different.”).

[58] Robson *supra* note 18 at 47-53 (describing federal statutes prohibiting the broadcast of “indecent” material on television (but not the internet); outlining restrictions to prevent minors from accessing harmful material when using the internet at libraries as part of the Children’s Internet Protection Act; and exploring the proffered reasons of addressing general concerns from property values to prostitution and other crimes within municipal and state ordinances prohibiting nude dancing in specific places). Although note that some states may extend greater protection to expression which the U.S. Supreme Court has designated as properly regulated through the secondary effects doctrine. *Club SinRock, LLC v. Municipality of Anchorage*, Off. of the Mun. Clerk, 445 P.3d 1031, 1037 (Alaska 2019) (“Although the United States Supreme Court long has construed expressive dancing as falling under the First Amendment’s purview, a plurality of the court has held that nude dancing “falls only within the outer ambit of the First Amendment’s protection.” Subjecting sexual speech to a lesser degree of free speech protection, the Supreme Court has reviewed otherwise content-based restrictions as content-neutral under intermediate scrutiny when the primary motivation behind their enactment is to prevent negative secondary effects. We previously have not designated sexually oriented speech as less worthy of protection than other types of speech, and we decline to do so now. Article I, section 5 of Alaska’s Constitution provides that “[e]very person may freely speak ... being responsible for the abuse of that right.””).

[59] In a case reviewing an Indiana public indecency statute which prohibited complete nudity in public places, requiring dancers at public establishments to not dance nude but wear specific coverings, the U.S. Supreme Court found the requirement that professional dancers in establishments offering go-go dancing and other forms of adult entertainment “wear pasties and G-strings d[id] not violate the First Amendment” because of “the statute’s purpose of protecting societal order and morality” and therefore “furthers a substantial government interest in protecting order and morality.” In addition, “the requirement that the dancers don pasties and G-strings d[id] not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic... [and] Indiana’s requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State’s purpose.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 568, 569, 571-572 (1991). See also *Bery v. City of New York*, 97 F.3d 689, 697 (2d Cir. 1996). In a later case, the U.S. Supreme Court reviewed the City of Erie’s ordinance banning public nudity generally was interpreted as “[b]y its terms... regulat[ing] conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity... the ordinance is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland, and not at suppressing the erotic message conveyed by this type of nude dancing.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 278-79, 120 S. Ct. 1382, 1385, 146 L. Ed. 2d 265 (2000). The Court therefore did not apply strict scrutiny but rather “[u]nder *O’Brien* standard for evaluating restrictions on symbolic speech, [where the] court inquires whether government regulation is within constitutional power of government to enact, whether regulation furthers important or substantial government interest, whether government interest is unrelated to suppression of free expression, and whether restriction is no greater than is essential to furtherance of the government interest.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000).

[60] ABA, *Understanding the First Amendment Limitations on Government Regulation of Artwork*, American Bar Association, available at [https://www.americanbar.org/groups/state\\_local\\_government/publications/state\\_local\\_law\\_news/2016-17/winter/understanding\\_first\\_amendment\\_limitations\\_government\\_regulation\\_artwork/](https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2016-17/winter/understanding_first_amendment_limitations_government_regulation_artwork/) (citing to *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) as an example of the Supreme Court’s finding “aesthetic and traffic safety significant and/or substantial as they relate to sign regulation” and to *Kleinman v. City of San Marcos*, 597 F.3d 323 (5th Cir. 2010), *cert. den.*, 562 U.S. 837 (2010) where a junked car presented as art in a private property owner’s yard was prohibited as a law evidencing an interest “narrowly tailored to serve the government’s interest in preventing attractive nuisances to children, prevention of rodents and other pests, and reducing urban blight, vandalism, and depressed property values”).

[61] Free Speech: When and Why Content-Based Laws Are Presumptively Unconstitutional, *Congressional Research Service*, January 10, 2023, <https://crsreports.congress.gov/product/pdf/IF/IF12308> (citing to *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989)).

