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The Protection and Promotion of Intangible Cultural Heritage: The Multilateral System vis-à-vis the Search for an Optimal Balance between the Protection of Cultural Traditional Values and the Creation of Ad Hoc Tools to Guarantee Intellectual Property Rights*

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Abstract: The promotion of the values and traditions enshrined in the national cultural heritage is always based on the recognition of the ideas that stand behind the realization of a cultural good, the features of its artistic creation, the significance of practical productive methodologies which contributed in last centuries to the appreciation and the credits acknowledged to our relevant artists, architects, designers and culture managers. Improvement of basic industrial knowledge and the development of relevant inventions in the main multilateral systems at the global and regional level, completed by a reference to the Italian Country-system, is explored in this paper to investigate the complexity of the compliance with international and European norms to protect out intangible heritage and, in particular, to strengthen the value of Italian industrial cultural goods combining factors such as culture, creativity and knowledge economy.

Key words: intangible heritage; intellectual property law rights; patents, trademarks and copyright; industrial design; Italian case

JEL codes: K110; K33

1. Introduction

The promotion and devolution of values and traditions formally and substantially enshrined within a national cultural heritage is always based on the recognition of the ideas that stand behind the realization of a cultural good, the features of its artistic creation, the significance of practical productive methodologies which contributed in last centuries to the appreciation and the credits acknowledged to our relevant artists, architects, designers and cultural managers.

Along these lines not only the Italian manufactures showing the ancient roots of our populations and the

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beauty of artistic products, but also the intangible cultural heritage that lead in the 19th century to the improvement of basic industrial knowledge as well as to the development of relevant inventions to be used in the daily work of primary sectors of the Country-system need to be explored in the following conceptual perspective.

2. The Legal Definition of Intangible Cultural Heritage and the Preliminary Relationship with Intellectual Property Law Rights

The definition of the legal concept of intangible cultural heritage was firstly introduced in the UNESCO Convention adopted and opened to signature in 2003. It covers "practices, representations, expressions, knowledge and skills — as well as the instruments, objects, artifacts and cultural spaces associated therewith — recognized by communities, groups and individuals as part of their cultural heritage and transmitted from generation to generation" (Art. 2§1) and is perceived as the sum of living components that are at the core of the feelings of identity and continuity of a community in relation to its origins and traditions and at the same time to the intentional and targeted promotion of creativity and well-being in the management of the natural and social environment to create economic growth and opportunities for all. An in-depth definition of this cultural heritage by categorization is also provided for in the same provision with reference to: "(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship" (Art. 2§2). Intangible cultural heritage indeed, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. State Parties of the Convention are requested to safeguard this kind of heritage through its identification, documentation, research, preservation, protection, promotion, enhancement, transmission and revitalization and so far to amend and complete cultural policies and legislations, to redesign institutional infrastructures, to develop inventory methods to better protect the intangible cultural heritage. If the domestic safeguarding mainly consists of drawing up one or more inventories of the intangible cultural heritage present in the national territory as well as to regularly update them (Art. 12), among the other measures for safeguarding the commitment upon State Parties is envisaged that one to "(c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage […]" (Art. 13). These efforts should be completed by the adoption of further measures to be promoted to safeguard the intangible cultural heritage at the international level.

At the same time the topic under consideration entails to deserve attention also to brands and patents of cultural objects by mentioning other relevant legal instruments aimed at protecting the intellectual property rights on inventions, mainly used in the last century for the launch of the post-second world war development process in many Countries trying to rebuild their war-torn economies.

It is clear that copyright and neighboring rights protection has been in past decades and is essential today for enhancing individual creativity, for the development of cultural industries and the promotion of cultural diversity. For this reason UNESCO adopted in 1952 the Universal Copyright Convention to ensure general respect for copyright in all fields of creation and from cultural industries — those ones (in the letter of the Convention) that combine the creation, production and commercialization of content which is intangible and cultural in its essence. To this scope the Convention provides for an "adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and

cinematographic works, and paintings, engravings and sculpture" (Art. I) and "The term of protection for works protected under this Convention shall not be less than the life of the author and twenty-five years after his death" (Art. IV§2.a), the protection comprising "basic rights ensuring the author's economic interests, including the exclusive- right to authorize reproduction by any means, public performance and broadcasting either in their original form or in any form recognizably derived from the original" (Art. IV bis).

