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Lucca, Italy**

**FASHION DESIGN OBJECTS AS CULTURAL PROPERTY IN
ITALY AND IN THE UNITED STATES**

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**By
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This dissertation is dedicated to my brothers:

for Guido, the thinker and
Bobby, the artist

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¹ The use of the term frontier to refer to the edges of cultural property has been used in Lorenzo Casini, *The Future of (International) Cultural Heritage Law* in 16(1) INT’L J. OF CONST. L. 1–10 (2018), <https://doi.org/10.1093/icon/moy038> [hereinafter Casini, *The Future*] and Michael F. Brown, *Heritage as Property*, in PROPERTY IN QUESTION: VALUE TRANSFORMATION IN THE GLOBAL ECONOMY (Katherine Verdery and Caroline Humphrey, eds.) 49- 68 (2004).

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² The title of this chapter is based on John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT’L L. 831 (1986) [hereinafter Merryman, *Two Ways*].

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Felicia Caponigri, *Conceptual Separability in Star Athletica, L.L.C. v. Varsity Brands, Inc. et al: "Designs" of Useful Articles as (Non)Copyrightable Subject Matter?* (Law and Media Working Paper Series, Paper No. 5, 2017), <http://www.medialaws.eu/conceptual-separability-in-star-athletica-l-l-c-v-varsity-brands-inc-et-al-designs-of-useful-articles-as-noncopyrightable-subject-matter-law-and-media-working-paper-series/>.

Felicia Caponigri, *Who Owns Villa La Pietra? The Story of A Family, their Home, and an American University under Italian Law*, 5(1) NOTRE DAME J. OF INT'L & COMPARATIVE LAW 201 (2015),
<http://scholarship.law.nd.edu/ndjicl/vol5/iss1/8>.

Abstract

This dissertation identifies a question which is undervalued, underexplored, and under-asked within the complex of laws that apply to fashion and in legal scholarship exploring fashion: how are fashion design objects cultural property? It answers this question by looking to modern and contemporary Italian fashion design objects as a case study, primarily because the history of Italian fashion, the current activities of Italian fashion brands, and Italian cultural property law provide ready examples and tools through which to answer the question. Bypassing the more common question of whether fashion is art, the dissertation asks how fashion design objects might be of historic, artistic, or other cultural interest for the public under the law such that they may be preserved and valorized like other cultural properties.

The first chapter gives a history of Italian fashion, spotlighting relevant key historical moments and constant tensions through Italian fashion history, including the complex nature of Italian fashion as both local and global, the relationship between traditional Italian craftsmanship and Italian brands and designers, the inspirational links between Italian cultural heritage and Italian fashion, and the almost inseparable links between intangible design and tangible properties. The second chapter examines the dilemmas surrounding the definition of cultural property under Italian cultural property law both throughout history and today – a boundless cultural interest, mechanisms of time, and an emphasis on things. This chapter also explores the relationship between Italian cultural property law and copyright in light of cultural property law's rules on reproductions and its regulation of *decoro*. The links between intangibility and tangibility in the legal definition of cultural property under Italian cultural property law and the work of legal scholars which explains cultural property law with reference to text provide the groundwork for an exploration in the third chapter of how certain texts, despite usually being identified as intangible and therefore outside the proverbial cultural property "box", may be tangible and therefore cultural property. Such an exploration is fruitful for how fashion design objects are cultural property since fashion design is often conceived of as intangible like text and may also incorporate text. The third chapter gives examples of text on a spectrum of intangibility and tangibility, with corresponding examples of fashion design. It crafts a standard for when and how fashion design objects might be cultural property or not. In addition to facilitating a test for when fashion design objects may be cultural property under cultural property law, this spectrum also provides an opportunity for new comparisons between cultural property and intellectual property, and more specifically between

cultural property and copyright and their corresponding legal regimes. This comparison is explored in chapter four, which recaps the spectrum of cultural property in terms of tangible text, visible images, intangible text or intangible images, and testaments having the value of civilization. The chapter examines conceptual separability in U.S. copyright law in particular with reference to this spectrum and the recent U.S. Supreme Court case, *Star Athletica v. Varsity Brands*, to show how conceptual separability seems, for the category of designs of useful articles eligible for inclusion in the category of pictorial, graphic, and sculptural works, to be about identifying a possible public cultural interest in intangible parts of tangible objects, in fashion designs which are like visible images. In this sense, the dissertation envisions closer ties between copyright law and cultural property law and sees copyright as an at times *ex ante* cultural property regime. Chapter five explores how the history of certain historic preservation laws in the United States might allow for a future inclusion of fashion design objects as part of historic property and acknowledges that certain parts of Art Law and other *sui generis* norms may protect fashion design objects as cultural property.

The dissertation suggests that while some fashion design objects can be currently included as cultural property under cultural property law, others cannot. Copyright may play a key role in the protection of fashion design objects as cultural property, both when these fashion design objects can and cannot be classified as cultural property under the law. These links suggest that protecting fashion design objects as cultural property and allowing this protection to inform the nature of fashion designs as copyrightable subject matter might result in a thin just as much as a thick copyright. Beyond cultural heritage law is an emerging field for the protection of fashion design objects as cultural property which will require considerations of how other legal regimes overlap with cultural property law as applied to fashion design objects, and the duties and obligations that members of the fashion industry have in protecting their fashion products as cultural property so as not to risk losing the cultural significance of fashion design objects for the future.

Introduction

Fashion as Cultural Property Beyond “Fashion Law” and other Legal Boundaries

1. Protecting Fashion between Cultural Heritage and Copyright

On July 5, 2019 the Italian fashion brand Dolce & Gabbana staged their Alta Moda Fall/Winter 2019 fashion show at the Temple of Concordia in Agrigento, Sicily [Figure 1].³ The result of a two year negotiation with the relevant Italian cultural authorities,⁴ in the middle of this Italian cultural heritage site models walked down a runway in gowns and accessories created by two Italian designers known for harnessing the local traditions of Southern Italy. At the same time as the gowns and accessories embodied traditional Italian craftsmanship, local traditions and contemporary fashion and even luxury, the gowns and accessories also reproduced items of Italian cultural heritage as part of their very designs. These reproductions ranged from images of fine art, statues and pottery decoration on the skirts of gowns [Figure 2], to miniature temples and busts on hats [Figure 3]. Staged in a Greek temple on the island of Sicily that is classified as Italian cultural heritage (and as cultural property), the visual of these Dolce & Gabbana fashion design objects embody the fundamental question of this dissertation: how are these fashion design objects like other cultural property? What is it exactly that we might recognize as common to both the temples and these fashion design objects? In other words, how are these Dolce & Gabbana fashion design objects cultural property under Italian cultural property law?

The answer to this specific question falls between some legal cracks, so to speak. This is so despite the recent advent of fashion law, the still longer history of legal tools to protect design through intellectual property law, conversations about how to protect parts of our culture in the legal academy, and even despite having cultural heritage law itself. The question is not one of cultural appropriation: the question is not

³ Anders Christian Madsen, *Dolce&Gabbana Alta Moda, Autumn/Winter 2019*, VOGUE UK, 6 July 2019, <https://www.vogue.co.uk/shows/autumn-winter-2019-couture/dolce-gabbana-alta-moda>.