- [62] Robson *supra* note 18 at 48-49 (describing the U.S. government's attempts to criminalize the dissemination of "indecent material" to minors through the internet).
- [63] Albert A. Anderson and Charles R. Garoian, *Exposed and Expelled: The "Maja" Controversy Revisited*, 28(4) *The J. Of Aesthetic education* 33, 33 (Winter, 1994), via JSTOR.
- [64] *Id.*
- [65] *Id.* at 34.
- [66] *Id.* at 34-35 (citing to Campus Liaison Committee's Statement). The *Maja Desnuda* was later hung in a student area high on a wall with other reproductions above a sign with the word "Gallery" to "forewarn" people entering the room. For a commentary on this see Kenneth J. Foster, *Art, Culture, and Administration*, *The Journal of Aesthetic Education*, Vol. 28, No. 4 (Winter, 1994), pagg. 62-65.
- [67] Amy Adler, *The Shifting Law of Sexual Speech*, *University of Chicago Legal Forum*: Vol. 2020, Article 2, 1, 2 (2020), <https://chicagounbound.uchicago.edu/uclf/vol2020/iss1/2> ("While obscenity law has receded in importance, and while the allegedly obscene photos from the trial have become widely accepted in museums and in the art market, child pornography law has followed the opposite course. In contrast to the allegedly obscene pictures, which pose almost no legal risk today, the two photographs of children that were on trial have become more, not less, controversial over the past thirty years, to the point where curators are quietly reluctant to show these images at all. In my view, these photos now occupy a space of legal and moral uncertainty.").
- [68] A perhaps unique American model, a charter school is a publicly-funded, privately-run school that is still designated as public, however, and first began as a model in the early 1990s. See Claudio Sanchez, *What is a Charter School?*, NPR, March 1, 2017, <https://www.npr.org/sections/ed/2017/03/01/511446388/just-what-is-a-charter-school-anyway>. Legislation passed by a state in the United States allows individuals or organizations or companies, to set up a school with the approval of specific not for profit groups identified in the enabling state legislation.
- [69] Juliana Kim, *A principal is fired, invited to Italy after students are shown Michelangelo's 'David'*, NPR, March 27, 2023, <https://www.npr.org/2023/03/27/1166079167/tallahassee-classical-michelangelo-david-principal-fired>; Torey Ackers, *Florida school principal fired for showing students Michelangelo's 'pornographic' David sculpture*, THE ART NEWSPAPER, March 23, 2023, <https://www.theartnewspaper.com/2023/03/23/florida-principal-fired-michelangelo-david-pornographic>.
- [70] Kim, *A principal is fired, invited to Italy after students are shown Michelangelo's 'David'*, *supra*.
- [71] *Tallahassee Classical School's Statement*, available at <https://tlhclassical.org/wp-content/uploads/2023/04/TCS-Statement-Sets-Record-Straight-Retains-Lawson-Huck-Gonzalez-Law-Firm-2.pdf>
- [72] *Id.*
- [73] Claudio Sanchez, *What is a Charter School?*, *supra* note 68.
- [74] *Tallahassee Classical School's Statement*, *supra* note 71.
- [75] For an overview of these different options see Nicole Stelle Garnett, *The Legal Landscape of Parental Choice Policy* (December 4, 2015). American Enterprise Institute, 2015, available at SSRN: <https://ssrn.com/abstract=2699296> at page 1.
- [76] Art. 33, Italian Constitution ("L'arte e la scienza sono libere e libero ne è l'insegnamento. La Repubblica detta le norme generali sull'istruzione ed istituisce scuole statali per tutti gli ordini e gradi. Enti e privati hanno il diritto di istituire scuole ed istituti di educazione, senza oneri per lo Stato. La legge, nel fissare i diritti e gli obblighi delle scuole non statali che chiedono la parità, deve assicurare ad esse piena libertà e ai loro alunni un trattamento scolastico equipollente a quello degli alunni di scuole statali.") The same article also includes references to the freedom of the arts, "The Republic guarantees the freedom of the arts and sciences, which may be freely taught." Freedom of expression is technically included in Article 21 ("Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.")
- [77] Art. 10, d.lg. n. 42/2004, in G.U. Feb. 24, 2004, in *Altalex*; Massimo Severo Giannini, *I Beni Culturali*, in *Riv. trim. dir. pubbl.*, 1976.
- [78] Art. 33, Italian Constitution ("È dovere e diritto dei genitori mantenere, istruire ed educare i figli, anche se nati fuori del matrimonio"); Garnett, *The Legal Landscape of Parental Choice Policy*, *supra* note 75 at 3 ("The Supreme Court has held that the federal constitution does not protect a right to an education although it does protect the right of parents to send their children to public school. Virtually every state constitution, however, enshrines the right to a public education - although there is tremendous diversity among both the wording of these entitlements and state supreme courts' interpretation of them..."). In referring to expanding rights, I refer to the U.S. Supreme Court's recognition that public funds and other public benefits may be given to privately run religious schools when parents decide to enroll their children in these schools as part of a program where "a wide range of private schools are eligible to receive...tuition assistance payments" from a state. The state's discrimination against the religious school and its requirement that private schools receiving these tuition assistance funds be "nonsectarian" has, in these circumstances, been held to violate the Free Exercise Clause See *Carson v. Makin*, 596 U.S. \_\_\_\_ , 1-2 (2022).
- [79] Lot Essay, Andy Warhol (1928-1987), *Birth of Venus (After Botticelli)*, Christie's, <https://www.christies.com/en/lot/lot-6171909> (noting "Executed in 1984 as part of a series of reimagined Quattrocento masterpieces, Warhol's red *Birth of Venus* is one of just six large-scale images of Botticelli's iconic goddess.").
- [80] *Warhol v. Goldsmith*, 598 U.S. \_\_\_\_ , 2 (2023) ("The Copyright Act encourages creativity by granting to the creator of an original work a bundle of rights that includes the rights to reproduce the copyrighted work and to prepare derivative works. 17 U.S.C. §106. Copyright, however, balances the benefits of incentives to create against the costs of restrictions on copying. This balancing act is reflected in the common-law doctrine of fair use, codified in §107.").
- [81] For the use of the concept of negatives space in IP law see Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 *Va. L. Rev.* 1687 (2013).
- [82] Although copyright law is not, in the American tradition supposed to express any opinion on artistic value or artistic merit. This is different from the Italian tradition, where we see considerations of artistic value in evaluations of industrial designs' copyrightability. See Article 2, clause 10 of *diritto d'autore* L n. 633/1941. Notwithstanding this American rule, some scholarship has shown that judges implicitly favor some aesthetic traditions and methods over others as they apply the law to pictorial, graphic, and sculptural works. Glen Cheng, *The Aesthetics of Copyright Adjudication*, 19 *Ucla Ent. L. Rev.* 113 (2012); Alfred C.

Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. Cal L. Rev. 247 (1998).

[83] See Amy Adler, *Why Art Does Not Need Copyright*, 86 Geo. Wash. L. Rev. 313 (2018).

