Beware of Michelangelo's David. 500 years after its carving its slingshot may still hurt…

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The Court of Florence last October 25, 2017 issued a decision prohibiting a travel agency to commercially use the image of Michelangelo's David without the authorization of the "*Galleria dell'Accademia*", (Galleria) the museum where the sculpture is located.

The decision came after the Italian Ministry of Cultural Heritage and Activities and

Tourism (the "Ministry") under whose control the Gallery operates, had sued the travel agency which on its advertising materials was making use of the name and image of Michelangelo's David to sell entrance tickets – at higher than regular price – to the Galleria. The Ministry argued, inter alia, that the travel agency lacked authorization to use David's name and image, and requested the Court to enjoin the travel agency's use of David's name and image in the European Union, the destruction of any commercial materials bearing such name and image and the closure of its website. The travel agency neither appeared nor filed any defense.

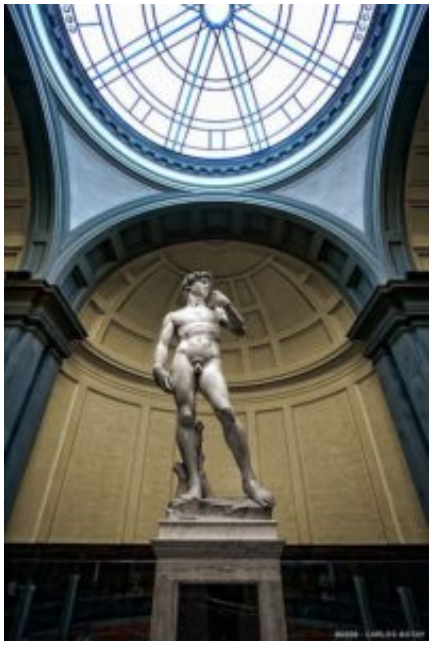
The Court held that the travel agency's conduct, being a commercial exploitation of the David, was capable of causing an economic damage to the Galleria because of the (peculiar) Italian law on *Cultural Heritage* which provides that for works of art that qualify as being part of the Italian "cultural heritage"[1], free reproduction is only allowed when is for personal or no-profit purposes, while for all commercial purposes a specific authorization and the payment of fees to the entity responsible for the artwork's administration is required (artt. 106-108). Since the travel agency had neither requested authorization, nor paid any fees, the Court issued an EU-wide injunction and ordered the removal from market and destruction of the agency's advertising materials, rejecting, however, the request to close the agency's website.

The decision *per se* is not surprising, although one may wonder if the travel agency had appeared, what arguments it might have invoked for its defense. Indeed, the travel agency was not selling "copies" of the David, but was simply using it in a descriptive manner, in the same way one travel agency may print a poster of, say, the Rome or Florence skyline, to advertise trips to these cities. Would such a poster, which may clearly depict the Coliseum, or the Giotto Bell Tower, cause an economic harm to the cities of Rome or Florence?

No one is here advocating "*freedom of panorama*", as per article 5(3)(h) of the Directive 29/2001. Although an attractive defense, on the basis that if – at least theoretically – the "freedom of panorama" may trump works protected under copyright laws, it should even more so be applicable to no longer protected works, such as the 500 years old David, Italy -like a handful of other EU countries- did not implement it. Moreover, the freedom of panorama applies to artworks that are freely visible and exposed to the public, and it is doubtful whether it may apply to an artwork which is located inside an inner courtyard, although visible from the street when the gates are opened.

However, although “freedom of panorama” may not be applicable, this decision and its holding is somewhat troublesome because of its broad effects. As for the poster example made above, should the reproduction of any “heritage” objects located ‘outdoors’ without authorization and payment of fees now always be considered inadmissible and expose to liability? Consider for instance the movie “Roman Holiday” where most of Rome’s heritage treasures are reproduced: were a remake of such movie be made today, would authorization by each administration authority for each monument depicted in the background and payment of fees be necessary? What about commercials shot in Siena, or Perugia or Venice where, admittedly, having a “heritage” site in the background is almost inevitable?

The Italian Cultural Heritage Code states that “*Ministry, regions and other public territorial entities can allow the reproduction of cultural objects…*” (article 107) and does not make any distinction between cultural works located ‘indoors’ or ‘outdoors’. Moreover, according to the judgment reported here, the simple reproduction may cause an economic harm to the administration authority. But such an interpretation would basically turn most of Italy in a no-picture, no-movie country because of the complexities and the costs related, Therefore, a more nuanced approach should be followed.



While we are neither judges or legislators, it seem reasonable to advocate that unless the “reproduction” per se of the cultural heritage is the main object (think of posters of a particular work of art, or merchandise items featuring the same), any “collateral” uses, such as uses in descriptive (like on the cover of an entrance ticket to a museum or historical place) or evocative forms (like in the background of a movie or of a commercial) should not be considered as infringing the Italian Cultural Heritage Code. We shall monitor future cases and report if anyone tries this defense. Stay tuned and beware of David’s slingshot…

[1] back to more than 50 years (articles 2, 10 and 11 Legislative Decree 42/2004, Italian Cultural Heritage Code).