Also in contemporary times States Parties continue to implement the Convention in a double effort: to ensure a balanced approach between the interests of authors of inventions and the interest of the public to access to knowledge and information, more and more developed in a digital environment, and to counteract piracy that poses a serious threat to each concerned country's cultural and economic development.

3. The Protection of Intangible Cultural Heritage in an Economic and Trade Perspective

In another legal environment such as the World Trade Organization the intellectual property rights have assumed specific relevance in the 20th century and were mainly divided into the following two main categories: the rights of authors and the rights of performers. Moreover they are linked with the "industrial property" concept, which includes the protection of distinctive signs, in particular trademarks and geographical indications, as well as other activities — such as inventions, industrial designs and trade secrets — aimed at stimulating innovation, design and the creation of technology and in need to be properly protected because they represents for many WTO Member States an incentive for the development and the transfer of technology in the form of foreign direct investment, joint ventures and licensing.

Assumed that ideas and knowledge have been considered as an important means for the global trade, the Organization decided to elaborate and adopt internationally-agreed trade rules for intellectual property rights disciplined in the TRIPS Agreement, entered into force after the institutional creation of WTO in 1995. By codifying common rules in this field the international community as a whole has benefitted from the economic, legal and social consequences deriving from this new legal setting, encouraging and protecting creation and invention. In particular the Agreement embraces the following key areas of action: the implementation of basic principles of the trading systems and other international intellectual property agreements; the protection of intellectual property rights; adequate enforcement of intellectual property rights at the domestic level; dispute settlement on intellectual property between WTO Member States; the adoption of special transitional arrangements during the period of introduction of the new system.

Moreover the Agreement is perfectly in line with other international legal instruments in force within the World Intellectual Property Organization such as the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, focused respectively on patents and industrial design products and on copyright. But the TRIPS Agreement tried to reinforce the standards introduced in the above mentioned Conventions, setting up very clearly the following areas of action starting from a plain distinction of categories: on one side patents, industrial designs, integrated circuit designs, geographical indications and trademarks have to be registered in order to receive protection and this procedure entails a public and comprehensive description of what is being protected — the invention, design, brand-name, logo, etc. On the other side copyright and trade secrets are protected automatically according to specified conditions and do not have to be registered.

With regard to the first category the protection of intellectual property rights is strongly linked with the

opportunity to stimulate creativity and inventiveness so that society could benefit from new or improved products, services or creative works.

This primary consideration lies on the access and use of knowledge as a public good, above all when the stimulus is directed towards private actors being attracted to invest out of the traditional perspective based only on recovering the costs of their investment and on capturing economic advantages. This attraction is represented by the social benefit of the creation itself, with an highest level of protection limiting its use, reproduction and distribution within a predetermined period of time. So far the producers could control the market and fix the price of their creations in compliance with and benefitting from competition rules, opening investment opportunities to all the players respecting these rules and empowering the legal burden of intellectual property rights: this is the positive linkage between economic and legal components foreseen in the TRIPS Agreement in the long run.

At the same time the complementary main purpose of WTO legal regime is that one to ensure the integrity of the market by correcting information asymmetries between buyers and sellers of a good or service by granting its true origin and high level quality through trademarks. This entails double beneficial effects in favour of consumers' experience and knowledge and producers' reputation and further investments.

As far as the legal component the TRIPS Agreement provides for a patent protection for inventions lasting for at least 20 years and covers all the fields in which technological objects are produced, providing also for the exception to "issue compulsory licenses" allowing a competitor to produce the product or use the process under license. As it concerns undisclosed information and trade secrets, in particular being of a relevant commercial value, they must be protected against breach of confidence and other acts contrary to honest commercial practices. In relation to trademarks a list of signs to be eligible for protection and the definition of minimum rights conferred on their owners have been set down. Moreover trademarks that have become well-known in a particular Country enjoy additional protection. The time limit of at least 10 years has been fixed to protect industrial designs and proper measures to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design have been created in favour of owners.