[84] *Eldred v. Ashcroft*, 537 U.S. 186, 190, 123 S. Ct. 769, 774, 154 L. Ed. 2d 683 (2003) (“The CTEA’s extension of existing and future copyrights does not violate the First Amendment. That Amendment and the Copyright Clause were adopted close in time. This proximity indicates the Framers’ view that copyright’s limited monopolies are compatible with free speech principles. In addition, copyright law contains built-in First Amendment accommodations. See *Harper & Row*, 471 U.S., at 560, 105 S.Ct. 2218. First, 17 U.S.C. § 102(b), which makes only expression, not ideas, eligible for copyright protection, strikes a definitional balance between the First Amendment and copyright law by permitting free communication of facts while still protecting an author’s expression. *Harper & Row*, 471 U.S., at 556, 105 S.Ct. 2218. Second, the “fair use” defense codified at § 107 allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself for limited purposes. “Fair use” thereby affords considerable latitude for scholarship and comment, *id.*, at 560, 105 S.Ct. 2218, and even for parody, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S.Ct. 1164, 127 L.Ed.2d 500.”).

[85] 17 U.S. Code §102.

[86] 17 U.S. Code §106(1).

[87] 17 U.S. Code §106(2).

[88] 17 U.S. Code §101 (“A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”).

[89] 17 U.S. Code §106(3).

[90] 17 U.S. Code §102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

[91] *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115-16 (2d Cir. 1998).

[92] See Mark A. Lemley and Mark P McKenna, *Scope* 57(6) *William and Mary L. Rev.* 2197 (2016) (defining scope as the extent of a right, or “the range of things the IP right lawfully protects against competition”).

[93] Originality has been defined in U.S. copyright law only as independent creation, but, as part of the substantial similarity test to determine copyright infringement, courts will filter out parts of a work that are part of the public domain, including parts that are not original, and compare the original parts of the expression present in each of the works to determine whether one work infringes another. For the definition of originality see *Gym Door Repairs, Inc. v. Young Equip. Sales, Inc.*, 206 F. Supp. 3d 869, 896 (S.D.N.Y. 2016) (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Feist*, 499 U.S. at 345 (citation omitted). “[T]he requisite level of creativity is extremely low” and “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be.”) For an analysis of the close relationship between determinations of originality and the public domain see Jessica D. Litman *The Public Domain*, 39 *Emory L.J.* 965 (1990) (arguing originality is a legal fiction and that the public domain insulates defendants from liability for copyright infringement). For a definition of substantial similarity see *Golden Star Wholesale, Inc. v. ZB Importing, Inc.*, 531 F. Supp. 3d 1231, 1250-52 (E.D. Mich. 2021) (“[T]his court applie[s] a two-step approach for determining whether substantial similarity exists.” *R.C. Olmstead*, 606 F.3d at 274. First, the factfinder asks, “what aspects of the copyright work, if any, are protected.” *Id.* at 274-75. “The essence of the first step is to filter out the unoriginal, unprotectible elements - elements that were not independently created by the inventor, and that possess no minimal degree of creativity, see *Feist*, 499 U.S. at 345, 111 S. Ct. 1282 - through a variety of analyses.” ... Second, once the non-protectable elements have been filtered out, the factfinder asks whether “the [defendant’s] work involves elements that are substantially similar to the protected elements of the original work.” *R.C. Olmstead*, 606 F.3d at 275. “Two works are substantially similar when ‘they are so alike that the later (unprotected) work can fairly be regarded as appropriating the original expression of the earlier (protected) work’, *Enchant Christmas Light Maze & Market Ltd. v. Glowco, LLC*, 958 F.3d 532, 539 (6th Cir. 2020) (quoting *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 67 (1st Cir. 2009)). “[T]his determination should be based on the judgment of the ordinary reasonable person (i.e., the ordinary lay observer).”).

[94] 17 U.S. Code § 107.

[95] *Id.*

[96] *Id.*

[97] Pierre Leval, *Toward a Fair Use Standard*, 103 *Harv. L. Rev.* 1105 (1990).

[98] *Andy Warhol Foundation for the Visual Arts, Inc., Petitioner v. Lynn Goldsmith, et al.*, 598 U.S. \_\_\_\_ , 16 (2023)

[99] *Andy Warhol Foundation for the Visual Arts, Inc., Petitioner v. Lynn Goldsmith, et al.*, 598 U.S. \_\_\_\_ , 4 (2023) (citing to *Campbell* at 580-581).

[100] *Andy Warhol Foundation for the Visual Arts, Inc., Petitioner v. Lynn Goldsmith, et al.*, 598 U.S. \_\_\_\_ , 4 (2023) (citing to *Campbell* at 580-581).

[101] *Andy Warhol Foundation for the Visual Arts, Inc., Petitioner v. Lynn Goldsmith, et al.*, 598 U.S. \_\_\_\_ , 3 (2023) (majority opinion).

[102] *Andy Warhol Foundation for the Visual Arts, Inc., Petitioner v. Lynn Goldsmith, et al.*, 598 U.S. \_\_\_\_ , 1-6 (2023) (majority opinion).

[103] *Id.* at 6.

[104] *Id.* at 7.

[105] The Court was only called to review the first factor of the test: “Although the Court of Appeals analyzed each fair use factor,



the only question before this Court is whether the court below correctly held that the first factor, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” §107(1), weighs in Goldsmith’s favor.” *Id.* at 12.

[106] *Id.* at 12.

[107] *Id.* at 12 (“Although new expression may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive of the first factor.”).

