CHAPTER FOUR

SEX AND PROPERTY RIGHTS

The analysis of the validity of contracts concerning the transfer of goods of a sexual nature brings us to a question that can be considered paramount, that is, the ownership of such entities and the possibility to assert property rights over them.

a. Property of obscene objects

It would appear reasonable to assume that if one can legitimately own “sexual goods” one can legitimately transfer them.\(^1\) We shall set aside the issue of property rights of one’s own sexual features, which will be discussed further on in Chapter 7.

Apparently with regard to material objects there seems to be a distinction between individual ownership of them, and the possibility to trade them. Whilst for the former there are no bans, nor any case law stating that these objects cannot be owned, for the latter, administrative regulations prevail establishing when, where and how such a trade may be run.

The validity of the contract between two individuals depends instead on the interpretation one gives to the general ban on immoral contracts which has been discussed in Chapter 3.

We are therefore in front of rather peculiar property rights: one can own and use an object and be protected in one’s right by the ordinary remedies of the law (restitution or damages), but one may not, altogether or under severe limitations, transfer that object by contract. The conclusion however is not surprising.

There are many other objects – e.g. works of art, buildings, environmentally protected land – that may be owned but not transferred unless there is compliance with strict regulations. The justifications which are given are all posited in public policy and are meant to protect the general interest.

In the case of property over sexual goods, the ban on transfer – because the contract is immoral – is justified on the basis of public morality. Applying the

principle of proportionality it is, however, difficult to understand how the prohibition of transfer from one individual to another on a non-professional basis could promote the values underlying the public morality principle.

This is a further reason for reconsidering the foundation and the scope of the immorality rule applied to contracts.

The issue gets more complicated when one is confronted with property rights over non-material entities.

b. Copyright

Can one assert copyright over an obscene work of art? In this regard, the first question which arises is if the author can claim rights over the result of his intellectual effort and can invoke the full protection of the law. Copyright laws do not contain express provisions banning from their scope works that are deemed immoral. Therefore, whether it be Gustave Courbet’s *L’origine du monde* (which finally has found its place in the Quay d’Orsay museum) or a lewd hardcore film, the creation of the work entitles the author to the protection of the law.

Following this line, limitations to the right to reproduce, represent and disseminate the work come after the work has been created and are justified by reasons of public policy, mostly laws against obscenity.

Similarly, a parallel issue is with works where the content is considered illegal for its subversive or criminal expression (a pamphlet advocating the extermination of a race, a handbook on how to organize a terrorist attack et cetera).

It is a crime to disseminate such works, but copyright is not questioned. And one can find an analogy with the rights over Adolf Hitler’s writings, which were not declared as non-existing, but were confiscated by the Allies and transferred to the Land of Bavaria, which now holds them.

There is, however, a different approach which has found the approval of the courts. There can be no right over obscene works, and therefore the author cannot invoke the protection of the law.

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2 See, for the US, *Jartech v. Clancy*, 666 F.2d 403 (1982) (“There is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work. The gravity and immensity of the problems, theological, philosophical, economic and scientific that would confront a court if this view were adopted are staggering to contemplate. It is surely not a task lightly to be assumed, and we decline the invitation to assume it.”)

3 For the adventurous history of this scandalous painting, created in 1866, see Savatier, *L’Origine du monde. Histoire d’un tableau de Gustave Courbet*, Bartillat, Paris 2006.


5 There is a long list of English cases dating back to the beginning of the 19th Century, and stretching well into the 20th: In *Southey v. Sherwood*, 35 Eng. Rep. 1006 (1817) (a case of an