1 An introduction

We have seen many cases of appropriation and in general of use of other's works.

From a legal standpoint the main question we have to address is: is it a copy, derivative or transformative? Which is, did it copy all, a part or nothing of another person's creativity?

To answer this question we have to examine the originality of the appropriation work. Is it totally original, original in part, or totally unoriginal?

So the second step is to define originality and mainly what must be the object of originality to evaluate in this comparative exam.

Finally, what are the legal consequences if the work is

totally unoriginal (unauthorized economic use of the whole work, plagiarism or *false d'auteur?* Seen as a copy or as an originalof the copier butin violation of moral rights, see the Durer case cited), partially original (derivative work), totally original (transformative and new work)?

A further issue is whether, when the appropriator is deemed to have taken whole or part of another person's creativity, he has the right to do so.

On this point after an overview of the mechanism of fair use and exceptions and limitations, I will conclude by outlining that fair use should not be the right ground for proper transformative works.

I will try to briefly address all those issues

2 Originality and creativity

2.1 Let's say that we consider the appropriation works as totally new and original works. In this case, as said, any link with the previously work is completely severed and the subsequent work enjoys maximum autonomy. Accordingly, the

appropriation work will not require authorization and neither will it risk actions to protect moral rights arising out of modifications that the original author feels are injurious.

What we have is a new and completely independent work. However, adopting this approach it becomes crucial to establish the originality of the subsequent work. In the sense of the originality of the work considered as a whole and non the mere elaboration of the previous work. But when is something original and what must originality really consist of?

In this regard, there is a well-known distinction between external form, internal form and content as well as the copyright dogma that protection can never concern ideas in themselves just their form of expression.

See now also article 9.2 TRIPS ("Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such").

An expansive interpretation of the notion that only the form of expression can be protected would seem, for example, to be at the heart of the copyright infringement dispute between Janine Gordon and Ryan McGinley. As quoted in the press, art critic and curator Dan Cameron has certified in an affidavit that "Gordon's work is completely original, in concept, color, composition and content and that Ryan McGinley" (some of them used in a Levi's ad campaign) "has derived much of his work from her (Gordon's) creations".

McGinley is alleged to have copied from Gordon (Plant your feet on the ground – 2000) the subject, the position of the woman depicted, its center of composition and the light coming from the left. McGinley's objection is naturally that the allegation refers to the idea of Gordon's photo, which is not protected by copyright, an objection that is countered by Gordon's lawyers according to whom a pattern of ideas, a combination of ideas the fruit the artist's creative process and imagination then incorporated into the artist's work, can be protected by copyright.

For its part originality is considered as existing whenever that which must constitute the subject matter of this originality is the original fruit of a given author. In substance, that the creative input, minimal as it might be, must be the product of the author's personality, not altered from others and not copied from others.

Also in Anglo-American law it is maintained that originality coincides with originarity.

It is also well known that the system of copyright (but see paragraph 2.3 below) does not call for an assessment of the degree of creativity (as is the case for patent law where one must fulfill the requirement that having regard to the state of the art the invention must not be obvious to a person skilled in the art because in addition to being objectively new there must also be an inventive step). An assessment of the creative merit is considered as having no place in copyright because any such evaluation is subjective and as such unacceptably discretionary.

This does not detract from the fact that "sweat of the brow" and "skill, judgment and labour" doctrines developed in common law jurisdictions, which in the presence of a strong entrepreneurial commitment granted copyright and as a response thereto clarification was necessary from the US Supreme Court (in 1991 with reference to telephone directories) that copyright presupposes at least "some minimal degree of creativity" and recently from the European Court of Justice that compiling football match fixture lists is not protected by copyright when it leaves "no room for creative freedom".

2.2 If with reference to traditional figurative art the originality of the external form could per se dispose of the issue as to whether the subsequent creator enjoyed an independent right, what happens when: a) the external form becomes almost an accessory, a fungible suit? or b) the true impact of a work is in its content, in the idea that it conveys, as in all conceptual art?

Right from the very first experiments with appropriation, which date back to cubism and collage, the form of the work is composed or completed through the inclusion of external elements. Often they were commonly used elements and materials and works of another's intellect. The seeds so sown are brought to extreme consequences by the provocative ideas and techniques of Dadaism. But the use of external elements is no longer seen as a technical instrument for overcoming a flatly representative vision (i.e. one in which the external form of the work is strictly linked to a faithful representation of reality, in other words, a vision, perception and ensuing representation of reality by the artists that is exclusively exterior and aesthetic) but takes on a different meaning. Transform in a work any element that the artist chooses to make such. Therefore, place at the centre of the work (and hence the rights in it) not what the object is but what it means for the author in his artistic gesture. What the author manages to portray and communicate through his use of that object.

