



# ENVIRONMENTAL AND INTELLECTUAL PROPERTY RIGHTS

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# TATTOOS, MORAL AND PERSONAL RIGHTS



The tattoo artist Victor Whitmill sued Warner Bros. for copyright infringement over the tattoo designed on Mike Tyson's face

# TATTOOS COPYRIGHT PROTECTION, TO WHAT ENDS?



Could a tattoo be a distinctive character of a famous person?

Does the person be entitled to claim any exception from copyright infringement claim?

Could any reproduction of the same tattoo be considered an infringement?



# MARADONA VS. DOLCE E GABBANA

Pibe de Oro (as Maradona was nicknamed) claims that fashion designers Domenico Dolce and Stefano Gabbana have unduly exploited his name for commercial reasons

# COPYRIGHT

protection of the form of expression  
not the idea itself

works of the mind having a creative  
character and belonging to literature,  
music, figurative arts, architecture,  
theater or cinematography, whatever  
their mode or form of expression, shall  
be protected



## THE ORIGIN OF COPYRIGHT

year 1450 - the invention of printing press and  
the needs to protect printers' work



## **GUTENBERG'S MOBILE LETTERS**

Gutenberg, a goldsmith by profession, developed a printing system, by adapting existing technologies to printing purposes.

his newly devised hand mould (matrix) made possible the precise and rapid creation of metal movable type in large quantities.

# Annæ Reginae.

An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.



Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the

Encouragement of Learned Men to Compose and Write useful Books: May it please Your Majesty, that it may be Enacted, and be it Enacted by the Queens most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That from and after the Tenth Day of April, One thousand seven hundred and ten, the Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books, Share or Shares thereof, or the Bookseller or Booksellers, Printer or Printers, or other Person or Persons, who hath or have Purchased or Acquired the Copy or Copies of any Book or Books, in order to Print or Reprint the same, shall have the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years, to Commence from the said Tenth Day of April, and no longer; and that the Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of Four-

LGV

LGV ADVOCATES  
LANGHAM LUIGI GOSLIA & PARTNERS

## UK COPYRIGHT ACT - 1710

The Statute of Anne, also known as the Copyright Act of 1710

"An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned"

# STATUTE OF ANNA - TIPS

first statute to provide for copyright regulated by the Government and Courts, rather than by private parties.

the statute is considered a "watershed event in Anglo-American copyright history ... transforming what had been the publishers' private law copyright into a public law grant" (see Patterson & Joyce 2003, 916)



# THE RIGHTS GRANTED under the Statute of Anna



right to copy;

control over the printing and reprinting of books;

no provision to benefit the owner of this right after the sale

as soon as it was published, although they had the ability to license these rights to another person

# HOW THE COPYRIGHT SYSTEM WORKED

## Two stages

1. registration of the book's publication (prevention against unintended infringement)
2. the deposit of copies of the book at the Stationers' Company, the royal library and various un

## Lacks

- means for identifying authors
- did not identify what constituted authored works, and covered only "books", even while discussing "property" as a whole
- the right provided was merely that of "making and selling exact reprints

# AIMS OF COPYRIGHT PROTECTION



rewarding authors and not just publishers

make the authors independent

circulate ideas

free expression

# COPYRIGHT ACTUAL PROTECTION



International level

Berne  
Convention  
1886;  
WTC and  
TRIPs 1996



European Level

Directive  
2001/29/EC  
(InfoSoc.  
Directive)



National

Law No.  
633/1941

# COPYRIGHT AT INTERNATIONAL LEVEL

IP is international even if the rights can be national because of international treaties, EC regulation, international convention, TRIPS agreement

All right holders shall be treated equally around the world



# THE BERNE CONVENTION 1886



## MAIN GOALS

Berne Convention lays down a common framework and agreement between nations in respect to intellectual property rights