Besides these standards the TRIPS Agreement deals with the license issuing from the owner to other person who wants to produce or copy the protected trademark, work, invention, design, etc. in a competitive trade market and, in recommending States Parties to implement its provisions, it settles strict rules to contrast willful trademark counterfeiting or copyright piracy on a commercial scale to be considered as criminal offences.

4. The Search for a Good Balance to Protect Intangible Cultural Heritage and Intellectual Property Law Rights

As far as the international legal framework considered as a contained regime per se, the protection of intellectual property rights is envisaged within the World Intellectual Property Organization through the above mentioned Paris Convention for the Protection of Industrial Property and Berne Convention for the Protection of Literary and Artistic Works, on patents and industrial design products and on copyright respectively.

On a more general note WIPO moves from a comprehensive definition of the good under protection in relation to its historical, social, cultural and economic function: it is based on the traditional feature as fundamental characteristic of knowledge (skills and know-how) and symbolic expression (design, appearance and style, also including forms of oral and material expression) of handicrafts. The prevention of misuse, misappropriation and illegal exploitation of traditional handicrafts is at the core of the negotiations of WIPO Conventions to protect their

reputation (style, origin, quality), their external appearance (shape and design) and their know-how (skills and knowledge) in the market place through ad hoc legal regimes concerning respectively patents, copyright or industrial designs and trademarks.

Patents rights usually allow the owner to prevent others from productive process and related commercial use of the invention for a predetermined period of time (at least 20 years), including any confidential information over these issues to be legally considered as a trade secret. Copyright law gives the owner exclusive rights to receive financial benefits from the commercialization of the good for a long period of time (plus than 50 years) avoiding its unauthorized reproduction and adaptation. When these rights are claimed on the shape, the patterns, the lines and colors of a good, design protection is granted for usually up to 25 years following its registration. Finally the use of a distinctive sign to distinguish the good in the trade market from identical or similar competitive products gives the owner an economic advantage and the consumer the opportunity to recognize its authentic, unique cultural and commercial value.

Along these premises the Organization launched and completed negotiations aimed at adopting and implementing several multilateral legal instruments in this field.

The Patent Cooperation Treaty (PCT) grants international patent protection on inventions worldwide by filing a single “international” and national patent application, under the control of the international bodies and national or regional patent Offices, turning on a so called standard international search to prevent and certificate the potential patentability of the invention.

The above mentioned Paris Convention for the Protection of Industrial Property, as amended in 1979, creating the Paris Union and establishing ad hoc bodies to monitor its implementation, entails the widest protection of industrial property in relation to patents, industrial designs, trademarks, utility models (a kind of “small-scale patent” provided for by the domestic legislations of some countries), service marks, trade names (designations under which an industrial or commercial activity is carried out), geographical indications and the repression of unfair competition. The Convention provides for three different levels of protection: the national treatment clause, by which each Contracting Party must grant the same protection to nationals of other Contracting States that it grants to its own nationals; the right of priority in the case of patents, marks and industrial designs, granted for a certain period of time (6-12 months) to applicants in one Contracting Party also for protection in any of the other Contracting Parties; the establishment of common rules as far as, for example, the granting of patents — included specific exemptions concerning compulsory licenses — and the filing and registration of marks in each Contracting Party — included refusal only in some exceptional circumstances in compliance with the claim for a fair and correct protection.