⁴ Hamish Bowles, *Dolce & Gabbana Stage an Epic Alta Moda Show in Sicily's Valley of the Temples*, VOGUE, July 6, 2019, <https://www.vogue.com/article/dolce-and-gabbana-alta-moda-sicily-valley-of-the-temples> (“The monument, of course, is a crown jewel in Italy’s cultural patrimony, so the negotiations to showcase the Alta Moda collection here, in Dolce’s native Sicily (where the collection was first launched in Taormina in 2012), were two years in the making and the preparations were extraordinarily elaborate.”)

whether Dolce & Gabbana has culturally appropriated Greek or Italian cultural heritage in their fashion designs.⁵ The question is not one for business law or even necessarily for intellectual property law in a traditional sense. Dolce & Gabbana is not accused of copying another designer's work, it is not using another company's trademarks, it is not engaging in a new business model. It is accurate to say that intellectual property law may apply. Parts of the hats and dresses might be conceptually separable and eligible for copyright protection, or eligible for a design patent. This does not yet, however, completely answer the question of these objects' cultural interest under the law. Even the evidence of creativity does not yet necessarily make cultural heritage law applicable to these objects: these Italian fashion design objects are contemporary objects which, as they stand presented in a runway show, do not yet fulfill the criteria of individual objects of cultural property. At most cultural heritage law would now guide the negotiation for the use of the Temple of Concordia or perhaps the reproductions of the fine art and sculptures on the fashion design objects, without asking however what the cultural interest is in the fashion design objects themselves and where it lies. Contracts might tell us what the private and public parties cared about, but such negotiations are not the same as an administrative decision about the fashion design objects' cultural value. Even if intangible cultural heritage law required safeguarding mechanisms for the artisanal work, that does not necessarily address how the objects themselves fit into the cultural heritage environment apart from their exemplary nature. With the question of how Italian fashion design objects are cultural property, we find ourselves on a legal fashion frontier. Answering the question requires cobbling together rules and norms from various legal fields in an as yet evolving legal space.

At the same time as the rules and norms from various legal fields are cobbled together, it becomes clear that cultural heritage law, and Italian cultural property law at that, best hold the legal answers to how Italian fashion design objects are cultural property. An emerging part of cultural heritage, these fashion design objects bring fashion law, design law, and other intellectual property law regimes into the fold of cultural heritage law alongside more rules from administrative law, constitutional law and even international law. Overall, however, Italian fashion design objects require cultural heritage law to evolve and also

⁵ Unlike other acts by Dolce & Gabbana which have been characterized as misappropriation or even outright racism, including their mischaracterization of a Chinese woman eating pasta in one of its ads. See Yuhan Xu, *Dolce & Gabbana Ad (With Chopsticks) Provokes Public Outrage in China*, NPR, December 1, 2018, <https://www.npr.org/sections/goatsandsoda/2018/12/01/671891818/dolce-gabbana-ad-with-chopsticks-provokes-public-outrage-in-china>.

gravitate towards cultural heritage law because of the cultural interest these objects hold for us.

2. Background: “Fashion Law” and Legal Scholarship between Piracy, Protection and “Public” Law

A logical place to look for rules governing the relationship between fashion and law is the eponymously named field, “Fashion Law”, which has taken on increased interest in the hallowed halls of legal academia since the early 21st century. Despite the existence of laws applicable to fashion for centuries outside a classroom, Susan Scafidi of Fordham University School of Law is usually heralded as creating Fashion Law for the law school classroom in 2006 and founding the Fashion Law Institute at Fordham in 2010.⁷ Of course, Scafidi was not alone in her interest in fashion and the law. Often cited concurrently to Scafidi’s work is that of Guillermo Jimenez, who, with Barbara Kolsun, published the first edition of *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys* in 2010.⁸ In addition, around the same time as

⁶ As will be detailed in Chapter 1, *infra*, from a fashion history point of view. Legal scholarship also acknowledges that laws applying to fashion outside the “fashion law” field have existed for centuries. See Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115, 116-117 (Peter K. Yu, ed., 2006) [hereinafter Scafidi, *Intellectual Property and Fashion Design*]; Susan Scafidi, *Fiat Fashion Law! The launch of a label – and a new branch of law*, in NAVIGATING FASHION LAW: LEADING LAWYERS ON EXPLORING THE TRENDS CASES, AND STRATEGIES OF FASHION LAW 8 (Thomson Reuters/Aspatore 2012) [hereinafter Scafidi, *Fiat Fashion Law!*] (“As long as there have been fashion houses- and almost as long as there have been people making clothes- there have been occasions to consult lawyers”); Charles E. Colman, *The History and Principles of American Copyright Protection for Fashion Design: A Strange Centennial*, 6 HARV. J. SPORTS & ENT. 225, 238 (2015) [hereinafter Colman, *History and Principles*] (examining copyright protection for fashion beginning with the analysis of the advent of copyright in the 16th century). Applying previous historical scholarship of the art market, it could even be said that early contracts for fashion objects and their raw materials might be the first evidence of a “fashion law.” See MICHELLE O’MALLEY, THE BUSINESS OF ART: CONTRACTS AND THE COMMISSIONING PROCESS IN RENAISSANCE ITALY 1 (2005) (noting through an exploration of the making of a work of art in Renaissance Italy that “contracts are the most fundamental and informative records we have about the nature of the decision-making process that lies behind the making of a work of art” and that tracing contract terms and stipulations over time and in different regions in Italy makes it “possible...to trace the cultural values of the period...”). Sumptuary laws, in effect since antiquity, testify to the regulation of fashions and clothing. For a study of sumptuary law in Italy see CATHERINE KOVESKI KILLERBY, SUMPTUARY LAW IN ITALY 1200-1500 (Oxford, 2002).

⁷ Newsroom, *Not Just Catwalks: A Closer Look at Fashion Law L.L.M.s*, FORDHAM LAW NEWS, January 9, 2018; *About*, FASHION LAW INSTITUTE, <https://fashionlawinstitute.com/about> (last visited July 16, 2019).

⁸ FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, AND ATTORNEYS (Guillermo c. Jimenez and Barbara Kolsun, eds., Fairchild Books, 2010) [hereinafter FASHION LAW: A GUIDE]. Both Scafidi and Jimenez are mentioned as early movers in the

the advent of the field of Fashion Law and separately to it, intellectual property scholars in the United States seemed to take an increased interest in the field of fashion. In 2006 Chris Sprigman and Kal Raustala published their seminal law review article *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*.⁹ The article essentially argues that a lack of intellectual property regulation (be it patent, trademark or copyright) for *designs of apparel*, not brands, is paradoxically good for the fashion industry because the copying of such designs promotes innovation, the proffered purpose of intellectual property protections, in the fashion industry; this allows fashion to thrive in a negative space of intellectual property protection.¹⁰ Sprigman and Raustala's argument contrasts with but exists alongside arguments which emphasize the artistry or creativity of fashion, including apparel design, and, therefore, fashion's worthiness of being protected like other works of art under copyright, often deemed the most appropriate intellectual property regime.¹¹ Sprigman and Raustala's article, along with their follow up work¹² and a contemporaneous legislative debate about whether the U.S. Copyright Act should be amended to protect fashion designs from roughly 2006 to 2012¹³, has, alongside Fashion Law, shaped the debate

field of fashion law in Mark K. Brewer, *Fashion Law: More than Wigs, Gowns, and Intellectual Property* 54 SAN DIEGO L. REV. 739, 742 (2017) [hereinafter Brewer, *Fashion Law: More than Wigs*] and the work of both is used to define fashion law in Joanna Buchalska, *Fashion Law: A New Approach*, 7 QUEEN MARY L. J., Special Conference Issue 13- 26, 14-15 (Autumn 2016).