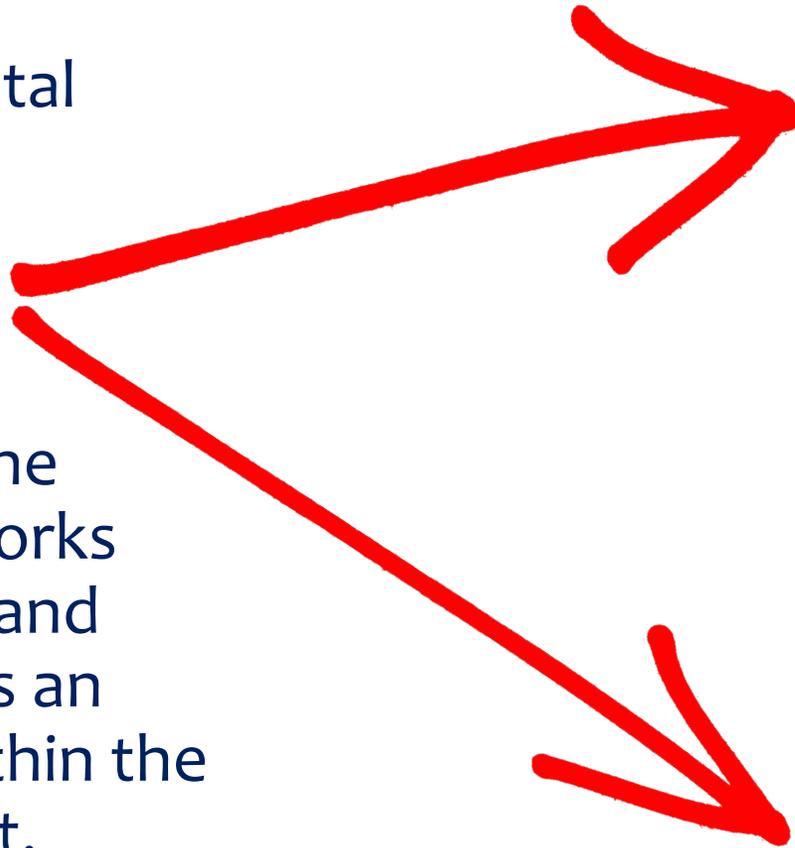
Berne Convention sets a minimum standard for the protection of the rights of the creators of copyrighted works around the world

member countries form a Union, and the Act provides protection for the work of authors who are nationals of one of the countries of the Union, or where the work is first published (or simultaneously published) in a country that is a member of the Union

# WIPO COPYRIGHT TREATY (WCT) 1996

Protection of works and the rights of their authors in the digital environment

Recognizes that the transmission of works over the Internet and similar networks is an exclusive right within the scope of copyright, originally held by the creator



computer programs, whatever the mode or form of their expression

compilations of data or other material ("databases")

# TRIPS AGREEMENTS - 1996



Includes a number of provisions related to the enforcement of IP rights

Says that national laws have to make the effective enforcement of IP rights possible, and describes in detail how enforcement should be addressed.

# DIRECTIVE 2001/29/EC INFOSOC.



To reflect technological developments in copyright law in Europe the Directive harmonized across European Union Member States:

- the rights of reproduction
- distribution and communication to the public
- legal protection of technical protection measures and rights management systems

It also included an exhaustive list of limitations and exceptions to copyright, most of which optional for the Member States to implement in their national laws

# WHAT IS COPYRIGHT?

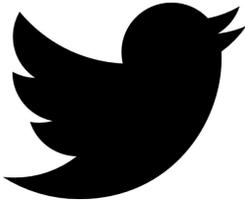
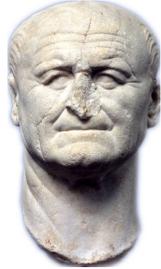
copyright is an ownership right that grants to the author of an original work a **bundle of rights** for a limited period of time

## **ECONOMIC RIGHTS**

allow the author to obtain, directly or indirectly, **financial rewards** from the use of his work

## **MORAL RIGHTS**

protect the **author's personality** and the **work's integrity**

<p>Painting</p> 	<p>Music</p> 	<p>Choreography</p> 	<p>Film</p> 
<p>Logos</p> 	<p>Catalogue</p> 	<p>Photography</p> 	<p>Forniture</p> 
<p>Poster</p> 	<p>Software</p> 	<p>Slogan</p> 	<p>Sculpture</p> 

# NEIGHBORING RIGHTS

neighboring (or related) rights do not have the same extent of the copyright protection granted to the artist (less duration - 20 years generally- and they do not cover any exploitation of the work of art)



they protect the economic investments of certain persons and legal entities that contribute to making works available to the public, such as:

- performers;
- producers of sound recordings (also referred to as phonograms);
- broadcasting organizations