As it concerns the Berne Convention for the Protection of Literary and Artistic Works, also amended in 1979 and under monitoring of specific competent bodies, it provides for the protection of works and the rights of their authors until the expiration of the 50th year after the author’s death on the base of three key principles: the above explained national treatment; the automatic protection, that must not be conditional upon compliance with any formality; the independence of the protection, beyond the existence of protection in the country of origin of the work. The Convention also deals with minimum standards of protection rules with reference to the kind of product (“every production in the literary, scientific and artistic domain, whatever the mode or form of its expression”, art. 2§1), the so called exclusive rights of authorization (the right to translate, the right to make adaptations and arrangements of the work, the right to perform in public dramatic, dramatic-musical and musical works, the right

to recite literary works in public**,** the right to communicate to the public the performance of such works, the right to broadcast, the right to make reproductions in any manner or form, the right to use the work as a basis for an audiovisual work**,** and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work). Moreover the Convention includes provisions to introduce moral and economic components in the protection of literary and artistic works: the first consists of the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honor or reputation, while the second creates exceptions in using protected works without the authorization of the owner of the copyright and without payment of compensation.

WIPO established also an international trademark system (the Madrid System) to centralize registration and management of marks by filing one application and paying the related fee costs through national or regional offices and obtaining so far a global protection in a globalized market by enlisting the products in an international register for at least 10 years.

With particular attention to the international design a proper system has been also created (the Hague System) for the international registration of industrial designs according to the provisions of the Hague Agreement Concerning the International Registration of Industrial Designs (composed of the following relevant legal instruments: the London Act of June 2, 1934, the Hague Act of November 28, 1960, the Additional Act of Monaco of November 18, 1961, the Complementary Act of Stockholm of July 14, 1967 as amended on September 28, 1979, the Geneva Act of July 2, 1999, the Agreed Statements by the Diplomatic Conference regarding the Geneva Act and the Regulations under the Geneva Act). In compliance with the regulations of this System the protection of industrial designs is granted by means of a *single* international application filed with the WIPO International Bureau. In respect of basic common requirements the applicant will obtain directly international protection by paying some standard fees, subjected to potential refusal, followed by a practical control by the competent authorities of the concerned Contracting Party for at least 5 years (renewable).

With respect to the above described international legal framework, Italy — as Country marked by a significant historical industrial tradition and by the involvement of several technical and design components for the creation of innovative objects of outstanding importance — has strongly contributed to the elaboration of the relevant above mentioned UNESCO and WIPO Conventions: the first two ones were ratified by Italy respectively by Law No. 399 of 20 June 1978 and Law No. 167 of 27 September 2007. At the same time in WIPO legal framework Italy ratified the Patent Cooperation Treaty on December 28, 1984 and it entered into force on March 28, 1985; as far as the Paris Convention for the Protection of Industrial Property it was ratified originally on June 6 1884, entering into force on July 7 1884; the Berne Convention for the Protection of Literary and Artistic Works was ratified on September 5 1887 and entered into force on December 5, 1887; Italy acceded to the Hague System on May 11, 1987 and it entered into force on June 13, 1987. Moreover our Country is committed to the implementation of the TRIPS Agreement, also for the preservation of its cultural intangible heritage and the pursue of new economic challenges for our trademarks, patents and industrial property.

5. The European Legal Framework and Its Programming Measures to Protect Intangible Cultural Heritage and Intellectual Property Law Rights

Furthermore only in recent times at the national and European level, in compliance with the legal contents of

several conventional instruments adopted within the international legal framework, both public and private entities and associations took on board the opportunity to preserve and to strengthen the value of this kind of cultural goods due to their historical and artistic value.

Within the EU the Member States are responsible for their own cultural heritage policy, so far supporting at the regional level the planning and implementation of policies, programmes and funding in compliance with Art. 3 TEU and Art. 167 TFEU to preserve and promote cultural heritage as a whole.

As it concerns specifically the protection of intellectual property it must be said that it is considered at the core of the Single Market policy as a tool to promote innovation and creativity, to support investments, to develop employment opportunities and to improve competitiveness in the European market and abroad. It is based on three main categories: industrial property, covering inventions (patents), trademarks, industrial designs, new varieties of plants and geographic indications of origin; the artistic work protected by copyright, including original literary and artistic works, music, television broadcasting, software, databases, architectural designs, advertising creations and multimedia; commercial strategies, comprising trade secrets, know-how, confidentiality agreements, or rapid production.