In this sense appropriationism seems to have simply completed the work including among the elements utilisable by the artists any intellectual work of another (images, video, etc. but there also comes to mind Pharmacy where Duchamp in 1913 purchased cheap reproduction of a winter evening landscape and added two small dots, one red and one yellow, to the horizon) that is then reused by the subsequent artist as an inanimate 'neutral' object, to be attributed a completely new and thus original meaning. The import and representative scope of the object used, in as much as it is an intellectual work itself is as if it dies out in the hands of the new artists only to then reignite again with a totally new and original meaning.

The above is lucidly summarised in an anonymous article referring to Duchamp's urinal readymade in 1917: "Whether Mr. Mutt with his own hands made the fountain or not has no importance. He chose it. He took an ordinary article of life, placed it so that its useful significance disappeared under a new title and point of view – created a new thought for that object",

The new meaning and not the internal or external form of the work thus becomes the central element of the originality of the appropriation work.

Duchamp himself in a lecture held at MoMa in 1961 on readymades clarified as follows: "A point that I want very much to establish is that the choice of these "readymades" was never dictated by aesthetic delectation. The choice was based on a reaction of visual indifference with at the same time a total absence of good or bad taste ... in fact a complete anaesthesia".

Almost a century ago a very authoritative Italian scholar (Piola Caselli who can be considered as the father of the Italian Copyright Act, passed in 1941) noted that in reality the interior form covered by copyright is none other than "the thought that is formed". The work thus conserves "as its sole raison d'être the immediate purpose of external representation of an intellectual content". The exterior form is said to be "the material vehicle which draws the thought to the public's attention" and which constitutes the means of materialization necessary so as to be able to create a right of exclusivity in the work-thought and its economic exploitation through reproduction and publication.

In this sense "in the face of a work that has a new important intellectual content but whose form exhibits little originality ... we can be somewhat indulgent in affording protection" and "on the other hand when a work lacks original content and it is just the originality of its form that serves as justification for affording it protection, it is reasonable to require that the form itself is such that not only does it identify the work but also has its own value as a creative result of a certain importance".

Therefore, according to this view, the evaluation as to originality should focus on the content-thought the more that this is strong and original and in that instance consequently gloss over the scant originality of the exterior form (thereby making the work protectable as an original).

That scheme would seem to best fit the phenomena that we have seen since ever more in relation to contemporary art that is not (or not strictly) figurative, the true object of originality that determines whether a work is plagiarism or derivative work lies in the significance that the author in an original manner attributes to the work that could imbue an already existing work with a new meaning, that could be just displace an object or artwork out of its normal

environment such as, just to take two examples of many, Manzoni did with its "merda d'artista" or with an opposite meaning like Eva and Franco Mattes did in their Re-enactments, putting in the web famous performances by their avatar. And the way in which one could represent (i.e. manifest and convey) this new and original meaning could be wide ranging.

Some US decisions, already cited, still seem by contrast to be very much anchored to a formal notion of expressivity and hence the originality of the subsequent work.

For example, in *Roger vs. Koons* the District Court compared the single formal elements (but we have seen in detail also the case of Frank Fairey's Barack Obama "Hope" poster) and concluded that the flowers in the hair of the couple or the bulbous noses of the puppies were small changes.

2.3 In the Italian system the degree of creativity is important precisely with reference to photography: distinguishing between photographs that are an intellectual work and hence fully protected by copyright and mere photographs protected by neighbouring rights. The difference lies in the fact that the former must exhibit a high degree of creativity assessed on the basis of the framing, the angle, the choice of colours or the deliberately created special interplay of light and shadow, such as to go beyond a mere factual reproduction of a certain object or event (Court of Trento judgment of 14 November 2007). Images of persons or features, elements or facts of natural and social life obtained through a photgraphic or similar process, including the reproduction of figurative works of art and photograms, are afforded the weaker (reproduction, dissemination and sale and obviously without prejudice – as regards photos that reproduce figurative works of art – to the copyright in the photographed object) and shorter (20 years from production) protection of neighbouring rights. Provision is made for an interesting mechanism of statutory licensing (upon payment of fair remuneration) for photographic images published in newspapers or other periodicals concerning persons, current affairs or in any event of public interest, although caselaw has clarified that the license does not cover any manipulation of the images (Court of Rome judgment of 22 September 2004).

In a case decided by the Court of Milan in 2009 regarding the appropriation of photographic images (Mauro Davoli's still lifes) by an artist to make hyper-realistic pictorial works (Giuseppe Muscio), first and foremost, the appropriated photograph was immediately acknowledged as exhibiting the necessary creativity "given that, far from relegating them to the sphere of mere reproduction of objects, their viewing clearly reveals the artist's contribution of personal creativity transcending the mere professionalism of the photograph".