# DOMESTIC PROVISION LAW 633/1941



## TYPES OF WORK PROTECTED (Article 2)

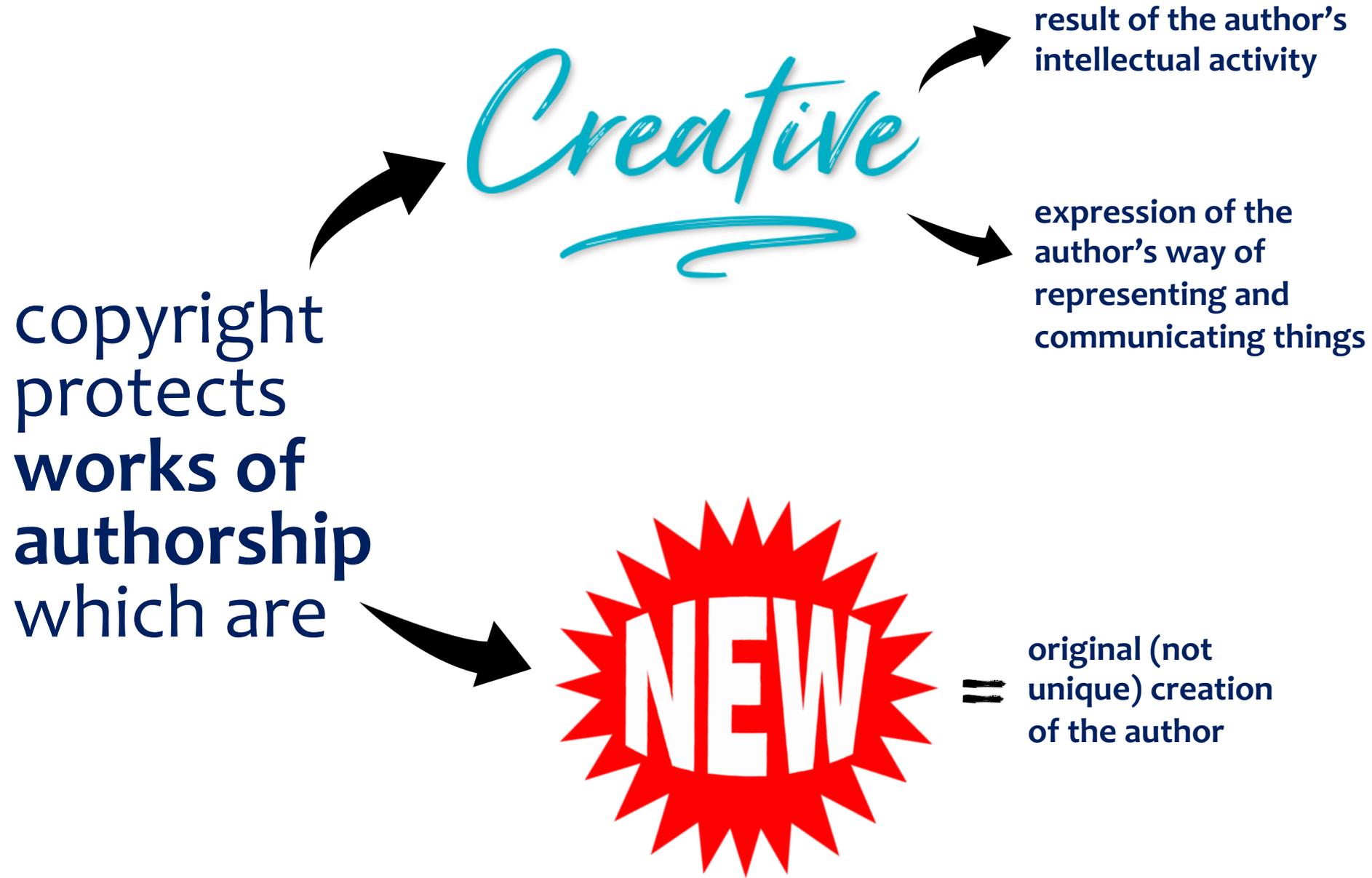
- literary works such as novels, poems, plays, reference works, newspaper articles;
- artistic works such as paintings, drawings, photographs, and sculpture;
- films, musical compositions, and choreography;
- Architecture; maps, and technical drawings;
- computer programs, databases;

# ART. 2, NOT A COMPREHENSIVE LIST



Copyright protects the *form of expression* rather than the subject matter of the writing

As a consequence, not only “literary” works *per se* (poetry, narrative, essay writing, etc.) but also those texts in which the word communicates information created and organized in a subjective and independent way by the author, for example, are protected (Cass. Civ. 11953/1993)



# REQUIREMENTS

creative and the individual nature of the work

autonomous decision of the author and presents certain degree of originality

ECJ decision Infopaq C-5/08 “copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation”

# ECJ DECISION C-5/08 INFOPAQ

second issue solved by the ECJ is the one that provides a harmonized definition of definition of “reproduction” of a work of art has been requested to the ECJ

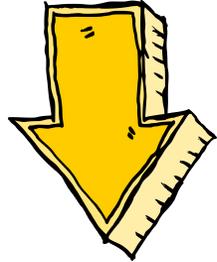
*“the act of printing out an extract of 11 words, during a data capture process consisting in scanning of newspaper articles followed by conversion into text file, electronic processing of the reproduction, storage of part of that reproduction and printing out, it cannot be carried out without the consent of the relevant rightholders” Para 74*