Even if the protection of intellectual property rights is under the competence of EU Members' national authorities the European institutions are at work to harmonize domestic legislations in force relating to industrial property rights to avoid internal trade barriers and to create efficient EU-wide systems for the protection of such rights. At the same time they are committed to counteract piracy and counterfeiting so that companies could access and use intellectual property rights more effectively.

On a general note with a view to offer incentives for EU companies to invest in the provision of goods and services with high standards of quality, innovation, design and creativity, a comprehensive strategy has been launched in 2011 by the EU Commission in its Communication "A single market for intellectual property rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe", to strengthen the legal framework in force protecting intellectual property rights by balancing creation and innovation, ensuring reward and investment for creators, and promoting the widest possible access to protected goods and services.

In the meanwhile an efficient and effective enforcement of intellectual property rights had been pursued to prevent their infringement by the adoption of the concerned Directive in April 2004, with reference to copyright and related rights, trademarks, designs or patents, requiring all EU Member States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy. Along these lines the Communication "Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan" has been adopted by the EU Commission in July 2014 asking for better compliance with intellectual property rights by all economic actors, so far depriving commercial scale infringers of the revenue flows that draw them into such activities.

As it concerns the above mentioned three categories, the following features have been introduced within the EU legal framework with a view to promote economic development and investments across Member States.

Patent give a legal title to inventors if the technical innovation is original and could be applied in the industrial field in terms of creation procedures and use of materials. Obtaining this title makes it possible for the owner of the invention to have the right to prevent others from making, using or selling the invention out of any kind of permission. If the inventor works for a company, the level of protection encourages also proper

investments in innovation, research and development, completed by the dissemination of scientific results and economic impact of the patent in the European trade market.

Moving from the adoption of the Convention on the Grant of European Patents on 5 October 1973, as revised in 1991 and in 2000, the release of a cost-saving, efficient unitary patent protection is granted both at the national and European level, the European Patent Office being in charge for the release of EU patents. Due to the use of an utility model, which is under monitoring of the EU Commission to study the economic impact descending from its uniform implementation across the European territory, the possibility to extend a patent right is provided for by the adoption of supplementary protection certificates or through the enhancement of patent valorization and exploitation above all for small and medium-sized companies suffering from scarce awareness on legal aspects of patents release and high transaction costs related to industrial innovations.

Similar considerations concern the trademarks' protection in the EU system, based on the complementary national and EU registration of a trademark distinguishing good and services of each company by words, logos, devices or any kind of distinctive feature. In other terms trademarks represent the very innovative essence of a company and their effectiveness could be tested through the production improvement, the investments in research, the practical impact on employment opportunities and access to work.

Starting from the first comprehensive harmonization of the trademarks' protection in 1989, completed by the creation of the EU trademark in 1994, a reform was launched in 2009 by the EU Commission to modernize and simplify the access to trademarks' registration and the cost-efficiency of this legal title, in particular in favour of small and medium-sized companies. The political results of this process are contained in an ad hoc agreement reached by the EU Commission, the Council and the European Parliament in April 2015.

The chance to harmonize industrial design as well as trade secret protection is the last EU working area demanding for an unitary approach on ordinary attributes of a product such as its shape, colours or materials, so far impacting on the competitiveness of companies and producers to match the desires of consumers. The adoption in 1998 of EU Directive 98/71/EC on the legal protection of designs represents the first step in the definition of the European legal framework on design protection for all the rights holders, followed by the Regulation No. 6/2002 to ensure the free movement of design goods in the EU Single Market only if registered at the Office for Harmonization of the Internal Market (OHIM).

After the registration original and individual designs are put under an exclusive protection so that they could be used only by the designers for up to 25 years, avoiding any other deliberate use from a third party.

Two further steps have been recently launched to reinforce the legal framework in force: in 2007 the European Union acceded to the WIPO Hague Agreement on the international registration of industrial designs, so far favouring EU companies in protecting their design products in a clearer, easier and low-costly way. In 2014 a comprehensive evaluation process on the functioning of the design protection system started under the competence of the EU Commission to be concluded in 2016: this exercise is focused on the value of the industrial design protection as a tool impacting on the economic development of concerned EU companies.