⁹ Christopher B. Sprigman and K. Raustala, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design* (hereinafter Sprigman and Raustala, *The Piracy Paradox*), 92 VA. L. REV. 1687 (2006). In their article Sprigman and Raustala do note Scafidi's work on her blog, Counterfeit Chic, as part of the "few legal commentators [who] have considered fashion design in the context of IP." *Id.* at 1690, n. 2.

¹⁰ *Id.* at 1691- 1692.

¹¹ See *The Piracy Paradox*, *supra* note 9 and Christopher Sprigman and Kal Raustala, *The Piracy Paradox Revisited*, 61(5) STANFORD L. REV. 1201, 1204, n. 5 (2009) [hereinafter Sprigman and Raustala, *Paradox Revisited*] (citing in part to Susan Scafidi, *F.I.T.: Fashion as Information Technology* 59 SYR. L. REV. 69 (2008)). Other examples which promote the artistry of fashion for copyrightability are Brief of Fashion Law Institute et al as Amici Curiae in Support of Respondents at 4, *Star Athletica LLC v. Varsity Brands, Inc.*, et al, Docket No. 15-866, 580 U.S. ____ (2017); Alexandra Manfredi, *Haute Copyright: Tailoring Copyright Protection to High-Profile Fashion Designs*, 21 CARDOZO J. INT'L & COMP. L. 111 (2012) (arguing for the protection of some haute couture fashion designs in some circumstances).

¹² Sprigman and Raustala, *Paradox Revisited*, *supra* note 11 (responding to Scott Hemphill and Jeannie Suk's *The Law, Culture and Economics of Fashion*); KAL RAUSTALA AND CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012) [hereinafter *THE KNOCKOFF ECONOMY*] (examining other field alongside fashion like comedy, cuisine, and football that also seem to thrive in the negative spaces of intellectual property law).

¹³ Excerpts of testimony on the subject before the U.S. Congress are reprinted in *Comparative Design Piracy Protection: U.S. and E.U.* in GUILLERMO JIMENEZ AND BARBARA KOLSUN, *FASHION LAW: CASES AND MATERIALS* (Carolina Academic Press, 2016)

about fashion design's relationship with law in the United States into one that is, or at least was in the past, deeply concerned with fashion's copyrightability. Most recently Scafidi's work has attempted to move beyond this dichotomy by situating Fashion Law as a still broader field which includes more rules, social norms, and institutions in her forward *Towards a Jurisprudence of Fashion*.¹⁴ Today, an academic interest in fashion's relationship to law seems to be increasingly subsumed into an academic interest in design, construed broadly and including any and all objects of industrial design.¹⁵

An increased interest in fashion in academia during the first decades of the 21st century was also part of a wider cultural appreciation of fashion and its embrace by the masses. This cultural appreciation and embrace occurred apart from discussions of design. The legal protection of design has been relevant for most intellectual property legal scholars and business lawyers in practice arguably since the Industrial Age and perhaps even before.¹⁶ An interest in fashion and law more often than not necessitates a consideration of design and law.¹⁷ At the same time, however, thanks to the rise of the internet and increased digitization,

[hereinafter FASHION LAW: CASES]. See also, for an overview of *The Innovative Design Protection and Piracy Prevention Act* as proposed by Senator Chuck Schumer, Cathy Horn, *Schumer Bill Seeks to Protect Fashion Design, On the Runway: All Things Fashion*, N.Y. TIMES, August 5, 2010, 10:43 PM, <https://runway.blogs.nytimes.com/2010/08/05/schumer-bill-seeks-to-protect-fashion-design/>.

¹⁴ Susan Scafidi, *Towards a Jurisprudence of Fashion*, 29(2) FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429 (2019).

Available at: <https://ir.lawnet.fordham.edu/ipj/vol29/iss2/1>.

¹⁵ See, as one recent example, Mark McKenna and Jessica Silbey, *Investigating Design: A Qualitative Study of Professional Designers*, forthcoming (a qualitative study of designers which seeks "to understand the [sic] how professional design work has evolved to encompass a combination of more traditional IP-rich fields, such as engineering, architecture, software and web design, product manufacturing, and graphic design"; in their presentation at the 2019 Intellectual Property Scholars' Conference, McKenna noted that fashion designers were not explicitly included because of fashion's industry particularities).

¹⁶ For an acknowledgement of the historical exploration of what they term modern intellectual property law see GRAEME B. DINWOODIE & MARK D. JANIS, *TRADE DRESS AND DESIGN LAW* 3 (2010) (citing to BRAD SHERMAN AND LIONEL BENTLEY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* (1999) (also discussing this law in terms of intangible property) [hereinafter *TRADE DRESS*]). See also the recently published *A HISTORY OF INTELLECTUAL PROPERTY IN 50 OBJECTS* (Claudy Op den Kamp and Dan Hunter, eds., 2019) (including objects from the Pre-Modern era in an essay on Murano Glass by Stefania Fusco and a separate essay about the Mona Lisa which explores the overlap between the Mona Lisa as a prized real property of cultural interest and the increasing claims of copyright in its digital reproductions).

¹⁷ See, for example, Veronique Pouillard and Tereza Kuldova, *Interrogating Intellectual Property Rights in Post-war Fashion and Design*, 30(4) J. OF DESIGN HISTORY 343 (2017), doi: 10.1093/jdh/epx014.

the increased mixing of high and low styles, or *maastige*¹⁸, fast fashion, and an evolving appreciation of fashion in pop culture¹⁹, decoding fashion has become almost a global pastime in the 21st century. The public is more aware of the links between celebrity, image-making and fashion.²⁰ Online forums dedicated to fashion have multiplied exponentially and they include those dedicated to the business of fashion and the legal rules surrounding it.²¹ Most importantly for the purposes of this dissertation, members of the public now have many more tactile and didactic interactions with fashion's increasingly elevated status and with its complex of meanings both in museums and in other cultural, non-retail spaces.²² This seems to have created a

¹⁸ ERICA CORBELLINI AND STEFANIA SAVIOLO, *MANAGING FASHION AND LUXURY COMPANIES* 116 (Milano, Rizzoli, 2009) [hereinafter *MANAGING FASHION*] (defining *maastige* as "mass business logic tak[ing] on prestige connotations", or trading on the ideas of luxury for generic products, or "a fashion statement that mixes both mass-produced and prestigious clothes").

¹⁹ There has been a proliferation of documentaries. See as just some examples *THE FIRST MONDAY IN MAY* (Magnolia Pictures, 2016); *VALENTINO: THE LAST EMPEROR* (Medusa Film, 2008); *THE DIRECTOR: AN EVOLUTION IN THREE ACTS* (RabbitBandini, 2013); *JEREMY SCOTT: THE PEOPLE'S DESIGNER* (Vladar Company, 2015). Movies and TV shows have been dedicated to the inner workings of the fashion industry and those that write the sartorial code in which we live our lives, with perhaps the best early 21st century example being *THE DEVIL WEARS PRADA* (Fox 2000, 2006) a movie iteration of a tell-all book about working in the industry.

²⁰ To name just two popular television shows which have showcased this, *PROJECT RUNWAY* (Miramax) and *AMERICA'S NEXT TOP MODEL* (Bankable Productions).

²¹ See *THE BUSINESS OF FASHION*, www.thebusinessoffashion.com; *THE FASHION LAW*, www.thefashionlaw.com. Magazines such as *Women's Wear Daily* also have business and legal sections. See Legal, *WOMEN'S WEAR DAILY*, <http://wwd.com/business-news/legal/>.