# CORPUS MYSTICUM VS. MECHANICUS

## CORPUS MYSTICUM

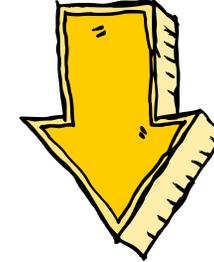
intellectual property, the existence of which is intuitively clear because of the unbreakable bond that ties the work to its creator



work considered as an immaterial item remains property of the author on behalf of the original right of its creation

## CORPUS MECHANICUM

item in which the intellectual creation of the author is embodied



corpus mechanicum consists of the exemplars of the book or of the work of art and it becomes the property of whoever has bought the material object in which the work has been reproduced or expressed



# KANT - Metaphysics of Morals

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Why does unauthorized publishing, which strikes one even at first glance as unjust, still have an appearance of being rightful? Because on the one hand a book is a corporeal artifact (*opus mechanicum*) that can be reproduced (by someone in legitimate possession of a copy of it), so that there is a right to a thing with regard to it. On the other hand a book is also a mere discourse of the publisher to the public, which the publisher may not repeat publicly without having a mandate from the author to do so (*praestatio operae*), and this is a right against a person. The error consists in mistaking one of these rights for the other

# CORPUS MYSTICUM VS. MECHANICUS



# AND WHAT IF?



# TATTOS AND COPYRIGHT PROTECTION



# USA COPYRIGHT LAWSUIT

## Solid Oak Sketches VS Take-Two Interactive Software



subject of the lawsuit was the game's reproductions of tattoos on the bodies of NBA players LeBron James, Eric Bledsoe and Kenyon Martin

are the tattoos part of the players' personality or, according to general rules, the tattoo artist could claim exclusive rights over the reproduction of his work?

and if any exclusive right is granted, could the tattoo artist interfere with the self-expression of the NBA players?

# USA COPYRIGHT LAWSUIT - decision

## Solid Oak Sketches VS Take-Two Interactive Software



**IMPLIED LICENCE** - those who are tattooed have an implied license to display their tattoos in public and thus the licence was also granted for their necessary reproduction in the game.

**DE MINIMIS USE** – the tattoo reproduction was limited to the initial part of the game in which the character was chosen, and the tattoo was not displayed during the normal phases of the game

**SEPARABILITY** – tattoo artist copyright protection in cases in which the tattoos are featured in ways that are separated from the identity of the person who is tattooed

# ECONOMIC RIGHTS

right of communication  
to the public  
right of distribution  
reproduction  
right  
rental and  
lending right  
right of public  
performance  
and recitation



# MORAL RIGHTS

right to  
paternity  
right of  
integrity  
of the  
publishing  
right

# FOCUS ON MORAL RIGHTS



**protect the non-economic interests of the author**

author personally and they cannot be waived, licensed or assigned.

the right to be identified as the author and to object to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the work, which would be prejudicial to his/her honor or reputation.

the author could also choice to withdraw his/her work from the market whenever serious moral reasons arise. After the death of the author, the moral rights may be asserted, without limitation of time, by his/her heirs. In this context, the heirs are also entitled to publish the unpublished works unless the author has expressly forbidden publication or has entrusted it to other persons

**In US moral rights are not generally granted**

# AUTHORSHIP VS. AUTHENTICATION

The right to be recognized as the author arises from Art. 20 Italian Copyright Law

