The Role of Images and Artworks in Everyday Roman Life as Reflected in the Sources of Roman Law

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Introduction

Classical Roman law (from the late first cent. BCE to the third cent. CE) had few rules that applied on images or other artworks as such: The artistic value of a painting became a *ratio decidendi* at times during the long discussions about the *tabula picta*; a particular legal regime was developed for imperial images and statues which consequently turned them into places of asylum. In addition to these special cases various kinds of artefacts appear in legal texts. However, most discussions are related to images or art only by the accidental facts of the individual cases decided and documented by Roman jurists. For the concrete solutions the artistic character of an object as such was marginal.

The number of texts involving artworks of all kinds is quite substantial; their legal problems come from almost all areas of Roman private law. Therefore their special historical value mostly lies in the many scattered factual details they preserve: They contain pieces of information on the place of artworks in Roman life, the art market, the producers of art, etc., of which only a few selected examples can be presented in this context.[1]

[1] On art in Roman legal sources see VISKY 1971, LUCREZI 1984, HORAK 1987, WILLVONSEDER 2006, and PLISECKA 2011; on its social dimensions see, e.g., CLARKE 2004 and STEWART 2008.

Powers of images

A text by late second/early third century jurist Paulus conserves an interesting reflection about the nature and purposes of portraits (*imagines*), occasioned by a strange case:[2] A person's remains had been buried in two places on estates of different owners. The jurist had to determine which was the person's grave (*sepulchrum*) in the legal sense.

A grave was considered *locus religiosus* (dedicated/belonging to the gods of the underworld) and could neither be privately owned nor sold; in addition the owner had to tolerate access to it (*iter ad sepulchrum*). These legal consequences threatened to devaluate the land which would become the site of the grave.[3] Therefore Paulus was asked for his opinion in this special situation.

A grave's function was, according to the late classical jurist Herennius Modestinus, to maintain the visible memory of a person's existence (*memoria humanae condicionis*).[4]

For Paulus, a person could only have one burial (*una sepultura*) and consequently one grave. From a practical viewpoint his decision for the resting-place of the head was impeccable: It relied on a nearly self-evident criterion which remained applicable irrespectively of the number of potential graves. And it did not necessitate impious investigations to find out where more parts of the corpse had been deposited.[5]

In the final part (*cuius imago – religiosus esse*) Paulus substantiated his view about the head being the most important part of a body/corpse (*principale*) by pointing to the commemorative functions of an *imago*: The head was the *principale* because it could be

[2] D. 11,7,44 (Paul. 3 quaest.) *Cum in diversis locis sepultum est, uterque quidem locus religiosus non fit, quia una sepultura plura sepulchra efficere non potest: mihi autem videtur illum religiosum esse, ubi quod est principale conditum est, id est caput, cuius imago fit, inde cognoscimur.* […] ("When a burial has been performed in more than one place, the places are not both made religious, because one burial cannot produce more than one tomb. In my opinion, the place which is religious is the one where the most important part of us is buried, that is, the head from which images are made, by which we are recognized. […]" – translation WATSON 1985).

[3] D. 1,8,6,2 and 4 (Marcian. 3 inst.); D. 18,1,4 and 6 pr. (Pomp. 9 Sab.); D. 11,7,12 pr. (Ulp. 25 ed.).

[4] In D. 28,7,27 pr. (Mod. 8 resp.) he lauds the heir for disregarding the testator's wish to throw his remains into the sea ([…] *laudandus est magis quam accusandus heres, qui reliquias testatoris non in mare secundum ipsius voluntatem abiecit, sed memoria humanae condicionis sepulturae tradidit.* […]).