²² For example *The Museum of the Fashion Institute of Technology* and *The Costume Institute at The Metropolitan Museum of Art* (recently renamed the Anna Wintour Costume Center) in New York City and *SCADFASH*, the fashion museum of the *Savannah College of Art and Design* in Savannah, Georgia. Not only has the Met Gala, the annual charitable fundraiser for the Metropolitan Museum of Art's Costume Institute, gained increased importance, as have the Met's exhibits such as *Alexander McQueen: Savage Beauty* (2011), but the popularity of fashion exhibits in areas of the United States outside of metropolitan cities has proliferated (for example, *Dressing Downton: Changing Fashion for Changing Times*, a traveling exhibit of the costumes of the popular PBS drama *Downton Abbey* successfully toured from 2016-2017). The Art Institute of Chicago also hosted the Fashion exhibit *Impressionism, Fashion and Modernity*, which had a record number of visitors. See Johnny Oleksinski, *Big crowd of visitors makes a run for Art Institute*, *CHICAGO TRIBUNE*, October 13, 2014, available at <http://www.chicagotribune.com/entertainment/museums/chi-art-institute-crowd-20141013-story.html> ("While final attendance figures weren't available, director of public affairs Rebecca Baldwin said the museum last saw such large crowds during the "Impressionism, Fashion and Modernity" exhibition in summer 2013."). Retail spaces also now include exhibitions of fashion design objects, as with the recent reseller Stockx displaying a "Fakes Halls of Fame" in their Nolita pop-up store. See Fashion Law Institute @FashionLawInstitute), *INSTAGRAM*, June 21, 2019, <https://www.instagram.com/p/By8raFzBcrY/> and other still more complex luxury examples like Salvatore Ferragamo's display of a working artisan in one of their flagships. See images of the 2016 re-opening of the Ferragamo boutique on Avenue Montaigne in

cultural moment for law, fashion, and public cultural interest.

Because fashion is connected to design and other disciplines the discussion in legal academia about fashion has benefited from the work of many other legal scholars in different legal fields. These legal scholars have investigated intellectual property and fashion from a historical point of view and/or imagined the relationships between different intellectual property regimes as applied to fashion; they have investigated how we might think of fashion with respect to other, perhaps unexpected legal rules, including those of public law. Charles Colman²³ has written extensively on the history of copyright and design patent as applied to fashion, taking a distinctly historical and theoretical approach that also employs gender studies.²⁴ Chris Buccafusco and Jeanne Fromer have investigated the relationship between fashion, function and different legal regimes of intellectual property²⁵; to spotlight just one example of their work.²⁶ Barton Beebe has brought historical and interpretative gravitas to legal academic explorations of fashion with his articles on aesthetic progress and modern conceptions of sumptuary law.²⁷ Still further, Ruth Robson has explored

Paris from Getty Images. *Re Opening of Salvatore Ferragamo Boutique Montaigne*, GETTY IMAGES, <https://www.gettyimages.it/immagine/ferragamo-avenue-montaigne?phrase=ferragamo,%20avenue%20montaigne&sort=best#license>.

²³ For a biography and a list of publications see Charles E. Colman, UNIVERSITY OF HAWAII AT MĀNOA WILLIAM S. RICHARDSON SCHOOL OF LAW, <https://www.law.hawaii.edu/person/charles-e-colman>.

²⁴ See, for example, Charles E. Colman, *Design and Deviance: Patent as Symbol, Rhetoric as Metric-Part 1*, 55 JURIMETRICS J. 419 (2015) and Colman's series' *The History and Principles of American Copyright Protection for Fashion Design*, 6-9 HARV. J. SPORTS & ENT. L. (2015-2018).

²⁵ Christopher Buccafusco and Jeanne Fromer, *Fashion's Function in Intellectual Property Law* 93 NOTRE DAME L. REV. 51 (2017).

²⁶ Buccafusco and Fromer also contributed to an issue of The University of Pennsylvania Law Review Online along with Jane Ginsburg, Mark McKenna and others which discussed separability in light of the *Star Athletica v. Varsity* case. See Christopher Buccafusco and Jeanne C. Fromer, *Forgetting Functionality*, 166 U. PA. L. REV. ONLINE 119 (2017) (seeming to discuss the importance of materiality through functionality: "Ultimately, the medium in which design features are fixed affects their functionality and thus their copyrightability. A court should not conclude that just because a design is non-functional in one medium it is necessarily non-functional in all media... Copyright should extend to only reproductions of the design in media where it does not have a function." *Id.* at 126.)

²⁷ Barton Beebe, *Bleistein, The Power of Aesthetic Progress, and the Making of American Copyright Law*, 117(2) COLUMBIA L. REV. 319 (2017) [hereinafter Beebe, *Bleistein, The Power of Aesthetic Progress*]; Barton Beebe, *Intellectual Property Law and the Sumptuary Code* in (123)4 HARVARD L. REV. 809 (2010) [hereinafter Beebe, *Sumptuary Code*]. See also THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY (Barton Beebe, et al eds., Oxford University Press, 2015) (also holding a contribution from Susan Scafidi, *The Scholarship of Envy: How the Framing of Fashion Leaves a Legal Lacuna*

constitutional legal issues as they are applied to fashion.²⁸

Indeed, as Susan Scafidi herself admits, Fashion Law is not just about fashion's relationship to intellectual property. Fashion law certainly imagines that it covers multiple legal fields and more besides. In addition, it desires to apply to an expansive definition of fashion. Under Scafidi's direction, Fordham's Fashion Law Institute has identified four pillars of fashion law: intellectual property, business and finance, international trade and government regulation, and consumer culture and civil rights.²⁹ On her blog *Counterfeit Chic*, the think tank, if you will, for Scafidi's early brainstorming on the field, Scafidi defined the discipline as "the field that embraces the legal substance of style, including the issues that may arise throughout the life of a garment, starting with the designer's original idea and continuing all the way to the consumer's closet."³⁰ According to Scafidi the discipline also comprises "mergers and acquisitions, securities law, international trade, tax, mediation, employment law, or any number of fields that we have made part of the fashion law curriculum."³¹ Jimenez and Kolsun break Fashion Law into three groups: fashion intellectual property law, fashion business law, and fashion public law.³² Jimenez and Kolsun also note that while "[i]ntellectual property...issues are at the heart of fashion law, many other legal specialties are called into play..."³³

The space where Fashion Law includes other legal disciplines allows for a consideration of how modern and contemporary fashion design objects are cultural property under cultural property law. Fashion Law is, however, not the exclusive field of my dissertation, nor the only one of interest. Fashion is a place where intellectual property law and real property law meet. It is in the legal overlap of properties, and a comparative consideration between two different jurisdictions, that the

and Christopher Sprigman and Kal Raustala's *How Can Brands Flourish in the Knockoff Kingdom? What China Tells Us About the Bad - And Good - Effects of Luxury Goods Counterfeiting*). Other scholars' work is also of importance for this discussion, including that of Mark McKenna, Graeme Dinwoodie, and Mark Janis, to name just a few.

²⁸ RUTH ANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* (2013).

²⁹ See Susan Scafidi, *Fiat Fashion Law!*, *supra* note 6 at 17; *MSL in Fashion Law*, FORDHAM UNIVERSITY SCHOOL OF LAW, https://www.fordham.edu/info/23328/msl_in_fashion_law (last visited March 27, 2019); see also Brewer, *Fashion Law: More than Wigs*, *supra* note 8 at 755 (attributing these pillars to Susan Scafidi).