Art. 23 foresees that heirs shall claim any moral right of the author

Not all moral rights can be claimed by heirs

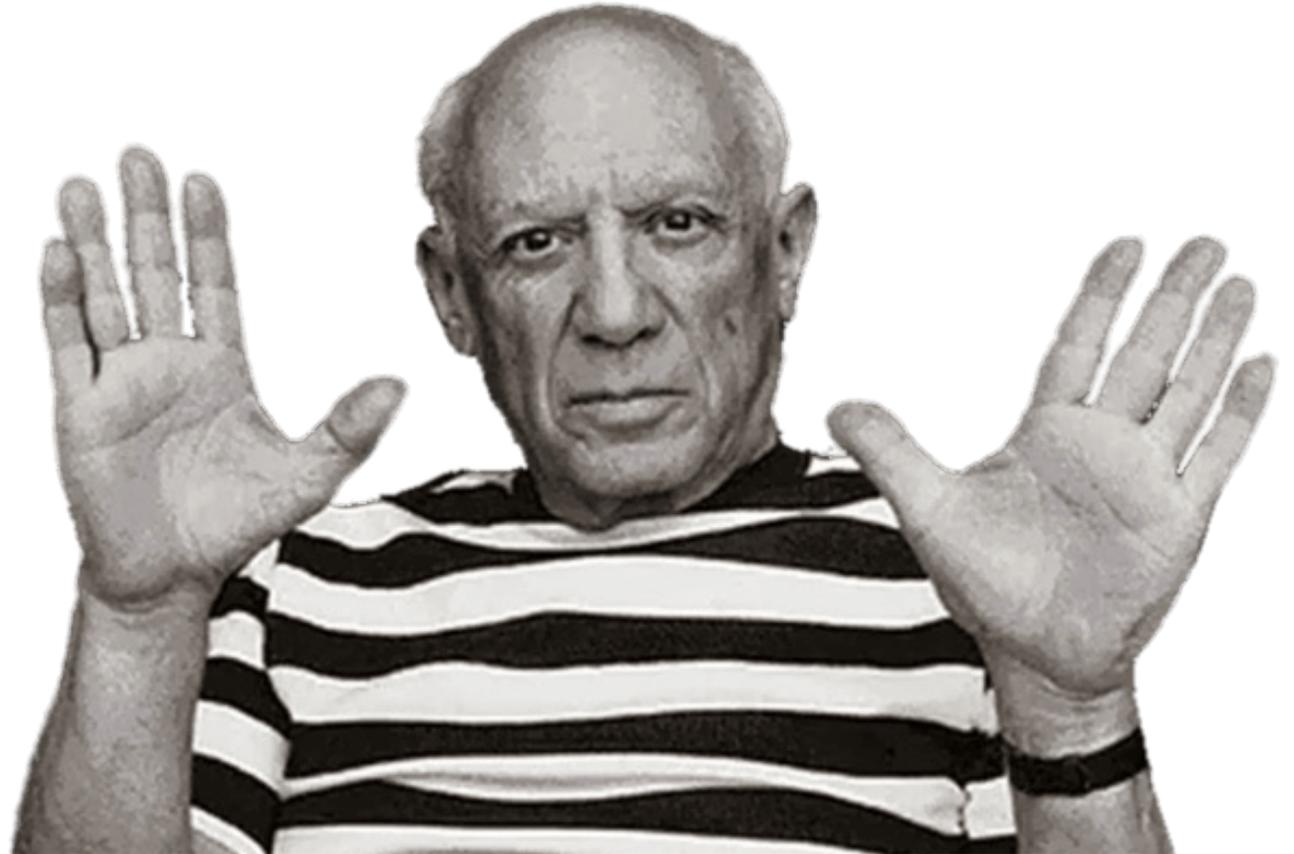
Authentication is a strictly personal claim that should not be claimed by heirs

# PICASSO AND CERTIFICATION OF HIS WORKS

he refused to sign a canvas he knew he had painted, saying, “*I can paint false Picassos just as well as anybody.*”

he refused to sign an authentic painting, explaining to the woman who had brought it to him, “*If I sign it now, I’ll be putting my 1943 signature on a canvas painted in 1922. No, I cannot sign it, madam, I’m sorry*”.

he angrily covered a work brought to him for authentication with so many signatures that he defaced and effectively ruined it.



# PROBLEMS OF AUTHENTICATION

while Picasso's heirs initially established an official committee to authenticate his works, this committee was short-lived and disbanded in large part due to conflicting opinions between Claude and Maya Picasso. Following the committee's disbandment, these two heirs began issuing individual certificates of authenticity independent of one another. For this reason, auction houses began requesting certificates from both heirs, a matter that was easier said than accomplished

# MARIO SCHIFANO CASE – COURT OF ROME LGV

The Court of Rome held that only the author has the right to authenticating his works. His heirs should claim other moral rights (modification, reputation). They might also release opinions but not authentications of Schifano's works.

(Court of Rome, July 19, 2010)



# PRINCIPLE OF «NO FORMALITIES»

Berne  
Convention



***copyright subsists independently of registration***

*the rights granted to creators subsist  
from the time a work is created*

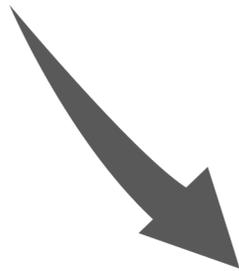


# how can you prove when your work was created?

- 1** register your copyright with national Copyright Offices (e.g. SIAE in Italy) or with a public notary
- 2** use the technique of “**poor man’s copyright**” and send a copy of your own work to yourself

do I need  
to put the  
© notice on  
my works?

including a copyright notice is  
**no longer required**  
for copyright protection,  
but it is a **good idea** to use it



1

© (the letter “c” in a circle)

2

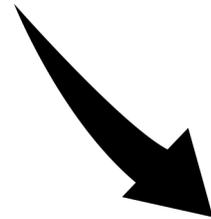
year when the work  
was first published

3

name of the  
copyright owner

**UNPUBLISHED WORKS**  
can they be protected?

**YES!**



**right on**  
**unpublished works**  
**= moral right**

author has the **exclusive right** to decide whether and when to publish his works

# SUBJECT MATTER OF PROTECTION

Perceptible form which excludes mere thoughts and ideas from the copyright protection.