[5] A special burial of the head is recorded for P. Quinctilius Varus (Vel. Pat. 119,5) and possibly the same happened in the case of Cn. Pompeius (Plut. Pomp. 80,6).

reproduced in the *imago* which then allowed the identification of the deceased *post mortem*. This allowed the ancestors to be visibly present during a burial and to guide a dead upper class Roman to the other world when their funerary masks/*imagines* were carried in the *pompa funebris* or worn by actors or family members at this occasion.[6] Because of the special commemorative finctions of such images an attack against an image positioned on a grave could be understood as an insult against the represented: If a commemorative statue was intentionally hit with a stone, the early first century jurist Antistius Labeo gave an *actio iniuriarum* (the action for insult) and not the *actio sepulchri violati* (the action for the violation of a grave).[7]

Images of power: Imperial statues

In the case of the Roman emperors, the identification of statues[8] with the portrayed turned them into places of asylum.[9] Imperial images officially represented the emperors throughout the empire. Therfore imperial statues (and images on coins etc.) deserved special respect and since Tiberius' reign prosecutions for *crimen laesae maiestatis*[10] were instituted for disrespectful acts against or in the vicinity of imperial images.[11] The respect for the emperor prohibited among other acts also the seizure of persons who took refuge at his statues or visibly carried imperial images in public.[12] Ignoring such an ostentatious appeal to the emperor could be understood as an instance of *crimen laesae maiestatis* and lead to prosecutions that especially members of the senatorial order tried to avoid. As a consequence, persons of low rank in need of protection,[13] especially

[6] GRAEN 2011, 51.
[7] D. 47,10,27 (Paul. 27 ed.). The inevitable difference to *iniuria* against a living person was that the son filed the claim as an indirect victim; see GUERRERO LEBRÓN 2005, 123 s.
[8] On the legal position of statues see ROLLIN 1979.
[9] GAMAUF 1999; DERLIEN, 2003, p.229-334; OSABA 2007.
[10] D. 48,4,5,2 (Marcian. 5 reg.); D. 48,4,6 (Ven. Sat. 2 iud. publ.); D. 48,4,7,4 (Mod. 12 pand.).
[11] GAMAUF 2003.
[12] Tac. Ann. 3,36; D. 47,10,38 (Scaev. 4 reg); D. 48,19,28,7 (Call. 6 cogn.).
[13] Abuse was punishable: D. 48,19,28,7 (Call. 6 cogn.); D. 47,10,38 (Scaev. 4 reg); D.47,11,5 (Ulp. 5 off. proc.).

slaves, could rely on the emperors' protection and by fleeing to a statue gain protection through the intervention of a public official in cases of mistreatment by their masters.[14]

Law pour l'art: *Tabula picta*

With regard to the so-called *tabula picta* some jurists considered the intrinsic value of art as a relevant factor for deciding its ownership. The problem referred to as *tabula picta* arose when a painting was made onto the panel of another.[15] Under the general rule *accessio cedit principali* applicable in such case, the painting as an accessory should have belonged to the owner of the panel which was the principal thing; the panel owner should have been treated no different from the owner of a piece of papyrus who acquired golden letters written on it.[16] However, for the *tabula picta* the mid second century jurist Gaius disapprovingly[17] noted the – in his opinion unwarranted – reversal of the rule: *dicitur tabulam picturae cedere.*[18] A generation later, Paulus treated the *tabula picta* like a regular case of *accessio* but he added that some jurists had decided otherwise in the past because of the value of the painting – *propter pretium picturae.*[19] This view then prevailed[20] until Justinian endorsed the contrary position in his

[14] Gai. inst. 1,53 = D. 1,6,1,2 = IJ. 1,8,2; D. 1,6,2 (Ulp. 8 off. proc.) = Coll. 3,3.
[15] MADERO 2004; PLISECKA 2011; LEESEN 2012.
[16] D. 41,1,9,1 (Gai. 2 rer. cott.).
[17] The *actio utilis* which he granted to the former owner of the panel reversed the decision.
[18] Gai. 2,78: *Sed si in tabula mea aliquis pinxerit veluti imaginem, contra probatur: magis enim dicitur tabulam picturae cedere. cuius diversitatis vix idonea ratio redditur.* […] ("But if someone has painted something on my board, such as a portrait, the opposite rule holds; the preferred view is that the tablet accedes to the painting. The reason given for this difference is scarcely adequate. […]" – translation GORDON/ROBINSON 1988)
D. 41,1,9,2 (Gai. 2 rer. cott.) *Sed non uti litterae chartis membranisve cedunt, ita solent picturae tabulis cedere, sed ex diverso placuit tabulas picturae cedere.* [...] ("Pictures do not accede to the tablets on which they are painted in the same way as writing to paper or parchment. On the contrary, the view established itself that the tablet accedes to the picture." – translation WATSON 1985)
[19] D. 6,1,23,3 (Paul. 21 ed) *Sed et id, quod in charta mea scribitur aut in tabula pingitur, statim meum fit: licet de pictura quidam contra senserint propter pretium picturae: sed necesse est ei rei cedi, quod sine illa esse non potest* […] ("Whatever is written on my paper or painted on my board at once becomes mine. Although in the case of a painting some writers have held the opposite, on account of a painting's value, yet where one thing cannot exist without the other, it necessarily accedes to that other […]" - translation WATSON 1985)
[20] A fifth century Visigothic editor of Gaius' institutes inserted the solution that Gaius himself would have preferred: Gai. epit. II 1,4: [...] *quod et de tabula, hoc est si aliquis in tabula mea picturam fecerit, observatur, quia statutum est, ut tabulae pictura cedat.* […] ("[…] And with regard to the tablet, that is, if someone made a picture on my tablet, it is observed, because it has been so ordered, that the painting cedes to the tablet. […]")