[108] *Id.* at 12-13.

[109] *Id.* at 13.

[110] *Id.* at 13. (“The Act, however, “reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Copyright thus trades off the benefits of incentives to create against the costs of restrictions on copying. The Act, for example, limits the duration of copyright, §§302-305, as required by the Constitution; makes facts and ideas uncopyrightable, §102; and limits the scope of copyright owners’ exclusive rights, §§107-122.”).

[111] *Id.* at 13.

[112] *Id.* at 15-16. (“Most copying has some further purpose in the sense that copying is socially useful *ex post*. Many secondary works add something new. That alone does not render such uses fair. Rather, the first factor (which is just one factor in a larger analysis) asks “whether and to what extent” the use at issue has a purpose or character different from the original. *Campbell*, 510 U.S., at 579 (emphasis added). The larger the difference, the more likely the first factor weighs in favor of fair use. The smaller the difference, the less likely.”).

[113] *Id.* at 19 (“A use that shares the purpose of a copyrighted work, by contrast, is more likely to provide “the public with a substantial substitute for matter protected by the [copyright owner’s] interests in the original wor[k] or derivatives of [it],” *id.*, at 207, which undermines the goal of copyright.”).

[114] *Andy Warhol Foundation for the Visual Arts, Inc., Petitioner v. Lynn Goldsmith, et al.*, 598 U.S. \_\_\_\_ , 31 (2023) (citing to “*Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits”).”).

[115] *Id.* at 32.

[116] *Id.*

[117] *Id.* at 33. (“Granting the District Court’s conclusion that Orange Prince reasonably can be perceived to portray Prince as iconic, whereas Goldsmith’s portrayal is photorealistic, that difference must be evaluated in the context of the specific use at issue. The use is AWF’s commercial licensing of Orange Prince to appear on the cover of Condé Nast’s special commemorative edition.”).

[118] *Id.* at 33.

[119] *Id.* at 33 (“To hold otherwise would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals. As long as the user somehow portrays the subject of the photograph differently, he could make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use. Many photographs will be open to various interpretations. A subject as open to interpretation as the human face, for example, reasonably can be perceived as conveying several possible meanings. The application of an artist’s characteristic style to bring out a particular meaning that was available in the photograph is less likely to constitute a “further purpose” as *Campbell* used the term. 510 U.S., at 579.”).

[120] *Id.* at 34 (“AWF asserts another, albeit related, purpose, which is to comment on the “dehumanizing nature” and “effects” of celebrity. Brief for Petitioner 44, 51. No doubt, many of Warhol’s works, and particularly his uses of repeated images, can be perceived as depicting celebrities as commodities. But again, even if such commentary is perceptible on the cover of Condé Nast’s tribute to “Prince Rogers Nelson, 1958-2016,” on the occasion of the man’s death, AWF has a problem: The asserted commentary is at *Campbell*’s lowest ebb. Because it “has no critical bearing on” Goldsmith’s photograph,<sup>20</sup> the commentary’s “claim to fairness in borrowing from” her work “diminishes accordingly (if it does not vanish).” 510 U.S., at 580.21 The commercial nature of the use, on the other hand, “loom[s] larger.” *Ibid.*”). Such secondary works would also not compete, in the majority’s view, with the derivative right. See *Id.* at 3 (Syllabus) (“To preserve the copyright owner’s right to prepare derivative works, defined in §101 of the Copyright Act to include “any other form in which a work may be recast, transformed, or adapted,” the degree of transformation required to make “transformative” use of an original work must go beyond that required to qualify as a derivative.”).

[121] *Andy Warhol Foundation for the Visual Arts, Inc., Petitioner v. Lynn Goldsmith, et al.*, 598 U.S. \_\_\_\_ , 1 (2023) (dissenting opinion) (“For in the majority’s view, copyright law’s first fair-use factor - addressing “the purpose and character” of “the use made of a work” - is uninterested in the distinctiveness and newness of Warhol’s portrait. 17 U.S.C. §107. What matters under that factor, the majority says, is instead a marketing decision: In the majority’s view, Warhol’s licensing of the silkscreen to a magazine precludes fair use.”).

[122] *Id.* at 3-4 (“It does not matter that because of those dissimilarities, the magazine publisher did not view the one as a substitute for the other. All that matters is that Warhol and the publisher entered into a licensing transaction, similar to one Goldsmith might have done. Because the artist had such a commercial purpose, all the creativity in the world could not save him. That doctrinal shift ill serves copyright’s core purpose. The law does not grant artists (and authors and composers and so on) exclusive rights - that is, monopolies - for their own sake. It does so to foster creativity - “[t]o promote the [p]rogress” of both arts and science. U.S. Const., Art. I, §8, cl. 8. And for that same reason, the law also protects the fair use of copyrighted material. Both Congress and the courts have long recognized that an overly stringent copyright regime actually “stifle[s]” creativity by preventing artists from building on the work of others. *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal quotation marks omitted); see *Campbell*, 510 U.S., at 578-579. For, let’s be honest, artists don’t create all on their own; they cannot do what they do without borrowing from or otherwise making use of the work of others. That is the way artistry of all kinds - visual, musical, literary - happens (as it is the way knowledge and invention generally develop). The fair-use test’s first factor responds to that truth: As understood in our precedent, it provides “breathing space” for artists to use existing materials to

make fundamentally new works, for the public's enjoyment and benefit. Id., at 579. In now remaking that factor, and thus constricting fair use's boundaries, the majority hampers creative progress and undermines creative freedom.”).