The Court held that the use of a different pictorial technique was "irrelevant" for plagiarism purposes (meaning that that plagiarism is possible also through different techniques and tools of expression) because the particular way of representing the objects in the original works has been fully taken and copied, precisely those aspects of creativity and originality that were the specific manifestation of the personality of the author.

In doing so, in my opinion, the Court erred. The fact is that the slavish reproposing of the work of another is precisely the purpose of the hyper-realistic vision of painting with the peculiarity that the object represented in a hyper-realistic way was a photograph. In such a case the slavish conformity of the formal elements should not be relevant but simply the different meaning that the same image assumes in its photographic representation compared to its pictorial one. The crux of hyper-realism (its meaning, its challenge) is specifically the feeling of disorientation that is generated between the real image 'recorded' through a photograph and the images mediated through a 'second-level' reproduction.

Probably in the case in point the link with the origin of the photographs was not clearly pointed out. On the website alongside the images of the paintings one could read "Photographed by Mauro Davoli". However, in reality that could be interpreted as referring to the person who photographed Muscio's work, whose photographs were then posted online. This gave rise to a problem of violation of the right of paternity and hence not solely infringement (of economic rights) but also plagiarism.

3 Adaptations

If the artwork its not totally original we can fall within the case of derivative work, a situation covered by article 4 of the Italian Copyright Act. In that case a derivative work which in turn is a creative elaboration of a previous work is itself protected by intellectual property law.

The person who has created the derivative work will be deemed to be the author of that work "within the limits of his own effort" (article 7 of the Italian Copyright Act).

Similar provisions can be found in the Berne Convention (article 2.3) to the effect that "alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work" and in § 101 and § 107 of the United States Code.

In that case however the derivation entails the continued existence of strong links between the original work and the subsequent work: the appropriated work and the appropriation work. These links essentially manifest themselves in two respects.

The first aspect has to do with the economic exploitation of the work, which cannot take place without an authorization from the owner of the original work. In fact, under Italian copyright law the author has the exclusive right to modify, adapt and transform his own work (see article 18 of the Italian Copyright Act and also the provison "without prejudice to the rights subsisting in the original work" contained in article 4 cited above)[1]

The Italian courts have held that in order for a derivative work to be afforded protection, it must exhibit a minimum of originality and cite the original work[2].

Therefore, in the case of a derivative work it is always necessary to obtain the authorization of the holder of the rights in the original work because "elaboration of a work without the consent of the owner" infringes copyright[3].

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[1] See also, Italian Supreme Court - Section I judgment no. 8597 of 29 May 2003.
[2] Italian Supreme Court - Section I, judgment no. 20925/2007.
[3] Court of Rome judgment of 11 January 2005.

The second aspect has to do with the protection of the moral rights of the author. An elaboration in effect also constitutes a modification of the original work and clashes with the right of the original author "independently of the exclusive rights of exploitation of the work [...] and even after the transfer of' such rights" not to authorize any "distortion, mutilation or any other modification of, and other derogatory action in relation to, the work, which would be prejudicial to his honour or reputation" (article 20 of the Italian Copyright Act). In other words the author's personal, inalienable and perpetual "moral rights". The transfer of any right of elaboration must not, therefore, harm moral rights.

In this regard the Court of Milan recently held that the unauthorized elaboration of the works of Giacometti by the Californian John Baldessarri harmed the moral rights of the appropriated author by virtue of the commercial context in which the work was displayed (a Prada Foundation exhibition, evidently held to be closely connected to the commercial activities carried on by the well known trademark such as to constitute a "advertising-type" context and exploitation of the exhibited works, exploitation with which the works of Giacometti were also associated).

With reference to derivative works and hence one of the tools through which "subsequent innovation" (in this case subsequent "creativity") is achieved, perhaps by now one of the chief ways in which the creative process has evolved, copyright does not embody a key principle of patent law that acts as one of main safeguards to ensure that the temporary monopoly enjoyed over the invention does not hinder subsequent innovation. The owner of the derivative invention (holder of the dependent patent) may obtain a (statutory) compulsory license from the holder of the original patent to the extent necessary to exploit the later invention (article 71 of the Italian Industrial Property Code). A system of compulsory licenses impacts solely on the patent holder's exclusive rights (specifically the right not to grant a license) but is without prejudice to the holder's right to economic remuneration since the system monetizes his rights of ownership. The holder so loses his exclusive rights in terms of being able to determine the value of exploitation of the right by limiting supply.