Institutes. For him it seemed absurd (*ridiculum*) that the work of a famous painter might be regarded as an accessory of some „vile tablet".[21] Yet, the problem was far from being resolved once and for all because the compilers had not weeded out the other opinion completely: Justinian's Institutes (IJ. 2,1,34) and one Digest-text (D. 41,1,9,2) now favoured the painter while another text in Justinian's Digest still preserved Paulus' decision for the panel owner (D. 6,1,23,3). These contradictions kept learned lawyers busy for centuries to come.

The extrinsic value of art

While for Paulus the economic value of a painting did not warrant a break with the principles of *accessio*, late classical jurists used it as a determining factor in other contexts: The duty to give a painting to someone could not be fulfilled by handing over the erased panel because in this case the "value consisted in the art".[22] For the same reasons the removal of a portrait from a tablet or the delivery of a blank panel in lieu of a painting gave rise to damages.[23]

The cases that regard the destruction of frescos involved different legal problems. Only therefore the jurists came to decisions for which the value of frescos payed no role at all.

A co-owner was not compensated for his "extremely precious" frescos (*pretiosissimas picturas*) but for ordinary plaster (*vulgaria tectoria*) only when the other co-owner had destroyed the common wall.[24] Similarly the value of expensive frescos was not

[21] IJ. 2,1,34: *Si quis in aliena tabula pinxerit, quidam putant tabulam picturae cedere: aliis videtur picturam, qualiscumque sit, tabulae cedere. sed nobis videtur melius esse tabulam picturae cedere: ridiculum est enim picturam Apellis vel Parrhasii in accessionem vilissimae tabulae cedere.* […] ("If someone paints on another person's board, some jurists think the board's identity is absorbed by the picture, others the picture's by the board, whatever the quality of the picture. Our view makes the picture prevail over the board. It would be ridiculous for a picture by Apelles or Parrhasius to accede a board worth almost nothing. […]" – translation BIRKS/MCLEOD 1987); Theoph. 2,1,34.

[22] D. 50,16,14 pr. (Paul. 7 ed.) [...] *quoniam earum rerum pretium non in substantia, sed in arte sit positum;* cf. PLISECKA 2011, p.94-96.

[23] D. 47,2,31 (Ulp. 41 Sab.); D. 34,2,12 (Pap. 17 quaest.).

[24] D. 8,2,13,1 (Proc. 2 epist.).

recoverable if they perished through the collapse of a neighbouring building.[25] The owners of such frescos were denied protection because these were regarded as immoderate and fruitless luxury (*immoderata luxuria*).[26] For the similar reasons a *bona fide* buyer who had constructed a house on land not belonging to the seller could not reclaim expenses for the appliction of luxury frescos from the land owner (who had become owner of the house by *accessio*) when he had to return the estate. However, their value was indirectly aknowledged insofar as the frustrated builder was prohibited from erasing them out of spite.[27]

The purpose of an objet d'art sometimes could gain legal relevance: In the bequest of a fully equipped estate (*fundus instructus*) images with other purposes than for mere decoration (e.g., the *imagines* of ancestors) were not included.[28] The bequest of a house with its necessary inventory did not embrace luxury artworks without practical purposes.[29] This does not prove that artworks in general were regarded as useless: The third century jurist Aelius Marcianus held a usufruct (the right to use a thing and enjoy its fruits) of statues for valid because some 'use' could be made of them by placing them in the appropriate places.[30]