³⁰ *So what is fashion law?*, *Welcome to Counterfeit Chic*, COUNTERFEIT CHIC, <http://intro.counterfeitichic.com> (last visited March 27, 2019).

³¹ Scafidi, *Fiat Fashion Law!*, *supra* note 6 at 17.

³² FASHION LAW: CASES, *supra* note 13 at 4-9 (Carolina Academic Press, 2016).

³³ *Id.* at 3.

dissertation is particularly placed. The dissertation envisions how Italian cultural property law applies to a specific slice of the fashion pie, modern and contemporary Italian fashion design objects. As part of the broader discourse of how fashion is regulated or not by rules and norms in Fashion Law, intellectual property law, constitutional law, business law, and still other fields, this dissertation's exploration of how modern and contemporary Italian fashion design objects are cultural property under Italian law necessarily includes a discussion of the ramifications that such a regulation would have for other regulations of fashion design objects, such as the regulation of fashion by U.S. copyright law. Moreover, even more than Fashion Law aspires to, Italian cultural property law embraces many diverse legal fields, including administrative law, constitutional law, private and public law, business law, and international law.³⁴ Italian cultural property law also lends itself to a consideration of overlaps between legal regimes, with fashion as a microscope under which to examine them.

The application of cultural property law to fashion is by no means as unexpected as one would at first think. To the contrary, a deep dive into Scafidi's early work reveals an interest in cultural appropriation and authenticity and the legal protection, or lack thereof, of cultural products, which for Scafidi include fashion objects. In her book *Who Owns Culture? Appropriation and Authenticity in American Law*, Scafidi looked at the counterfeit goods sold on Canal Street in New York, which include "'Prada' bags [and] 'Fendi' wallets."³⁵ Scafidi imagined that the reason consumers purchase almost identical fashion objects for a higher price lay in the fact that the higher priced items, not sold on Canal Street, were

'authentic' goods [that]- even when compared with virtually identical and much less expensive counterfeits- offer the purchaser a certain intangible value. The consumer who shuns Canal Street and opts to purchase the genuine article advertises her individual ability to distinguish real from the mass-produced fake, her aristocratic intolerance for invisible flaws, her appreciation of fine craftsmanship, her economic position, and her membership in an elite society welcomed into the most exclusive retail venues. For the creator of the original product, an assertion of authenticity may thus compensate for an inability to secure or protect ownership of an embodied idea,

³⁴ Casini, *The Future*, *supra* note 1 (although referring to cultural heritage law more broadly).

³⁵ SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 52 (2005) [hereinafter SCAFIDI, WHO OWNS CULTURE?].

creation, or design.³⁶

Taking a perspective of fashion as communication similar to that of fashion scholar Malcolm Barnard³⁷, Scafidi has already emphasized one out of many intangible values of fashion objects- authenticity- as part of her discussion of a wider category of cultural products.³⁸

In addition, Scafidi has also entertained how cultural products that are similarly situated to fashion objects span the legal categories of intellectual property and cultural property, albeit by defining intellectual property and cultural property in a rather broad but limited way.³⁹ Citing the work of John Henry Merryman and Patty Gerstenblith, Scafidi has noted Merryman's definition of cultural property as "objects of artistic, archeological, ethnological, or historical interest"⁴⁰ and Gerstenblith's emphasis on "the one constant" in cultural property, "the physical embodiment of culture in tangible objects"⁴¹, without however necessarily referencing source nations' complex cultural property codes which bring needed nuances to characterizations of cultural property as unique objects and to characterizations of intellectual property as embodied intangible ideas. It is these nuances between cultural property law and intellectual property law that this dissertation explores. Looking at the Italian Code of Cultural Property, for example, it becomes apparent that cultural property under the law is not only "characterized by its association with a particular cultural group"; nor does it "need not consist of physical objects at all."⁴² Italian

* *Id.* at 52.

* See generally, MALCOLM BARNARD, *FASHION AS COMMUNICATION* (Routledge, 2nd ed., 2001) (grounding fashion's communicative ability in social agreement and context and not material essence). Scafidi cites to Barnard in her work as an example of how scholars outside the field of law examine fashion's communicative ability in all its diversity: Susan Scafidi, *F.I.T.: Fashion as Information Technology* 59 SYRACUSE L. REV. 69, 78 (2008) [hereinafter Scafidi, *F.I.T.*].

* SCAFIDI, WHO OWNS CULTURE?, *supra* note 35 at 52.

* Scafidi refers to intellectual property as "a protected category of intangible ideas embodied and reproduced in tangible form" and to cultural property as "[t]he traditional category of cultural property...[involving] the embodiment of intangible cultural values, albeit in specific unique objects." *Id.* at 48. As we will discuss *infra*, such definitions may be misleading with reference to Italian cultural property law, which elaborately categorizes works, and therefore nuances the use of the qualifier "unique".

* *Id.* at 48 (citing to Merryman, *Two ways*).

* *Id.* (citing to Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995).)

* As noted by Susan Scafidi in *Introduction: New Dimensions of Cultural Property* in 31(3) *FORDHAM INT'L L. J.* 684, 684 (2007) [hereinafter Scafidi, *Introduction: New Dimensions*]. A flattening of the concept of cultural property in English might also be thanks to challenges in the translation of the term. This is implied in John Henry Merryman, "Protection" of Cultural "Heritage"?, 38 *THE AM. J. COMP. LAW* 513, 520 (1990) [hereinafter Merryman,

cultural property law allows for the regulation of additional intangible values in modern and contemporary Italian fashion design objects, over, above, and in addition to values of authenticity. It also offers a complex negotiation process between an intangible public cultural interest and tangible properties. The exploration of Italian cultural property law's nuances can only benefit academic discussions of how fashion should be regulated (or not) as a cultural product. Indeed, these nuances can also help us understand why, in certain circumstances, fashion is not (and should not) be regulated by intellectual property at all, especially by copyright; and, for that matter, why even cultural property law should not regulate it at all times.

The nuances that Italian cultural property law can reveal about the relationship between intellectual property and cultural property when cultural property law is applied to fashion certainly build on observations made in Scafidi's previous work. Regarding the relationship between the mechanisms of time in each, Scafidi has noted "*intellectual property law protects only new ideas, and then for a limited period of time, while cultural property law protects historical objects that have acquired cultural significance over time.*"⁴³ In terms of authorship, "*while objects of cultural property are often created by an individual, their status as cultural property derives from community recognition rather than Romantic genius.*"⁴⁴ Using architecture as an example, Scafidi further elucidates the relationships between the two: architectural plans are classified as copyrightable and therefore part of intellectual property; the cross in the architectural plan for or in the physical embodiment of a church may be a "replicable cultural product"; while "a particular architectural structure of historical or artistic importance" is cultural property.⁴⁵ At the same time as these explanations are helpful, Italian cultural property law gives us a more proper shovel to dig deeper into these observations, and fashion provides the fertile ground. Might, for example, there be a more explicit hand-off between copyright and cultural property, given Italian cultural property law's express mention of copyright in its legal rules and the overlap between the time of application of Italian cultural property law and copyright law? Are copyright and cultural property really so distinct in terms of authorship, when Italian copyright law uses collective cultural criteria linked to the cultural sphere and Italian cultural property law itself as an indicia of copyrightability in certain

"Protection"] and in *ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE* 193 (Barbara T. Hoffman, ed., 2006) (citing to Frigo).