4 Fair use

The use of a previous work in a subsequent creation can be considered as the expression of a right, clashing with that of the original holder, by an author who needs to access and use the previous work to express his own new creativity. In this case, although the link with the appropriated work remains and is acknowledged, the conflict between the two creators is solved in terms of an exception to the original holder's exclusive rights. The monopoly granted to the author over his creation gives way in the face of values that are on a par with or higher than that of the protection of intellectual property rights, which is the essence of copyright. In Italy the constitutional basis justifying such a contraction of the rights of the original creator can be found in article 21 of the Italian Constitution governing freedom of expression and in article 33 governing freedom of art and science.

In a European framework some of the exceptions and limitations in Directive 2001/29/EC, that we will see in a while, are underpinned by fundamental freedoms such as the right of expression and the right to information and hence could be 'covered' by article 11 of the EU Charter of Fundamental Rights and article 10 of the European Convention on Human Rights.

Underlying such exceptions to copyright are often practical considerations to the effect that, on the basis of a substantive principle of proportionality, one should not inhibit the use of the works of another that have little or no impact on the right (essentially in remunerative terms) of the original holder. Those considerations have thus led to the establishment of that which in civil law jurisdictions and in EU Member States (but also in international Treaties) has become the system of exceptions and limitations and in common law jurisdictions is the doctrine of fair use.

The two approaches differ greatly in their fundamentals. The Anglo-American system, especially the US one, provides by statute for a general and open rule which, on the basis of the four key factors specified in general terms in § 107 of

the United States Copyright Act, the courts are then charged with applying in concrete.

Fair use is essentially a defence against a charge of infringement of copyright. It has its origins in caselaw and was codified for the first time in the US Copyright Act 1976 with the intent of incorporating the judicial precedent up to then.

The statutory requirements listed in § 107 of the United States Code are four: a) the purpose and character of the use (commercial/non commercial, private/public); b) the nature of the copyrighted work; c) the proportion that was taken; d) the economic impact of the appropriation.

As a general value in a copyright balance fair use test there is the freedom of speech enshrined in the First Amendment. A value, though not provided for in the Constitution itself unlike copyright (Article 1, Section 8, Clause 8 of the US Constitution), is considered as ranking higher constitutionally than copyright.

In general the conflict between the First Amendment and copyright is resolved (and hence denied for the most part) on the basis of the idea-expression dichotomy, whereby the former is protected by the First Amendment and the second by copyright.

The first factor is thus the **purpose or character** of the use. commercial/non commercial, public/private. Any findings on those factors is just presumptive of the final assessment that the use is fair or not. Ass for the purposes they should be "such as" criticism, comment, news reporting, teaching scholarship or research. In assessing character, the wilfulness or otherwise of the infringement is important.

About commercial purpose, it would seem that the factor in question is normally strictly linked to the fourth one concerning the economic impact of the appropriation on the rights of the owner of the appropriated work. In the sense that what is important is that in order for use to be permitted, it must not impact on the physiological economic exploitation of each work. In this sense the joint reading of the first and the fourth factors does not seem all that different from that used in Europe in the three step test of exceptions and limitations (about which more shortly) and in particular the fact that the permitted use, according to that

factor, is not contrary to the normal exploitation of the work and does not prejudice the author.

Various assessments come together and intersect in the factor concerning the **nature of the work which means that the work its more** 'fact-based works' or on the countary "fiction". The argument about the nature of the work (fact or fiction) is used to claim that the appropriate work exhibits little creativity and originality, hence leaving more room for fair use to operate.

The **amount and substantiality of the portion used** in relation to the copyrighted work as a whole is assessed in terms of quantity and quality (core of the work) and the centrality of the appropriated portion is evaluated considering not just the appropriated work but also the appropriation work (reverse proportionality) in the sense that one can take just a small part of the another's work but that must not be the core of the new work.

The fair use doctrine, unlike the European system of exceptions and limitations, is thus an open scheme that enables one to strike a balance "from the inside" between copyright and competing interests, on a case by case basis through an overall evaluation and individual weighing of the single factors in a final conclusion. It is not a per se rule and none of its single factors are per se.

5 Exceptions and limitations

5.1 In general

The system of exceptions and limitations dates back as far as the Berne Convention (articles 10, 10-*bis* and 11-*bis*, providing for a body of uncompensated and compensated exceptions).

The European system of exceptions and limitations was specifically introduced by Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, which contains a specific list of cases

that constitute a predefined set of exceptions and limitations to copyright that the Member States can choose from among (save for a compulsory exception regarding a so-called 'cash copy'). Therefore, the maximum limits that the single legal systems of the Member States can adopt.

Consequently, when transposing Directive 2001/29/EC many countries, including Italy, had to review and partially add to or amend the exceptions and limitations (in Italy referred to as "free uses") previously provided for in their domestic law.

The freedom enjoyed by the Member States within the non-mandatory exceptions is said to have led to a poor level of harmonization among the laws of the Member States.