[123] Article 1, Section 8, clause 8, U.S. Constitution.

[124] Mark Tushnet, *Art and the First Amendment* in *Free Speech beyond words* (Mark V. Tushnet, Alan K. Chen, and Joseph Blocher, eds.) 81 (New York University Press, 2017) (describing historic preservation statutes as laws that are permissible “content-neutral regulations that can be applied to artworks without violating the First Amendment” but also as potentially unconstitutional if we consider more deeply why non-representational art is covered under the First Amendment and how we parse and understand non-representational art’s communicative value compared to the government’s interest in historic preservation).

[125] [M. Arisi, Riproduzioni di opere d'arte visive in pubblico dominio: l'articolo 14 della Direttiva \(EU\) 2019/790 e la trasposizione in Italia](#), in *Aedon*, 2021, 1; [Lorenzo Casini, Riprodurre il Patrimonio Culturale?](#), in *Aedon*, 2018, 3; Giulia Dore, *The puzzled tie of copyright, cultural heritage and public domain in Italian law: is the Vitruvian Man taking on unbalanced proportions?*, *Kluwer Copyright Blog*, April 6, 2023, <https://copyrightblog.kluweriplaw.com/2023/04/06/the-puzzled-tie-of-copyright-cultural-heritage-and-public-domain-in-italian-law-is-the-vitruvian-man-taking-on-unbalanced-proportions/>; See also Anna Pirri Valentini, *La riproduzione dei beni culturali: tra controllo pubblico e diritto all'immagine*, 2 *Giornale di Diritto Amministrativo* 251 (2023). But see [Daniele Manacorda, L'Immagine del Bene Culturale Pubblico tra lucro e decoro: una questione di libertà](#), in *Aedon*, 2021 (arguing that the extension of *decoro* to intangible reproductions of tangible cultural properties is an inappropriate extension of this legal notion and that *decoro* should instead, Manacorda proposes, be more closely connected to policing the cultural purposes of a physical use of a cultural property).

[126] Eleonora Rosati, *Is it a breach of the Italian Cultural Heritage Code to feature on GQ a model posing like Michelangelo's David? Yes, says Florence Court*, *IPKat*, June 6, 2023, <https://ipkitten.blogspot.com/2023/06/is-it-breach-of-italian-cultural.html> (quoting Pietro Boselli, “My first @gqitalia cover! Printed on lenticular paper, superimposing Michelangelo’s masterpiece “David”, the ultimate symbol of Renaissance and classical perfection. I am humbled. Thank you to the team behind this fashion editorial shot in 3D for the first time.”).

[127] *Bridgeman Art Libr., Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) (“In this case, plaintiff by its own admission has labored to create “slavish copies” of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality - indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.”).

[128] Article 14, *Eu Directive 2019/790* (“Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author’s own intellectual creation.”); Art. 32-*quater*, *Legge, 22/04/1941 n° 633, G.U. 16/07/1941* (transposing the Directive into Italian law, “Upon the expiration of the duration of protection of a work of visual art, even as identified in article 2, the material derived from an act of reproduction of this work is not subject to copyright or its related rights, unless it constitutes an original work. The rules regarding the reproduction of cultural properties in the decree law of January 22, 2004, n. 42, remain in force.”).

[129] *Cass. civ. Sez. VI - 1, Ord.*, (ud. 13/12/2012) 23-04-2013, n. 9757. This possibility seems to be confirmed by the guidelines of the Digital Library, which point to a layered cultural property and copyright licensing scheme when third parties seek to reproduce “creative reproductions” of cultural properties. See 2.4.1. *B1. Beni culturali pubblici in pubblico dominio* in *Linee guida per l'acquisizione, la circolazione e il riuso delle riproduzioni dei beni culturali in ambiente digitale*, 2022-2023, Ministero della Cultura, <https://docs.italia.it/italia/icdp/icdp-pnd-circolazione-riuso-docs/it/v1.0-giugno-2022/index.html> (“Nella riproduzione creativa (R2) di un bene culturale pubblico in pubblico dominio (B1) è necessario dunque far riferimento a due diverse normative: da un lato quella riferita all’autore dell’opera fotografica, dall’altro quella riferita al bene culturale pubblico oggetto di riproduzione ai sensi dell’art. 108 del Codice dei beni culturali. È questo il caso, ad esempio, del concorso fotografico annuale promosso da Wikimedia Italia e denominato “Wiki Loves Monuments” [17](#), in occasione del quale fotografi professionisti e dilettanti ritraggono i monumenti italiani alimentando una banca dati di immagini online a disposizione per il riuso. Il fatto che i fotografi pubblichino le immagini con licenza aperta (nella fattispecie CC BY-SA), consentendo quindi anche ad altri di sfruttare economicamente l’opera fotografica di cui sono autori, non implica il venir meno della disciplina del Codice dei beni culturali. Quindi, in tutti i casi in cui le immagini siano sfruttate economicamente, dal fotografo stesso o da terzi, si applicano i corrispettivi di riproduzione del Codice. È quindi opportuno in questi casi procedere preliminarmente alla stipula di chiari accordi tra il fotografo/artista e il luogo della cultura che ha in consegna il bene al fine di disciplinare la gestione dei diritti di sfruttamento economico dell’opera creativa e degli eventuali corrispettivi previsti dal Codice dei beni culturali in presenza di forme di riutilizzo commerciale delle riproduzioni del bene.”).