Art production and consumption

Roman legal sources provide modern readers with accidental information about the makers, the production of artworks, and their consumers from various legal contextes. Slave painters serve as regular examples of especially valuable slaves: The late classical jurist Ulpian exemplified how the owner of a killed slave was entitled to the highest

[25] D. 39,2,40 pr. (Ulp. 43 Sab.).
[26] D. 50,16,79,2 (Paul. 6 Plaut.); D. 5,3,39,1 (Gai. 6 ed. prov.). The differentiation went back to the origin of the rules about the reimbursement for investments in the law of dowry.
[27] D. 6,1,38 (Cels. 3 dig.).
[28] D. 33,7,12,36 (Ulp. 20 Sab.).
[29] D. 33,7,12,16 (Ulp. 20 Sab.).
[30] D. 7,1,41 (Marcian. 7 inst.). The owner had obviously argued that the usufruct was void because statues could neither be used nor did they produce fruits.

value in the year before the killing under the *lex Aquilia*[31] with reference to a slave painter who had lost "his art together with his thumb" during that period.[32] The (obviously high) costs involved in the training as a painter are used to demonstrate a situation in which a possessor in good faith who had paid for the instruction of another's slave could not claim compensation for his investments from a poor slave owner.[33] Despite costly training and prospective high profits such slaves were ranked not as artists but as artisans: The services/*operae* of freedmen painters fell into the same category as the work of builders etc. (*operae fabriles*).[34] A slave artist/artisan might be freed by testament under the condition to execute one more work (for the heir or a third party).[35] In such cases a thoughtful master could support the future earnings of the freedman by also leaving his instruments/*instrumentum* to him.[36]

Legal sources document some practices of Roman art trading[37] as well: In a text on the dividing line between sale and service contract (*locatio conductio operis*) the commission of a sculpture is mentioned side by side with ordering clothes,[38] so that one might suppose this was quite a common occurrence. The habit of 'collectors' to buy houses primarily for the statues and paintings therein is also mentioned once.[39] If such sale contract failed to specify which artefacts had been sold, jurists only included *tabulae pictae* firmly inserted into a wall but not those hanging on chains or just loosely attached to a wall.[40]

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[31] The owner of a killed slave was entitled to the slave's highest value in the year preceding the killing instead of it actual value; D. 9,2,2 pr. (Gai. 7 ed. prov.).
[32] D. 9,2,23,3 (Ulp. 18 ed.) [...] *pretioque eo aestimandum, quanti fuit priusquam artem cum pollice amisisset.*
[33] D. 6,1,27,5 (Paul. 21 ed.); D. 6,1,28 (Gai. 7 ed. prov.); D. 6,1,29 (Pomp. 21 Q. Muc.); GAMAUF 2012, p.236-240.
[34] D. 12,6,26,12 (Ulp. 26 ed.); D. 38,1,23 (Iul. 22 dig.); WALDSTEIN 1986, p.223-239; on the status of art producers in general STEWART 2008, p.18-21; on legal aspects PLISECKA 2011, p.171-197.
[35] D. 40,4,13 pr. (Ulp. 5 disp.).
[36] D. 33,7,17 (Marcian. 7 inst.); PS 3,6,63; PLISECKA 2011, p.36-46.
[37] More common in the legal texts, however, is the acquisition of artworks by will.
[38] D. 33,7,17 (Marcian. 7 inst.); a similar situation regarding a painting in D. 19,5,5,2 (Paul. 5 quaest.).
[39] D. 18,1,34 pr. (Paul. 33 ed.).
[40] D. 19,1,17,3 (Ulp. 32 ed.); D. 50,16,245 pr. (Pomp. 10 epist.).