As regards the exceptions they are said to be warranted precisely by values that run counter to copyright. On the other hand, the limitations are said to involve a contraction in the exercise of rights which holders may often encounter practical difficulties in fully and individually exploiting such that the law makes provision for compulsory or statutory licenses under which the holders are still remunerated to an extent determined in various ways (for example, the fair compensation for private copies paid to the Italian copyright collection society SIAE by the manufacturers of devices (equipment or media) that can reproduce the works).

The specificness of the list and the fact that it consists of derogations from copyright law means that it is a body of special rules not susceptible to interpretation by analogy or broad interpretation. This is confirmed by the European Court of Justice[4]. Indeed, it is specifically provided that should technological developments (for example, systems that check single instances of exploitation, including privately) no longer make the derogations justifiable, the derogations should be reviewed, presumably in a more restrictive sense (Recital 44 of Directive 2001/29) .

5.2 The three-step test

[4] See CJEU 16.7.2009, case C-57108 and CJEU, 4.10.2011 cases C-403/08 and C-429/08. The latter with a wider vision outlines that exceptions must enable the effectiveness of the exceptions thereby established to be safeguarded and permit observance of the exception purposes.

A study conducted by the Institute for Information Law (IViR) at the University of Amsterdam at the end of last year highlights that "the current lack of flexibility in copyright law undermines the very fundamental freedoms, societal interests and economic goals that copyright law traditionally aims to protect and advance. This is the case particularly in the area of exceptions and limitations – an area where more than elsewhere in the law of copyright rules have become detailed, rigid and connected to specific states of technology".

As is known, the system of European exceptions through article 5(5) of Directive 2001/29/EC provides that *"The exceptions and limitations provided for in paragraphs*
1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder"

The European system of exceptions and limitations (see also the art. 9(2) of the Berne Convention, 13 of TRIPS and 10(2) of the WCT) so introduces a general parameter, which acts as a control for the Member States regarding whether they should introduce one or more of the exceptions listed. In other words, the so-called 'three-step test', whereby the exceptions to copyright and hence the possibility for third parties to use an existing work, is conditional on the fact that the exception must relate to special cases that do not conflict with the normal exploitation of the work and that do not unreasonably prejudice the legitimate interests of the author / right-holder (even when not in contrast with normal exploitation).

This test was included in the Directive and addressed to the single Member States precisely to guide them in that process of selecting the exceptions from among the options afforded by EU law. In some countries like Italy the three-step test was 'internalized' so to speak thereby becoming an interpretative parameter in applying exceptions expressly introduced by domestic legislation.

The test in question (which revolves around an assessment of the economic impact of authorized third party use) constitutes a fundamental facet of how "fair use" operates in Europe and has been the subject matter of heated debate between those who use the test to force and further restrict the exceptions (tending to enormously broaden the concept of normal economic exploitation of the work – let's say the market outlets – thereby reducing the scope for third party use) and those who call for a "reasonable" interpretation aimed at making the rigid European system of exceptions and limitations more open and flexible.

In other words, it is sought to make the system of exceptions and limitations flexible precisely through assigning a different role to the three-step test, including correctly placing it back in an international framework (article 9 CB and article 10 WCT) and underlining that it is exactly in that context that its genesis is strictly linked to an attempt to introduce into the copyright system fair use mechanisms typical of common law jurisdictions.

In the process of the adoption of Directive 2001/29/EC the three-step test was apparently introduced to balance the long list of situations contained in the Directive dictated by the needs of the single Member States to include in the Directive all of the exceptions and limitations that were already in force in each domestic legal system.

In this regard the requirement that an exception must not "unreasonably prejudice the legitimate interests of the rightholder", which could well cover, for example, interests of a moral nature, has by contrast been interpreted – as a safeguard against the breadth of the listed situations – as economic prejudice. So the requirement has ended up becoming only an assessment of the exception's impact on the economic rights of the rightholder and not a system to justify the contraction of the author's economic rights in order to protect other values while at the same time ensuring proportionality in the balancing exercise, i.e. that the contraction of the rights (economic or otherwise) does not lead to unreasonable prejudice.

According to this approach "limitations and exceptions are the most important legal instrument for reconciling copyright with the individual and collective interests of the general public" and for this reason "the three-step test does not require limitation and exceptions to be interpreted narrowly". Moreover, the closed system of EU exceptions would not prevent "legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable" or "courts from apply existing limitations to similar factual circumstances mutatis mutandis or creating further limitations or exceptions". Finally limitations and exceptions do not conflict with the normal exploitation of the work if adequate compensation is ensured (hence compulsory licensing systems would be admissible if accompanied by forms of fair remuneration for rightholders. (Atrip - International Association for the Advancement of Teaching and Research in Intellectual Property, 2008)

Moreover, one must consider a) that the hypotheses listed in Directive 2001/29/EC are apparently only 'prototypes' and as such leave ample flexibility for national lawmakers and b) that they apparently relate to just the rights governed by the Directive (reproduction, communication to the public and distribution) and not, for example, to the further right of adaptation.