[130] See, for example, the aforementioned GQ case, but also cases where a “simple” reproduction for commercial purposes is at issue but where the context of the use or uses chilled by the bringing of litigation might have been cast as creative. See *Tribunale - Firenze, 11/04/2022, Rg. 1910-2022 (DeJure)* (chilling Brioni’s use of a copy of Michelangelo’s *David* in their Bespoke advertisement and a Carrara workshop’s use of this tangible copy which they owned and created, prohibiting the use of the image of the copy on the Carrara workshop’s website, and distinguishing the control of the image of a cultural property under Italian cultural property law from copyright law, including at the supranational level). For an exposition of this case see Anna Pirri Valentini, *La riproduzione dei beni culturali: tra controllo pubblico e diritto all'immagine*, 2 *Giornale di diritto amministrativo* 251 (2023).

[131] Consider how Lorenzo Casini has written that article 107, theoretically separate from *decoro*, grounds the necessity to protect a public interest in the “truth”, or authenticity or integrity, that is within the cultural property itself. Building on Merryman’s foundational article on *The Public Interest in Cultural Property*, Casini grounds these concerns for truth, authenticity, and integrity even further in Merryman’s mention of “the shared concerns for accuracy, probity, and validity that, when combined with industry, insight, and imagination, produce good science and good scholarship.” Lorenzo Casini, *Riprodurre il Patrimonio Culturale?*, cit. This very reasoning, when accompanied by the reasoning of courts to ground the image of a right to a cultural property in public use (uses that support a full knowledge of a cultural property and concerns for the collective) shows the cross-pollination between ideas of the debasement of cultural property and controls on the images of cultural properties. See also A.L. Tarasco, *Diritto e gestione del patrimonio culturale*, 101-104 (2019).

[132] Taylor Dafoe, *A Florence Museum Won Its Lawsuit Against a Publisher That Used a ‘Mortifying and Humiliating’ Image of Michelangelo’s ‘David’*, *ArtNet*, June 1, 2023, <https://news.artnet.com/art-world/florence-gallerie-dellaccademia-wins-david-lawsuit-2313262>.

[133] *Italy Furious At Gun-Toting ‘David’ Statue In U.S. Rifle Ad*, *TIME*, March 9, 2014, <https://time.com/17313/italy-furious-at-gun-toting-david-statue-in-u-s-rifle-ad/> (“Italy’s culture minister Dario Franceschini said the image was offensive and violated the

law, and an official at the Department of Culture in Florence said it has warned the arms producer not to use the image. Anyone who wants to use the statue of David for “promotional purposes,” said the official, “has to respect the cultural dignity (of the work of art).”.

[134] Art. 9, Italian Constitution.

[135] Art. 42, Italian Constitution.

[136] See Art. 52, Art. 106, Art. 120(2) and Art. 20, Codice d.lg. n. 42/2004, *Diritto del patrimonio culturale* (Carla Barbati et al, eds) 197-198 (2nd ed, 2020). See also Lorenzo Casini, *Riprodurre il Patrimonio Culturale?*, cit., (“La disciplina del Codice è prevalentemente intrisa di materialità e incentrata sulla conservazione fisica del supporto. Non mancano, è vero, alcuni spunti che mostrano forme di attenzione anche verso la dimensione immateriale dei beni, per esempio con riguardo alla tutela del decoro, un concetto giuridico indeterminato di grande interesse e rilievo anche per le questioni legate alle riproduzioni...”) As discussed above, in the same article Lorenzo Casini has written that article 107, theoretically separate from *decoro*, grounds the necessity to protect a public interest in the “truth”, or authenticity or integrity, that is within the cultural property itself. See also, as above, A.L. Tarasco, *Diritto e gestione del patrimonio culturale*, 101-104 (2019) (criticizing, like Manacorda, the extension of *decoro* to reproductions that are separate from a cultural property, a criticism now rebuffed in legal opinions confirming a right to the image of a cultural property to the Italian State).

[137] 17 U.S.C. §106A.

[138] See *supra* note 135. Art. 120(2) Codice d.lg. n. 42/2004 (“La promozione di cui al comma 1 avviene attraverso l’associazione del nome, del marchio, dell’immagine, dell’attività o del prodotto all’iniziativa oggetto del contributo, in forme compatibili con il carattere artistico o storico, l’aspetto e il decoro del bene culturale da tutelare o valorizzare, da stabilirsi con il contratto di sponsorizzazione.”). See also Art. 20, Codice d.lg. n. 42/2004, implying the concept of *decoro* (“I beni culturali non possono essere distrutti, deteriorati, danneggiati o adibiti ad usi non compatibili con il loro carattere storico o artistico oppure tali da recare pregiudizio alla loro conservazione.”) See also Pierpaolo Forte, *Il bene pubblico digitalizzato: note per uno studio giuridico* in *Persona e mercato*, Vol 2 293 (2019) (describing other parts of the Code where *decoro* may be inferred).

[139] Massimo Severo Giannini, *Review of Mario Grisolia’s La tutela delle cose d’arte, estratto da Rivista trimestrale di diritto pubblico*, III, 1953, n. 1, p. 171-172 in *Scritti*, Vol 3, 842 (2003) (“Il massimo di potere dispositivo che la legge riconosce allo Stato è il divieto, che può imporsi, di utilizzare il bene in modi incompatibili con ‘il carattere’ storico o artistico: divieto, peraltro, di rilievo marginale, e di contenuto piuttosto confuso e incerto.”).

[140] Massimo Severo Giannini, *I Beni Culturali* 31, in *Riv. trim. dir. pubbl.*, 1976, 33; Lorenzo Casini, “Italian Hours” *The Globalization of cultural property law*, 9 INT’L J. OF CONST. L. 369, 375 (2011).