In the last century BCE, a case involving an 'art gallery' was decided by Cicero's friend Servius Sulpicius Rufus:[41] A painter had exhibited a painting (either a round *clipeus*/tondo or a rectangular tablet) in a *pergola*. The painting fell and damaged the property of a passer-by or injured a slave. Servius supported a claim based on the model of the action for damages caused by objects dangerously placed or suspended on a building.[42] This might indicate where of this case the *pergola* had been situated:[43] The elder Pliny tells an anecdote about the Greek fourth century painter Appelles (the origin of the proverb „let the cobbler stick to his last") who used to display his paintings in an open *pergola* on the ground level to study the comments of passers-by;[44] judging from Servius' reasoning this *pergula* could have been a kind of studio on an upper floor as well. If the victim had been a slave, he might have been among the un-free art-lovers whose harmless spleens the second century jurist Venuleius Saturninus did not regard important enough to warrant an action under the edict of the *aediles curules*.[45]

Epilogue :

This brief tour of classical Roman law texts mentioning images and art clearly shows that Roman jurists were not particularily concerned with images or art. When in some sources paintings on wood and frescos are treated differently with regard to damages for their destruction this neither proves incoherence in the jurists' thinking nor an intentional differentiation based on the different types of artefacts. The sole explanation for the different solutions lies in the different legal problems presented by the cases: The quality of art works as such carried no argumentative weight in such cases. Yet art

[41] D. 9,3,5,12 (Ulp. 23 ed.) […] *nam et cum pictor in pergula clipeum vel tabulam expositam habuisset eaque excidisset et transeunti damni quid dedisset, Servius respondit ad exemplum huius actionis dari oportere actionem* […] ("[…] Thus, when a painter had exhibited a shield or a picture in a booth and it fell and injured a passerby, Servius took the view that an action framed on the analogy of this one should be granted. […]" – translation WATSON 1985)

[42] On the *actio de posito vel suspenso* cf. ZIMMERMANN 1990, 16.

[43] On the different views cf. PRIESTER 2002, 156 s.

[44] Plin. nat. hist 35,84 s.

[45] D. 21,1,65 (Ven. 5 act.) *Animi potius quam corporis vitium est, veluti si ludos adsidue velit spectare aut tabulas pictas studiose intueatur* […] ("There are defects which are mental rather than physical, as when a slave is addicted to watching the games or studying pictures […]" – translation WATSON 1985)

related questions are comparatively more prominent in Roman sources than in contemporary law.[46] This was also linked to an interest in art that pervaded all strata of Roman society, from the occasional 'art crazy' slave to exceptional rich who could afford the commission of "most precious frescos".

The images mentioned in the Digest no longer uphold the *memoria humanae condicionis* (the memory of a human existence) and keep deceased persons identifiable as Paulus defined as their purpose in D. 11,7,44. In one case only a private statue referred to in the Digest can be linked to an individual. This is the statue of the eminent jurist Servius Sulpicius Rufus that according to Sextus Pomponius was still on the *forum Romanum* in the second century.[47] However, Pomponius took note of the statue only because he remembered the jurist for what had remained of his 180 books of legal writings. Only because Servius was already on Pomponius' mind for his merits as a jurist made his statue worth mentioning in this context. However, the statue had been set up for Servius as a politician who had died on the return from a meeting with Antony at Mutina from exertion and ill health. On February 9, 43 BCE Cicero argued his late friend's case before the senate. The leitmotif of this ninth Philippic speech is *memoria*. Cicero asked for a statue to immortalise Servius as a politician because as a jurist – as Cicero correctly foresaw – he would be remembered anyway from his works. Cicero was only partly successful: The senate finally granted a public funeral but only a bronze statue instead of a gilded because Servius' death, despite Cicero's skilful legal argumentation to the contrary, was not accepted as the result of enemy action.[48] Also

[46] HORAK 1987.

[47] D. 1,2,2,43 (Pomp. l. sing. enchir.) […] *hic cum in legatione perisset, statuam ei populus Romanus pro rostris posuit, et hodieque exstat pro rostris Augusti. huius volumina complura exstant: reliquit autem prope centum et octoginta libros.* ("[…] When Servius died during a period of acting as an ambassador, the people of Rome put up a statue of him in front of the rostra, and that statue still stands before the rostra of Augustus. Several volumes of his survive, but he left almost one hundred eighty books." – translation WATSON 1985).

[48] NÖRR 1986, p.15-20.

this may serve as a telling example for how difficult the relationship between images, law and Roman jurists could be.

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