At times the flexibility of the system of exceptions and limitations is achieved through recourse to parameters outside copyright (and hence irrespective of the application of the three-step test from a 'liberal' standpoint).

The system of the exceptions and limitations is currently being reviewed at EU level. In particular, under discussion (in some cases allied to considering whether mandatory exceptions and limitations should be introduced) is the digitization by libraries and archives of orphan works (in relation which a proposal for a Directive has been tabled: COM(2011)289 final of 24 May 2011 "on certain permitted uses of orphan works") as well as needs linked to the use of works for teaching and research purposes, those of the disabled and especially the elaboration of works for the blind and those relating to user generated contents, a topic which in light of the feedback from a public consultation the European Commission is sitting on for the moment and is investigating further.

5.3 Specific (may be) relevant exceptions: quotations

Among the exceptions provided for by Directive 2001/29/EC that could be relevant for the purposes of appropriationism is the right of quotation (article 5(3)(d): quotations for purposes such as criticism or review provided that they relate to a work which has already been published and the author's name is indicated where possible).

Under the Berne Convention the quotation right is worded in broad terms and is substantially in line with the breadth of the US fair use test. In fact, the only limits are that the quotation must be consistent with the purpose for which the quotation is necessary (hence there is no restriction as to "purpose" like criticism or review) and must be compatible with fair practice.

With reference to the quotation right some EU Member States have sought to broaden the definition contained in Directive 2001/29/EC by relying on the fact that its wording refers to purposes "such as" criticism or review. On the other hand, the European Court of Justice (in a decision dated 1.12.2011 in Case C145/10, but see in particular the conclusions of the Attorney General) seems to upheld a restrictive interpretation of the term "quotation", holding that for the exception to apply it is necessary that the quoted part be "reproduced without modification" and there must be "a material reference back to the quoted work in the form of a description, commentary or analysis. The quotation must therefore be a basis for discussion". Furthermore the quotation mast be evaluated according to the Three step test in the sense that the reproduction by mass media on newspapers, websistes etc. should not consist in an economic prejudice of the author's interests as could be if, by such quotations the economic value of the works decreased (a fact that can e avoided by citing the author). Finally the quotation right would be interpreted in a too restrictive way if, as far as photographs are concerned, permitting only a partial reproduction of the work.

As far as Italy is concerned, the above exception has been transposed into article 70 of the Italian Copyright Act in more restrictive terms than those contemplated by the Directive, limiting the lawfulness of quotations for critical

discussion, teaching and research solely to "fragments or parts of a work". It is also necessary that the use not compete with the economic use of the work. In substance, one of the scenarios of "internalization" of the three-step test (about which more later) in relation to the exceptions in question that domestic law has adopted.

Furthermore, according to Italian caselaw the exception can never apply to reproduction of the entire work[5]. It can apply only to a fragment and for this reason there are those who argue that it cannot apply in concrete to works of plastic or figurative arts. It must however be an accessory element of an independent intellectual work[6]. Photographic reproductions in a catalogue are excluded while partial photographic reproductions, if for the above mentioned purposes, can fall within the exception in question[7] The exception relating to the right of quotation, where the conditions therefor are fulfilled, does not require any authorization from or remuneration for the author. That said, the author of the quoted work must be clearly mentioned so as to safeguard his moral rights.

6 Transformative uses and parody: fair use/exception?

Normally, as pointed out recently by Sterpi, the main instrument to legitimate a transformative use of an artwork is the parody defense as an element of the fair use test or as an specific exception and limitation.

I would think that most properly a parody defense and in general protection of transformative work should operate out of the fair use test or of specific exceptions.

In fact, any fair use is based on a use of other creators' creativity. Which the law in some cases deems lawful (because fair).

In this sense the fair use scheme does not fit in with cases of transformative work where the originality is total. There is a totally new meaning. Because in this case

[5] Italian Supreme Court - Section I, judgment no. 412 of 15 January 1992.
[6] Court of Milan judgment of 2 March 2003.

[7] Court of Rome judgment of 10 August 1990.

even if the appropriator is taking the artwork of another, he is not taking the original creativity. We could say that he is just taking the material but not the spirit (the *corpus mechanicum* but not the *corpus mysticum*).

And if this is true, even a comparative exam of the exterior aspect of the works is pointless because the form of expression of the thought of the appropriated artist is irrelevant if the thought of appropriator is radically different.