[141] See Art. 108(3-bis), Codice d.lg. n. 42/2004.

[142] See Art. 108(1)(2) and (6), Codice d.lg. n. 42/2004. For one example of how the current Italian Ministry of Culture is implementing these fees for commercial reproductions, with problematic consequences, see *Linee guida per la determinazione degli importi minimi dei canoni e dei corrispettivi per la concessione d’uso dei beni in consegna agli istituti e luoghi della cultura statali*, Ministero della Cultura, [https://www.italyformovies.it/app/docs/news/Allegato%20-%20Criteri%20per%20tariffari\\_marzo%202023%20-%20def.pdf](https://www.italyformovies.it/app/docs/news/Allegato%20-%20Criteri%20per%20tariffari_marzo%202023%20-%20def.pdf); *Adottate le Linee Guida per i canoni d’uso dei Beni Culturali*, Ministero della Cultura, April 17, 2023, <https://cinema.cultura.gov.it/notizie/adottate-le-linee-guida-per-i-canoni-duso-dei-beni-culturali/>.

[143] See Casini *supra* note 136; M. Clarich and M. Ramajoli, *Diritto amministrativo e clausole generali: un dialogo* 15 (2021); P. Forte, *Il bene pubblico digitalizzato: note per uno studio giuridico*, *supra* note 138 at 293-295.

[144] Forte, *Il bene pubblico digitalizzato: note per uno studio giuridico*, *supra* note 138 at 253 (“L’ipotesi di studio infatti è che, pur partendo da una prima dimensione tangibile o comunque dotata di una peculiare capacità di percepibilità, una volta (ri)strutturato in forma digitale il bene si affranchi dalla sua “cosità” originale, e assuma veste di oggetto a sé, sia altra “cosa” rispetto al bene di base, con un suo proprio supporto e caratteri immateriali e performativi che lo rendono distinto bene complesso, con la notevole conseguenza che, per questa via, si spezzi, anzitutto, un elemento determinante per la dimensione giuridica del bene, ovvero la sua scarsità assiomatica e la conseguente fruibilità circoscritta a causa dei limiti della cosa: digitalizzati e messi in rete, questi oggetti sono disponibili ad un indifferenziato numero di fruitori, ed offrono potenzialità di riuso che moltiplicano le possibilità di costituire valore aggiunto, e nuovi prodotti e servizi, ma soprattutto generano una nuova ontologia<sup>18</sup>, una entità in sé, non solamente (come in certe visioni il bene fa in confronto alla cosa radicale) la sua differenziazione/identificazione rispetto al soggetto o ai suoi interessi”).

[145] Forte, *Il bene pubblico digitalizzato: note per uno studio giuridico*, *supra* note 138 at 245-247.

[146] *Id.*

[147] *Id.* at 294.

[148] Although it must be noted that the Superintendent of Archeological Cultural Properties of Calabria said he had not given permission for this specific dress or fashion, and that Forte himself finds these photographs to be illegal under Italian cultural property law not because they violate *decoro* but because they risked damaging the bronzes in their materiality as the “basic property”. *Id.* at 294-295, especially footnote 171.

[149] *Id.* at 295 (translation my own).

[150] *Id.*

[151] RG. n° 15147/2018, Tribunale di Impresa, Sezione Imprese, January 2, 2019 (opinion on file with the author) (p. 3 of the PDF) (“La fruizione pubblica va dunque interpretata come un “processo di conoscenza, qualificata e compiuta, di un oggetto, di una realtà che diventa parte e patrimonio della cultura singola e collettiva...non è sufficiente per la legittima riproduzione del bene culturale il pagamento (ancorché *ex post*) di un corrispettivo, poiché elemento imprescindibile dell’utilizzo lecito dell’immagine è il consenso reso dall’Amministrazione, all’esito della valutazione discrezionale circa la compatibilità dell’uso richiesto (e la sua eventuale conformazione) con la destinazione culturale ed il carattere storico-artistico del bene. La natura stessa del bene culturale intrinsecamente dunque esige la protezione della sua immagine, mediante la valutazione di compatibilità riservata all’Amministrazione, intesa come diritto alla sua riproduzione nonché come tutela della considerazione del bene da parte dei consociati oltre che della sua identità, intesa come memoria della comunità nazionale e del territorio, quale nozione identitaria collettiva: tale contenuto configura un diritto all’immagine del bene culturale in senso pieno.”); Tribunale - Firenze, 11/04/2022,