Tangible property in which such expression is embodied is NOT protected by copyright

Works of figurative art and the authors of original manuscripts are also entitled to a royalty on the price of each sale subsequent to the first transfer of the original artwork (the so-called "droit de suite").

# DROIT DE SUITE

The resale right or *droit de suite* is the most important copyright for authors of fine art. Unlike writers and composers who have a regular income from royalties which are due whenever their works are performed or published, artists depend primarily on the selling of original works and, therefore, without the resale right, they would be excluded to benefit from subsequent increase in value of their works.



# GRAPHIC INTERFACE COPYRIGHT PROTECTION ECJ SAYS

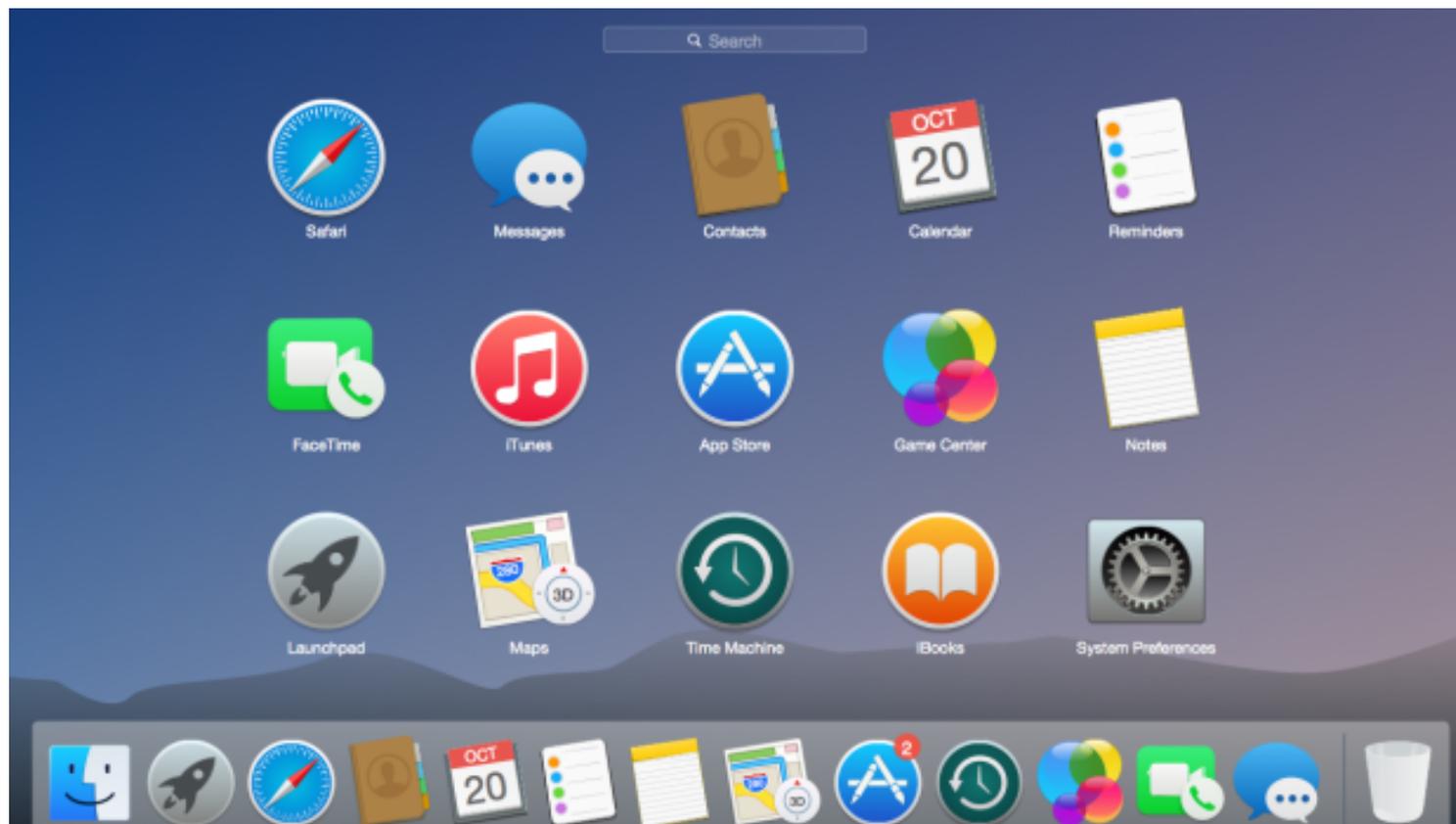
Decision of December 22,  
2010

Case C-393/09

Bezpečnostní softwarová  
asociace – Svaz softwarové  
ochrany

Vs.

Ministerstvo kultury



# BSA CLAIMS

## The Software Alliance

BSA applied before the relevant Czech Ministry of Culture for authorization for the collective administration of copyrights to computer programs of its members, including the **copyright protection of the graphic interface** (para 15)

## BSA

the application was refused since the Copyright Law protects **only the object code and the source code of a computer program**, but not the result of the display of the program on the computer screen (para 18)



# ECJ PRELIMINARY RULING AND LEGAL BACKGROUND

national court asked whether the **graphic user interface** of a computer program is a form of expression of that program and is thus protected by copyright as a computer program (para 28)



within the meaning of Article 1(2) of Directive 91/250



Protection in accordance with the Directive 91/250 shall apply to the expression **in any form of a computer program**

# COMPUTER PROGRAMS AND GRAPHIC INTERFACES – ECJ RULING

## Source code and object code

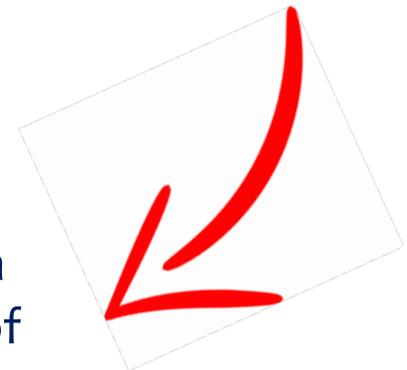
are **forms of expression** thereof which, consequently, are entitled to be protected by copyright as computer programs (para 34)

VS.

## Graphic user interface

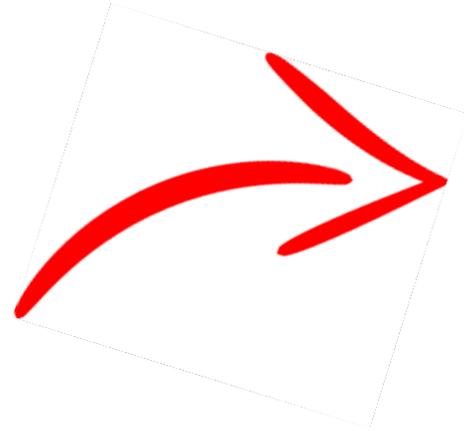
is an interaction interface which **enables communication** between the computer program and the user (para 40)

interface **does not constitute** a form of expression of a computer program within the meaning of Article 1(2) of Directive 91/250 (para 42)