It means that when a court recognizes that the appropriator work is transformative in meaning (and should do so, as I will say, not only in case of "comment" on the appropriated work) it ought to just dismiss the fair use test, without evaluating other factors like, for instance, the economic impact on the appropriated author's market.

Said that, about parody the Directive 2001/29 provides a specific exception: article 5(3)(k): use for the purpose of caricature, parody or pastiche).

The exception is not expressly contemplated in Italian legislation and one supposes that the legislator intentionally omitted to transpose it because well-established caselaw recognized it.

In some countries parodies are free adaptations if they have their own features that make those of the original work vanish (§ 24 of the German Copyright Code) and it is within the scope of those types of work that parodies fall. In other EU Member States parodies constitute completely new works (article 13 of the Dutch Copyright Code). In those countries the exception provided for in Directive 2001/29/EC may apply in cases where the parody does not exhibit the originality that is required to allow it to be considered as a free adaptation or a completely original work.

Italian caselaw on the point holds that parody entails a work radically different from and independent of the parodied work, stressing exactly that parody is a "radical reversal of the meaning" of a work.

And it is precisely the capacity and the need of the author to express this new meaning that would make it necessary and lawful to permit the accomplishment of this work, also in light of the constitutional values in articles 21 and 33[8] .

["In that way the constitutional principles give rise, in the case of parody and caricature, to a wider exemption than that permitted by the typical copyright law exceptions. Recognition of the independent value of a work as an authentic parody (and protected as such) means that it is impossible to hold that there has been a breach of article 70 regarding unauthorised quotation or article 20 regarding injury to the honour and reputation of the author of the parodied work"[9]

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"The crucial point regarding the exclusion of the applicability of articles 4 and 18 of the [Italian] Copyright Act in both cases is the absence of appropriation of the ideological content of the parodied work"[10]

With reference to vignettes based on protected drawings, in its judgment of 21 October 1991 the Court of Bologna talks of overturning the meaning of the previous work because "the elements the other person's work are distorted in their graphic aspect by the addition of totally original elements that deform the semantic structure, in that way overturning the meaning of the previous work that is the aim of the newly completed work".

On the contrary, the parody defence, as mentioned before, is often used in US cases. Relying on the purpose for "comment" referred to in the opening paragraph of § 107 of the Copyright Act 1976 as a requisite for claiming fair use, it is maintained that reference to the original work is fundamental.

In the US decisions it appears that in order to be able to make appropriation lawful on the basis of the parody defence, the modification in meaning must maintain an original link with the meaning of the used author. The author who

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[8] Court of Naples judgment of 15 February 200.

[9] Court of Milan judgment of 15 November 1995.

[10] Ercolani, commento art. 4 L.A. Utet., 2011.

has been "parodied" and the meaning that he sought to convey through his work must constitute the exact specific object of the appropriation author. His original expression must constitute what the appropriation artist parodies.

In fact in *Roger vs. Koons* the US Court of Appeals for Second Circuit underlined that "the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work" and that this "is a necessary rule, as were it otherwise there would be no real limitation on the copier's use of an author's copyrighted work to make a statement on some aspect of society at large" and hence in the present case the problems is that "even given that "String of Puppies" is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph "Puppies" itself".

In the judgment at first instance in *Cariou vs. Prince*, for example, it was held that using the works of another as "raw ingredients" cannot give rise to a transformative use "absent a transformative comment on the original". Consequently, the US District Court in that case "declines Defendants' invitation to find that appropriation art is per se fair use regardless of whether or not the new artwork in any way comments on the original works appropriated. Accordingly, Prince's paintings are transformative only to the extent that they comment on the Photos". Consequently, "to the extend they merely recast, transform or adapt the Photos, Prince's Paintings are instead infringing derivative works".

Critical comment of the appropriated artist, in some cases of appropriation, especially those relating to important artists in the history of contemporary art, may be out of place in appropriations that use the work of another (protected by copyright in that it is deemed to have a certain originality) as fungible "raw ingredients". Where the objective of the appropriation artists is not the specific author but what his production represents, what it evokes, exactly like Warhol's Campbell soup cans or many images taken by the mass media.

In these cases the change of meaning and the originality of the appropriation work can be evident but, as we have seen, will not meet the requirements for parody and hence for fair use that would make the new work independent of the appropriated work and autonomously protectable.

The parody defence is even harder to use when the meaning of the appropriation work is deliberately left open and hence susceptible to many subjective meanings.

7 Trasformative works and impact on the normal exploitation of the work appropriated.

Finally, one must keep in mind an aspect highlighted by the 1995 Court of Milan judgment cited above. The difference of meaning determines (and must determine) the different public for whom the work is intended. In fact, "the substantial result of the total contrast between the content of the two works ... determines the respective destination for different categories of users" Indeed, even if negatively, the Court went on to say that "parody is such only in the absence of commercial competition with the parodied work, whose existence would inevitably show up the failure to achieve that conceptual distortion that represents its very essence".