⁴³ Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 813 (2001) [hereinafter Scafidi, *Intellectual Property and Cultural Products*].

⁴⁴ *Id.*

⁴⁵ SCAFIDI, *WHO OWNS CULTURE?*, *supra* note 35 at 48- 49.

instances? Even an emphasis on cultural property as unable to be replicated compared to intellectual property⁴⁶ might be tweaked, given Italian cultural property law's regulation of the intangible cultural interest caught up in tangible properties and the replication of them.⁴⁷ Does Italian cultural property law at times act like a copyright regime, and might copyright be best understood as a type of cultural property law?

Some might call the exploration of how modern and contemporary Italian fashion design objects are regulated by cultural property law in Italy an exploration of cultural appropriation by another name. Cultural appropriation, as applied to fashion, is usually understood as the unauthorized use of clothing or accessories with religious or other cultural meaning for specific groups of people; these groups are usually indigenous peoples or groups otherwise understood as needing protection in part thanks to historic or contemporary discrimination.⁴⁸ Asking how modern and contemporary Italian fashion design objects are cultural property, however, significantly flips the arguments of the usual cultural appropriation debate. It does not ask whether Gucci, for

**As Scafidi explains, "The unprotected category of cultural products resembles both cultural property and intellectual property, but it is distinct from either of them. All three involve protection of intangible human creations that may be embodied in tangible form. In the case of both cultural property and cultural products, the intangible good is the Volksgeist or the self-imagination of a particular community; in the case of intellectual property, the intangible good is a new artistic creation or invention. Cultural property and cultural products also share a participatory structure of creation or at least recognition, while intellectual property looks to individual genius. Turning to tangible embodiments, intellectual property and cultural products are designed to be replicated; the physical forms of cultural property are unique. Each of the three categories also offers a distinct temporal paradigm. Intellectual property protects the new and innovative; cultural property protects the old and venerated. Cultural products derive from ongoing expression and development of community symbols and practices, and are thus neither new nor old, but in a sense both. Any extension of intellectual property law to cultural products must consider the singular configuration of this category of intangible property."* Scafidi, *Intellectual Property and Cultural Products*, *supra* note 43 at 813- 814.

⁴⁶ Art. 107, Decreto legislativo, 22 Gennaio 2004, n. 42, G.U. Feb. 24, 2004, ALTALEX [hereinafter CODICE, D.L. n.42/2004].

⁴⁸ See for example, descriptions of Gucci's appropriation of a Sikh turban, Any Lingala, *Op-Ed | Another Season, Another Cultural Appropriation Controversy*, THE BUSINESS OF FASHION, February 27, 2018, <https://www.businessoffashion.com/articles/opinion/op-ed-%E2%80%8Banother-season-another-cultural-appropriation-controversy>. Win Gruenig, *The illogic of cultural appropriation*, JUNEAU EMPIRE, March 8, 2018, <https://www.juneauempire.com/opinion/the-illogic-of-cultural-appropriation/> (Interviewing Susan Scafidi in the context of critiques of a wearable art show in which a design seemed to perpetuate Asian stereotypes; "Fordham law professor Susan Scafidi defines cultural appropriation as "taking intellectual property, traditional knowledge, cultural expressions or artifacts from someone else's culture without permission including ... dance, dress, music, language, folklore, cuisine, traditional medicine, religious symbols, etc.").

example, is inappropriately presenting a Sikh turban.⁴⁹ Instead, it asks whether certain examples of Gucci's designs, like the *Flora* or the *Bamboo Bag*, are themselves of such cultural interest, like Dastaars are for the Sikh culture, that we must protect these fashion design objects as cultural property, as part of our cultural heritage.

For fashion in general, given the contested nature of its regulation by intellectual property law, this question is loaded. As Christopher Sprigman has recently said, "Cultures inevitably interact. They take from one another, learn from what they take, and define themselves both through contrast and assimilation. In most instances this is not only desirable, but an important part of human progress."⁵⁰ Indeed, modern and contemporary Italian fashion design objects may need to travel both practically and proverbially, not only to survive but also to be what they are: fashion. Sprigman's comments, and the doubts it raises about the ability to "own" cultural material "outside the kind of materials that IP protects"⁵¹, raise logical and important doubts about the wisdom of protecting Italian fashion design objects as cultural property under Italian cultural property law. They suggest that fashion, no matter its cultural importance, might not, or should not be, owned at all, whether through intellectual property law or through cultural property law, for the very reason that fashion displays a cultural interest. They also suggest that if fashion is, in some way, "owned", that that ownership must take into account the importance of "cultural interchange" and the difficulty of capturing the situations in which cultural appropriation, especially the reverse of cultural appropriation presented here, is wrong in "legal code."⁵²

Parsing the intangible and tangible divide that hangs over these academic debates like a black cloud is central to engaging with these legitimate concerns. Understanding the intangible and tangible divide is

⁴⁹ Lingala, *supra* note 48.

⁵⁰ @CJSprigman, TWITTER, June 14, 2019 (images of tweets on file with author); Sprigman's comments were precipitated in part by accusations by the Mexican Minister of Culture that Carolina Herrera has culturally appropriated traditional Mexican embroidery. Vanessa Friedman, *Homage or Theft? Carolina Herrera Called Out by Mexican Minister*, ON THE RUNWAY, N.Y. TIMES, June 13, 2019, <https://www.nytimes.com/2019/06/13/fashion/carolina-herrera-mexico-appropriation.html>.

⁵¹ @CJSprigman, TWITTER, June 14, 2019 (images of tweets on file with author).

⁵² @CJSprigman, June 14, 2019 (replying to @TimberlakeLaw and @kavalsultana_jd) (images of tweets on file with author). This also brings up arguments that copyright is about cultural conversation, as implied in the work of Abraham Drassinower and Carys Craig. See ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? (2015); CARYS J CRAIG, COPYRIGHT, COMMUNICATION AND CULTURE TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW (Elgar, 2011).

also important to problematize how modern and contemporary Italian fashion design objects are cultural property under Italian cultural property law and their ensuing relationship to parts of intellectual property law. Indeed, when we speak of cultural appropriation we are usually speaking of the theft or unlicensed use of intangibles. The theft of tangible cultural property might not even be susceptible to such rationalizations- just think of the outrage, and not support, that follows most restitution claims. In this sense, a theory of property is needed which incorporates a notion of a cultural interest that is capable of negotiating between these tangible and intangible worlds. This notion of cultural interest needs to help us imagine how Italian fashion design objects, so associated with intangibility, can be tangible cultural property. This theory of property would need to acknowledge a property's cultural importance, both for its "owners" and its "appropriators", while allowing the cultural interest to travel when appropriate. The theory of property under Italian cultural property law, seen through the subject matter of modern and contemporary Italian fashion design objects, can, at the very least, provide an initial foundation for such a theory of property.⁵³

There is also, of course, a hierarchical concern to equating modern and contemporary Italian fashion design objects with other culturally appropriated heritage. It is a concern of perpetuating high fashion hierarchies over artisanal production, of supporting urban realities over regional traditions, of protecting global conglomerates over local businesses.⁵⁴ Italy again, however, with its rich, sometimes still problematic, history, and long evolution of legal norms for cultural heritage generally, provides us with ways to address these concerns. These ways, moreover, do not necessarily mean protecting or

⁵³ Such a new theory of property is in line with other legal scholars' interest in developing new theories of property which will address changes brought on by technology. Data, for example, is seen as a new kind of property that necessitates a new legal definition. See Christina Mulligan with James Grimmelman, *Data is Property*, a working paper presented at the 2019 Intellectual Property Scholars Conference (defining property as an "institution for organizing resources in Society").