# GRAPHIC INTERFACES COPYRIGHTABLE UNDER DIRECTIVE 2001/29

graphic user interface can, as a work, be protected by **copyright** if it is its author's own intellectual creation under the meaning of directive 2001/29



it must be taken into account, inter alia, about the **specific arrangement or configuration** of all the components which form part of the graphic user interface in order to determine which meet the criterion of originality

**BUT WAIT!  
THERE'S MORE!**

components of the graphic user interface which are differentiated only by their **technical function** should be excluded by copyrightable matters

# INDUSTRIAL DESIGN WORKS

Industrial design works could access copyright protection whether they present creative character and artistic value

Artistic value implies that originality, from an aesthetic point of view, prevails over the functionality of the product and is higher than that of other works on the market, in the consumers' perception

# THE CUMULABILITY OF DESIGN AND COPYRIGHT PROTECTION - THE ECJ RULING

Flos claimed that Semeraro had infringed its copyright on the “Arco” lamp, by importing from China and marketing in Italy a lamp called “Fluida” with aesthetically similar features of the Flos “Arco” lamp.

the ECJ held that national laws (in the specific case, the IPC) cannot refuse copyright protection to designs that, even if entered into the public domain, are eligible for protection (Case C-168/09)



# COURT OF MILAN RULING ABOUT THE ARCO LAMP

the Court of Milan stressed that, based on the ECJ's decision, industrial design works could be protected as copyrighted works regardless of whether they have been previously registered as industrial designs. Indeed, even if, as clarified, Article 17 of Directive 98/71/EC (whose interpretation was at the core of the ECJ's decision) only concerns registered designs, unregistered designs could still be protected under the Copyright Law as far as they are creative (which is a general requirement of all copyrighted works) and have 'inherent artistic value.'

it has been included in several art catalogues and exhibitions as best representative of the Italian design in the postwar period

(Court of Milan, September 12, 2012)



# PANTON CHAIR

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its aesthetic value prevails over functionality

it also anticipated the pop art aesthetic characters of sixties. It has also been included within several art exhibitions.