In *Prince vs. Cariou* the US District Court cited caselaw which states that "where Defendant's derivative work is only marginally transformative, it is likely to supplant the market for Plaintiff's derivative work". Therefore the more transformative the meaning the more the work is intended for a public different from that which could desire a work derived from the original.

And this aspect can become important also if one, consistent with Directive 2001/29/EC and the American fair use test, sees parody (and the like) as an exception to the copyright. If, according to the fair use test and the European and international three-step test used in a protective sense (as a valve that closes and does not open up the copyright system), the impact on the relevant market of the owner of the appropriated work is crucial in establishing whether there is fair use or in confirming an exception, then the point regarding the different final public (in terms of the cultural circles and target the work is intended for) could be decisive.

Equally decisive would be the point that the markets for the appropriated work and the appropriation work would not be substitutable on the basis, for example,

that for a collector a Gavin Turk work could never be a substitute for the well known and recognisable original work by Boetti and neither could a work by Richter (it too well know to the hypothetical typical collector of these types of words) ever be substituted by a Kippenberger appropriation work.

In short, is it reasonable to suppose that Koon's String of Puppies is a derivative work of Rogers' Puppies (and possibly its photgraphic reproductions) that competes in the same relevant market for elaborations or possible reproductions of Rogers' Puppies (such as postcards sold in tourist shops) since (drawing from antitrust law) the price, quality and other factors mean that there is substitutability on the demand side for the works (of Koons or Rogers) amomg the consumers that the works are intended for?

In brief, with a deep evaluation of the impact on the normal exploitation of the work, using tipical antitrust schemes and methodologies, more weight could be put on the forth factor of the fair use test or on the balancing instrument of the three step test, to legitimate appropriationist's works that don't fit exactly within the narrow confines of parody.

Furhermore, in assessing damages one would have to also compute an inverse operation. To what extent has the appropriated artist benefited from the enoblement and attention that his work has received through its metabolisation by an artist who has succeeded in placing it in a context and attributing it a much more complex meaning, let's say an intellectually higher one. The appropriated artist's current or potential market, with reference to which the adverse effects of the appropriation are to be assessed, should be evaluated before and not after the litigation. For example, Prince's lawyers pointed out that after the litigation Yes Rasta's publication price went from $ 50 to $100.

8 Some conclusions

First

The fungible way in which appropriationism uses objects, works of famous artists, works of not so famous artists, newspaper images, media images and media products serve a need that is diametrically opposed to free-riding and intellectual parasitism. That is an irrepressible need for re-elaboration in the face of an incommensurable series of stimuli given by commonly used objects, media and obviously, for artists, the famous works of other artists, whose meaning they know full well and for this reason they conceptually deal with daily and in their work and which constitutes the fuel that powers further interpretations of the world that surround them including through a new interpretation or simply a new contextualisation of those works that is the expression of a new proposition, a new imagination linked to those works.

So on this point my conclusion should be actually a wishful thinking:

No matter what you take and how much

Take as much you need to say as much you can: "to promote the Progress of Science and useful Arts" (article I, § 8 of the United States Constitution)

Second

How does the story end?

After lawsuits many appropriators began to get licenses from the right holders of the material utilized.

So did Koons, for instance, for his Popeye series. As Koons's lawyer said recently "hordes of people have granted permission".

So too did Warhol in the past, for instance, for the use of Mickey Mouse and Donald Duck images by entering an agreement with Disney sharing copyright and likewise with DC Comics for the use of Superman in the Myths series.

In 1992 Prince paid $ 2,000 to Garry Gross for the use of the 1976 photograph of Brook Shields as a 10-year old girl, to reuse in his 1983 "Spiritual America".

The question so is: does it affect their creativity?

For instance Mike Bidlo was not able to get a license from the heirs of Duchamp to replicate "Fountain" and just created extrapolations and transformation drawings from that object.

In the music field it is interesting to recall an interview released in 2002 (and reported in http://www.stayfreemagazine.org) by two rappers from Public Enemy, where they say that at the beginning of their work they were using plenty of short samples of other artists' music mixing them together.

As they said "Public Enemy was all about having a sound that had its own distinct vision" because "if you separate the sounds, they wouldn't have been anything – they were unrecognizable. The sounds were all collaged together to make a sonic wall".

But because it was too difficult and too costly to get a clearance for each single part utilized in their songs, in the end they had to change their style, either by using a single main track or by using a sample of live music (bypassing in that way the recording company and paying only the publisher of the music).

But the artistic result was different. "A guitar sampled off a record is going to hit differently than a guitar sampled in the studio. The guitar that's sampled off a record … it's going to hit the tape harder".