⁵⁴ In some ways this is a complaint levied or challenge addressed by those who seek to solve the inadequacy of the term property applied to material aspects of cultural heritage. For a discussion of the challenges of thinking about cultural property between community property and traditional, ownership-based property in the United States see Kristin A. Carpenter, Sonia K. Katyal and Angela R. Riley, *In Defense of Property*, 118(6) YALE L. J. 1022 (2009) ("offer[ing] a stewardship model of property to explain and justify indigenous peoples' cultural property claims in terms of nonowners' fiduciary obligations towards cultural resources"); Michael F. Brown, *Culture, Property and Peoplehood: A Comment on Carpenter, Katyal and Riley's 'In Defense of Property'*, 17 INT'L J. OF CULTURAL PROP. 569 (2010) [hereinafter Brown, *Culture, Property and Peoplehood*]; Michael F. Brown, *Can Culture Be Copyrighted?* 39(2) CURRENT ANTHROPOLOGY 193, 197 (1998) [hereinafter Brown, *Can Culture*].

preserving modern and contemporary Italian fashion design objects to the detriment of a market, a culture, a people, or society at large.

Fashion Law has today been exported to Italy. Concurrently to Scafidi's and Jimenez's efforts two Florentine lawyers published *Il Diritto e la Moda*, with a preface by Ferruccio Ferragamo, President of Salvatore Ferragamo, s.P.a. in 2006.⁵⁵ In Italy, Scafidi's work on fashion law has been taken up with gusto by scholars such as Barbara Pozzo, who has written her own book *Fashion Law*⁵⁶ and begun courses in the subject at the Università degli Studi dell'Insubria.⁵⁷ Other courses in fashion law have recently appeared over time in Italy. Most recently LUISS in Rome has started a Masters in Fashion Law⁵⁸, on the heels of Fordham's Masters of Laws in Fashion Law program⁵⁹, and Milan and Florence also offer continuing legal education courses and seminars in the subject.⁶⁰ Over the past few years, more books on Fashion Law have also appeared in Italy, such as Silvia Segnalini's *Le Leggi della Moda* and Angelo Maietta's *Il Diritto della Moda*.⁶¹ More than simply adding a European gloss, however, to Fashion Law, Italian law provides legal tools as yet undervalued in the Fashion Law arsenal. As Fabio Moretti has explained, the archives of Italian companies might have items of cultural property in them, or, at the very least, things protected by intellectual property and moral rights which need to be properly evaluated during a company's public offering or properly construed as

⁵⁵ MARIA GRAZIA ANTOCI AND ANDREA ORCIANI, *IL DIRITTO E LA MODA: ASPETTI LEGALI ESSENZIALI PER OPERATORI DEL SETTORE* [Law and Fashion: Essential Legal Aspects for Operators in the Sector] (2006).

⁵⁶ *FASHION LAW: LE PROBLEMATICHE GIURIDICHE DELLA FILIERA DELLA MODA* [Fashion Law: Legal Problems of the Fashion Supply Chain] (Barbara Pozzo and Valentina Jacometti, eds.) (Giuffrè 2017).

⁵⁷ The course at the Università degli Studi dell'Insubria is also mentioned in Brewer, *Fashion Law: More than Wigs*, *supra* note 8 at 747, n. 55. See also *Corso di perfezionamento in Fashion Law - Le problematiche giuridiche della filiera della moda*, UNIVERSITÀ DEGLI STUDI DELL'INSUBRIA, <https://www.uninsubria.it/postlauream/corso-di-perfezionamento-fashion-law-le-problematiche-giuridiche-della-filiera-della> (last visited March 27, 2019).

⁵⁸ *The new master's program in Fashion Law*, LUISS, February 25, 2019, 1:24pm, <https://www.luiss.edu/news/2019/02/25/new-masters-program-fashion-law> (last visited March 27, 2019).

⁵⁹ See *supra* note 29.

⁶⁰ See, for example, the Milano Fashion Institute, a consortium of universities including the Università Commerciale Luigi Bocconi and the Università Cattolica del Sacro Cuore, which offers a short course in Fashion Law. See *Fashion Law*, MILANO FASHION INSTITUTE, <https://www.milanofashioninstitute.com/short-courses/fashion-law>, last visited March 27, 2019; *Fashion Law. Diritto e Cultura nella Filiera della Moda*, DIPARTIMENTO DI SCIENZE GIURIDICHE, UNIVERSITÀ DEGLI STUDI DI FIRENZE, <https://www.dsg.unifi.it/vp-550-fashion-law-diritto-e-cultura-nella-filiera-della-moda.html> (last visited March 27, 2019).

⁶¹ SILVIA SEGNALINI, *LE LEGGI DELLA MODA: GUIDA AL DIRITTO PER IL MONDO DELLA MODA* [The Laws of Fashion: A Guide to Law for the Fashion World] (2012); ANGELO MAIETTA, *IL DIRITTO DELLA MODA* [The Law of Fashion] (2018).

assets of a company foundation.⁶² Italian cultural property law, which would restrict the alienation of such items or impose obligations for their preservation would affect the nature and activity of fashion businesses, fashion brands, and even fashion not for profit foundations. These effects would be beyond those already exerted by intellectual property law. American lawyers and legal scholars dealing with fashion and law benefit from a knowledge of such cultural property rules. These cultural property rules also have the ability to change how we think about fashion itself- both as part of design and as part of the objects in which we live our lives. In addition, modern and contemporary Italian fashion design objects are only proliferating in spaces of public trust, like museums. They are also crucial parts of company archives, private museums, and exhibitions which serve the ends of for-profit companies while also involving the public and its collective cultural interest.⁶³ Modern and contemporary Italian fashion design objects are, whether or not they are protected by intellectual property law, aging in to Italian cultural property law's requirements for cultural property. Understanding how modern and contemporary Italian fashion design objects are the subject matter of cultural property law, with reference to one area of intellectual property law, copyright, will help us to properly inherit our future cultural heritage and define cultural property under the law for that future and for our present.

⁶² Fabio Moretti, Gavin Llewellyn, Javier Garcia | Union Internationale des Avocats, *Lecture: Heritage in the fashion world. IP, contractual and corporate issues* (April 12, 2019) (part of the course FASHION LAW: DIRITTO E CULTURALE NELLA FILIERA DELLA MODA, Università degli Studi di Firenze).