(Court of Milan, Nov. 28, 2006)



# MOON BOOT COURT OF MILAN JULY 12, 2016

for their particular aesthetic impact they changed the après-ski boots market becoming an icon of the Italian design

they received national and international awards until in 2006 being chosen by the Louvre Museum as one of the 100 most significant symbols of twentieth century international design



# AND HOW ABOUT THE BEAR MADE BY THUN?

artistic value should be assessed on a objective indicators' basis: the recognition of aesthetic and artistic qualities by cultural and institutional environments, the exhibition in shows or museums, the publication in specialized journals, the assignment of awards, the gaining of such a high market value to transcend that linked only to their functionality, or the creation by a well-known artist

(Italian Supreme Court, March 23, 2017, n. 7477)



# ECONOMIC RIGHTS



exploitation of the copyrighted work lasts **70 years** after the death of the author and includes:

**reproduction** in various forms, such as printed publication or sound recording;

**public performance**, such as in a play or musical work;

**recording**, for example, in the form of compact discs or DVDs;

**broadcasting**, by radio, cable or satellite;

**translation** into other languages;

**adaptation**, such as a novel into a film screenplay

# DERIVATIVE WORKS VS. INFRIGEMENT

## Derivative work (legitimate)

expressive creation that includes major copyright-protected elements of an original, previously created first work (the underlying work)

the derivative work becomes a second, separate work independent in form from the first but it does not recall the original one

## Infrigement

use of the same or a similar work in which the personality of the author of the infringed work is recognizable

# PIAGGIO VESPA INFRINGEMENT

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the Court of Turin held that the well-known Vespa enjoys also copyright protection

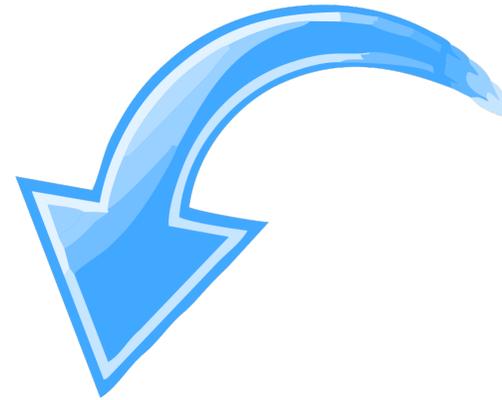
Vespa has been infringed by two Chinese models since they reproduce the essential features that made Vespa's shapes recognizable on the market

(Court of Turin, April 4, 2017 No. 1900/17)



# EXCEPTIONS AND LIMITATIONS

balance between authors' rights and public interests and justified by legitimate reasons



- a. private purposes (i.e. personal use only and not made for profit usually under certain percentage of the work);
- b. benefit of the general public, such as use for public speeches or other public communications;
- c. education and information purposes

# INTERNET SERVICE PROVIDERS

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ISP provides access to copyrighted work throughout the internet

Three different types of ISPs:

- **Mere conduit** (mere transmission of the information; providing access to a communication network)
- **Caching** (automatic, intermediate and temporary storage for the sole purpose of making more efficient the information's onward transmission to other recipients);
- **Hosting** (storage of information provided by a recipient of the service)



# EXCEPTIONS FOR ISPS

in Italy ISP «safe harbours» apply only for compensation of damages but injunctions could be granted



ISPs should be liable only whether some requirement are met (generally the knowledge of the illicit content or whether they have manipulated the infringing content)

- Notice and **take down**
- Notice and **stay down**

# COPYRIGHT LICENSING

according to Article 107 of Italian copyright law, exploitation rights may be acquired, sold or transferred in any manner by the author

in case of agreements not regulated by copyright law, the parties shall analytically indicate which exploitation right is transferred or licensed. Failing to do so, the transfer of one or more copies of the work shall not imply transfer of the exploitation rights.

the transfer of the tangible means on which the copyrighted work is included shall be deemed, in the absence of agreement to the contrary, to include the right to reproduce the work, provided such right belongs to the transferor



**Thank you for your attention!**  
**Next discussion will be on trademarks**

**Alessandro Bura**