6. The Italian Case: Ad Hoc Tools to Strengthen the Relationship between Intangible Cultural Heritage and Intellectual Property Law Rights

To show how factors such as culture, creativity and knowledge economy are strongly interrelated not only at the international and European level but also at the national level, the Italian case need to be further explored to

this scope by introducing the good practice carried out by the National Central Archives in Rome: it consists of the creation of a huge database of documents and images that witness the creativity and the willpower to move from the past to launch a new phase for the development of inventions in Italy using all the available technologies (http://dati.acs.beniculturali.it/).

Beyond the conceptual vision of the issue and the related elaboration of proper legislation to protect our cultural intangible heritage, this experience proves the intrinsic value of a practical approach to protect brands and patents moving from the recognition of domestic heritage.

The idea to launch this project in 2009 was co-conceived by the National Central Archive and the General Directorate for the Archives of the Italian Ministry of Cultural Goods and Policies, with the involvement of the Consortium BAICR Sistema Cultura and other relevant partners (i.e., Confindustria, Museimpresa, Bocconi, Istituto dell'Enciclopedia Italiana and about 30 Foundations of Historical Archives of some Italian Companies — http://151.12.58.182/marchi/local/).[1]

The main target of this significant good practice both at the national and European level has been the creation of a digital platform of official documents, advertising graphics and photos of our companies trademarks and patents coming from the Italian Offices for Trademarks and Patents of the former Ministry of the Industry, Trade and Manufacture: about 172.000 files were submitted from 1867 to 1965 by Italian companies and individuals to demand for the protection of their inventions.

Companies trademarks and patents, inventions and manufacturing models representing the combination of scientific knowledge, technical development and artistic value within the manufacturing process, encompassing the creativity and the communication to promote the cultural object in the trade market have represented the foundation of the Italian brand worldwide since the last century.

Having access to this digital platform it is possible to explore the contents of the website of Companies Archives (questioning by keywords general and territorial chronology, actors, thematic paths, companies, gallery, library, news): the project has aimed so far to safeguard the Archives of plenty of Italian public and private companies and to promote research opportunities and paths in this area (www.imprese.san.beniculturali.it).

Along the lines of this successful best practice, the future challenge in this field is to facilitate the linkage between public institutions and private entities (collectors, museums, local industries) to support the creativity, the diversity, the well known quality of our industries at the global level, by starting from their cultural traditions, towards a rebirth of their heritage contributing to the increase of their volume of international trade as well as confirming the extraordinary value of our cultural intangible heritage composed of thousand and thousand of trademarks and patents proving the best examples of creativity, manufacture and design of our Country.

To this scope Museimpresa, the Italian Association of the Companies Archives and Museums, born in 2001 from a common idea of Assolombarda and Confidustria, started working in the new century to encourage dialogue and common actions of companies that intend to preserve their cultural heritage according to determined high qualitative standards and guidelines (http://www.museimpresa.com/).

The Companies Archives and Museums are institutions which are linked to the economic activity of a company or a district with the support of the own local community. The heritage of each Archive or Museum could be composed of several materials: technical, administrative, commercial documents, graphics, products and machineries, in a *continuum* that confirms the evolution of the productive goals and methodologies of a huge

[1] For more information please refer to: http://www.museimpresa.com/.

number of Italian companies representing the best made in Italy products — design, food, fashion, vehicles. The project constitutes also an opportunity to promote research and analysis, training of professionals, exchange of information and good practices, involvement and financial support from public and private stakeholders, at the national and international level.

The two above illustrated best practices confirm that only with the contribution from public and private actors together not only the need to recognize the original and innovative traditions supporting the economic progress of our Country could be accomplished, but also the idea that moving from the past the need to continue to collect ideas and the realization of inventions must be also ensured.

In other words, in particular for Italy, the establishment of individual or collective experiences, mainly at the local level, to disseminate our cultural treasure and to encourage the access to collections to the public at large is one of the basic challenges to trace the linkage with the past, to protect our intangible and tangible cultural heritage and to promote new economic opportunities while properly preserving the intellectual property rights of the Italian Companies trademarks, patents and inventions.

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