Rg. 1910-2022 (DeJure) (“...la volgarizzazione dell’opera d’arte e culturale e la riproduzione senza il preliminare vaglio ad opera delle autorità preposte con riferimento alla compatibilità tra l’uso e il valore culturale dell’opera, crea il pericolo di un danno irreversibile per tutti quegli usi che l’autorità preposta dovesse giudicare incompatibile, inibendola. Infatti, poiché il danno all’immagine dell’opera pubblica è un danno anche immateriale al bene culturale per il suo valore collettivo, già sopra richiamato e che di seguito si viene ad approfondire, tale valore subirebbe un irreversibile pregiudizio nelle more della definizione della causa di merito.”); Tribunale Venezia Sez. II, Ord., 17/11/2022 (pg. 8 of the PDF) (“il bene culturale, di per sé considerato - secondo la più autorevole dottrina - come entità immateriale distinta dal supporto materiale cui inerisce e costituente un valore identitario collettivo destinato alla fruizione pubblica, costituisca un bene giuridico meritevole di tutela rafforzata (anche a livello costituzionale) secondo l’ordinamento, tuttavia lo stesso non possiede evidentemente un’autonomia soggettività cosicché si verifica una scissione tra l’oggetto di tutela rispetto alla lesione dell’immagine (i.e. il bene culturale) e il soggetto deputato, quale titolare del potere concessorio/autorizzatorio rispetto alla sua destinazione, ad agire per la sua tutela e a ricevere l’eventuale risarcimento del conseguente danno non patrimoniale (i.e. l’Amministrazione consegnataria del bene). Ciò che giustifica la legittimazione attiva delle odierne reclamanti rispetto alla domanda cautelare rispetto al pregiudizio non patrimoniale...l’irreparabilità del danno (a fronte di un risarcimento per equivalente nel futuro ed eventuale giudizio di merito), in questo caso, è costituita dalla gravità della lesione perpetrata per anni all’immagine e al nome del bene culturale, danneggiato irrimediabilmente per il solo fatto di essere stato (e continuare a esserlo) oggetto di una riproduzione indiscriminata ovvero senza il necessario e preventivo vaglio da parte dell’Amministrazione consegnataria circa l’appropriatezza della destinazione d’uso e delle modalità di utilizzo del bene in rapporto al suo valore culturale.”).

[152] Clarich and Ramajoli, *supra* note 143 at 14-15.

[153] *Id.* at 24.

[154] *Id.* at 22.

[155] *Id.* at 22-23. See also A. Crosetti and D. Vaiano, *Beni culturali e pasagistici* 51 (Giappichelli, 2014) (describing the evaluation of the artistic value of a Van Gogh painting as part of the administration’s technical discretion where, however, the technical aspects in some ways negate the discretion - how could the administration not determine that a Van Gogh painting has artistic value?)

[156] Clarich and Ramajoli, *supra* note 143 at 26-27 (see also especially 60 - 67, where Margherita Ramajoli describes more contemporary theories of administrative discretion); Crosetti and Vaiano, *supra* note 154 at 57-59.

[157] Clarich and Ramajoli, *supra* note 143 at 67.

[158] *Id.* at 73 (describing the abolition of administrative censorship in cinema in Italy and the move to allow producers and other stakeholders in the movie industry to classify their works as appropriate to certain age groups).

[159] *Id.* at 75 (“Dal momento che però è e sempre rimarrà ineliminabile la dimensione fattuale del diritto, le clausole generali, beninteso se utilizzate in maniera parsimoniosa ed equilibrate, consentono all’ordinamento giuridico di essere vitale, in quanto svolgono la funzione di ‘organi respiratori’ del diritto.”).

[160] The recent guidelines on fees emanated by the Italian Ministry of Culture include, for example, academic publications, which should be free under article 108’s exceptions, in the fee-paying section of the guidelines. See *Linee guida per la determinazione degli importi minimi dei canoni e dei corrispettivi per la concessione d’uso dei beni in consegna agli istituti e luoghi della cultura statali*, Ministero della Cultura, available at <https://www.beniculturali.it/comunicato/dm-161-11042023> (at pg. 8 of the PDF) (classifying “Editoria e riviste scientifiche di settore in canali commerciali online/cartacea” as part of “Riproduzioni a Scopo di Lucro”).

[161] Armani Syed, *Why Many Italians Are Upset About a Strange, New Tourism Ad*, TIME, April 27, 2023, <https://time.com/6275183/italy-controversial-tourism-ad-venus/>.

[162] Dafoe, *A Florence Museum Won Its Lawsuit Against a Publisher That Used a ‘Mortifying and Humiliating’ Image of Michelangelo’s ‘David’*, *supra* note 132.

[163] As in the example of Chiara Ferragni’s approved editorial for VOGUE Hong Kong. Vogue Hong Kong, ‘Chiara Ferragni Stars On Vogue Hong Kong’s October Issue’, *Vogue Hong Kong*, October 6, 2020, <https://www.voguehk.com/en/article/fashion/chiara-ferragni-vogue-hong-kong-october-issue-cover/>.

[164] RG. n° 15147/2018, Tribunale di Impresa, Sezione Imprese, January 2, 2019 (opinion on file with the author) (“La fruizione pubblica va dunque interpretata come un “processo di conoscenza, qualificata e compiuta, di un oggetto, di una realtà che diventa parte e patrimonio della cultura singola e collettiva...”).

[165] Massimo Severo Giannini, *I Beni Culturali*, cit.

[166] As Lorenzo Casini has written, the regulation of reproductions of cultural properties is also fundamentally related to the development of culture, which is why, as early as 1913, the Italian legislator allowed for exceptions to the State’s regulation of cultural property which would allow immovable and movable things on public view to be free. Lorenzo Casini, *Riprodurre il Patrimonio Culturale?*, cit., (“Vi è, infine, ancora un ritardo nel riconoscere che la disciplina della riproduzioni non è un tema solo di tutela (anche del decoro), né certo soltanto di valorizzazione economica e redditività, ma è, innanzitutto, un tema di promozione dello sviluppo della cultura. E, anche in questo caso, non bisogna dimenticare le scelte del passato. Si discute molto, ancora oggi, se sia preferibile o meno assicurare una “libertà di panorama”, ma, già nel 1913, la normativa italiana - ancorata all’impostazione costruita sulla protezione fisica delle cose - stabiliva che “le riproduzioni fotografiche all’aperto di cose immobili o mobili esposte alla pubblica vista sono libere a tutti.”).