⁶³ While an exhaustive list of exhibitions involving modern and contemporary Italian fashion design objects is beyond the scope of this dissertation, since 2015 major exhibitions have been held both in Italy and in the United States which prominently featured Italian fashion in places of public trust, beyond traditional museums. These include *Couture/Sculpture*, an exhibition of Azzedine Alaïa's work at the Villa Borghese in Rome in 2015 and *Italiana. L'Italia vista dalla moda 1971- 2001* at Palazzo Reale in Milan. See Azzedine Alaïa, GALLERIA BORGHESE, <http://galleriaborghese.beniculturali.it/it/news/azzedine-alaia>; see also ITALIANA. ITALY THROUGH THE LENS OF FASHION 1971- 2001 (Stefano Tonchi, ed., 2018). In addition, private museums belonging to Italian fashion brands have remained opened, facilitating research (such as the *Museo Ferragamo*) or have closed (such as the *Museo Gucci*, now the *Gucci Garden* or *Gucci Galleria*). Italian fashion brands continue to lend their design objects to museums in the United States, often playing a crucial role in the message of fashion not only as art but as on par with other items of ascertained cultural property. One example is the exhibit *Heavenly Bodies: Fashion and the Catholic Imagination* at The Metropolitan Museum of Art in 2018. See *Heavenly Bodies: Fashion and the Catholic Imagination*, THE METROPOLITAN MUSEUM OF ART, <https://www.metmuseum.org/exhibitions/listings/2018/heavenly-bodies>. The *Heavenly Bodies* exhibition also presents an example of how fashion design objects can reveal the same competing interests as other cultural properties that are also of religious significance and in religious use, like chapels. See LORENZO CASINI, EREDITARE IL FUTURO: DILEMMI SUL PATRIMONIO CULTURALE [Inheriting our Future: Cultural Heritage Dilemmas] 27 (2014) [hereinafter CASINI, EREDITARE IL FUTURO].

3. Aim and Scope of the Dissertation

The aim of this dissertation is to trace the legal links that exist between cultural property and Italian fashion design objects in Italy and in the United States. The primary legal links examined are those of Italian cultural property law as applied to Italian fashion design objects, although Italian copyright law is also contemplated. The reason to compare cultural property law and copyright, and not, for example, cultural property law and design rights, or even cultural property law and trademark law, both of which might also be appropriate, among still other regime comparisons, is twofold. First, Italian cultural property law, which is the closest legal regime to define Italian fashion design objects as cultural property for territorial reasons, namechecks copyright law within its legal code. Italian cultural property law deliberately carves out a negative space for itself and lets copyright law act in its stead or alongside it in certain circumstances.⁶⁴ Second, recent, but also historic⁶⁵, calls to extend copyright protection to fashion designs in the U.S., a recent U.S. Supreme Court case holding certain features of cheerleading uniform designs copyrightable subject matter, and the lack of a comprehensive body of cultural property law for non-indigenous movable objects not on public property but of American cultural significance in the United States, all point to copyright law as an important legal field for fashion design and, therefore, for fashion design objects. In addition, U.S. copyright law's complex framing of itself as an intangible property which embodies certain intangible expressions fixed in a tangible finds a partner in Italian cultural property law's own parsing of tangibles and intangibles.

The chosen law might have been contained to Italian legal sources and Italian legal doctrine, but the nature of modern and contemporary Italian fashion design objects calls for a comparative legal framework. Indeed, the history of Italian fashion and the nature of cultural property highlight how other countries, including France and the United States, played a crucial role both in the presentation, dissemination and acceptance of Italian fashion around the world and, separately, in the presentation and evolution of Italy's cultural property legal framework.

⁶⁴ Art. 107(1), CODICE, D.L. n.42/2004.

⁶⁵ For a description and historical reconstruction of an extension of copyright protection to fashion in the United States see C. Scott Hemphill and Jeannie Suk, *The Fashion Originators' Guild of America: Self-help at the edge of IP and Anti-trust* in INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP (Rachel Cooper Dreyfuss and Jane C. Ginsburg, eds.) 159- 179 (2014) [hereinafter Hemphill and Suk, *The Fashion Originators' Guild of America*]; see generally Colman, *History and Principles*, supra note 6 (also with some references to design rights).

A comparison between France and Italy in terms of how modern and contemporary Italian fashion design objects are cultural property under the law would be apt. Not only does France now deliberately collect examples of contemporary French fashion as part of its governmental support of French cultural heritage⁶⁶, but France has an extensive cultural heritage legal framework in place which has recently allowed for the acquisition of certain costumes as part of French cultural heritage.⁶⁷ In addition, the status of Paris as the capital of fashion until World War II, in the fashion imaginary at the very least if not, sometimes, in fact⁶⁸, has informed contemporary discussions of fashion's artistry and comparative legal explorations of its copyrightability.⁶⁹

⁶⁶ Joelle Diderich, *French Government to Buy Five Designer Items Every Season*, WOMEN'S WEAR DAILY, April 28, 2017, WWD database (discussing this collecting as part of "a permanent collection to be housed at the National Center for Visual Arts" alongside the initiatives of private French fashion houses, such as the Yves Saint Laurent museum and Dior Heritage; also mentioning the institution of a "French Fashion Heritage label to underline the exemplary nature of the conservation work carried out by certain couture houses and luxury brands"). The notion of *haute couture* as part of French cultural heritage is visible in an article in French Vogue in 1980, Robert F. Caillé (and Ministre de la Culture, Monsieur Jean-Philippe Lecat), *Le Point de Vue de Vogue : Le Haute Couture Notre Patrimoine*, VOGUE FRANCE, March 1980 at 283-285.

⁶⁷ Collection « Un trésor national au musée de l'armée », L'ÉCHO DU DÔME #31 MUSÉE DE L'ARME INVALIDES, OCTOBRE 2014/JANVIER 2015, <https://www.musee-armee.fr/echo-du-dome/31/html-accessible/actualites/collection-un-tresor-national-au-musee-de-l-armee.html> (describing the acquisition of a ceremonial uniform, as the result of the French government's acquisition after the heirs attempted to sell it and export it from France). See also *L'habit et le manteau de cérémonie du maréchal Ney*, LE BLOG DES ACTUALITÉS DU MUSÉE DE L'ARMÉE, MUSÉE DE L'ARMÉE INVALIDES, December 13, 2014, <http://actualites.musee-armee.fr/non-classe/lhabit-et-le-manteau-de-ceremonie-du-marechal-ney/>. For a codification of the French law governing cultural patrimony see Ordonnance n° 2004-178 du 20 février 2004 relative à la partie législative du code du patrimoine [Ordonnance n. 2004-178 of the February 20, 2004 on the legislative part of the Cultural Heritage Code], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], February 24, 2004, p. 37048.

⁶⁸ For an overview of Paris as a capital of fashion see VALERIE STEELE, PARIS, CAPITAL OF FASHION (Bloomsbury, 2019) but also VALERIE STEELE, PARIS FASHION: A CULTURAL HISTORY (Bloomsbury, 2017).

⁶⁹ Susan Scafidi partially underlies the differences in copyright protection for fashion designs in France and the United States in a historical presentation of France as a past and current capital of fashion and the United States as a nation of copyists with a fashion industry fighting for cultural recognition. See Scafidi, *Intellectual Property and Fashion Design*, *supra* note 6; Raustiala and Sprigman, *The Piracy Paradox*, *supra* note 9 discuss both the history of copying French fashions in the United States and the legal protections available in the United States at their writing, concluding that increased legal protection for fashion designs would not change the practices of fashion copying on either side of the Atlantic; C. Scott Hemphill and Jeannie Suk Gersen in *The Law, Culture, and Economics of Fashion*, 61 STANFORD L. REV. 1147 (2009) (arguing for an extension of protection for fashion designs which would consider close copying as copyright infringement, note that such a protection in Europe does result in less close copies, both in

Historical explorations of the differences between the United States and France in terms of the protection of fashion under the law already exist as a part of the literature.⁷⁰ A direct examination of legal protections for modern and contemporary Italian fashion design objects under French law is, however, beyond the scope of this dissertation. This is notwithstanding the fact that perhaps the earliest example of a work dedicated to “fashion law” as a field is found in the French text by Jeanne Belhumeur, *Droit International de la Mode*.⁷¹

Instead, the dissertation explores Italian cultural property law as applied to modern and contemporary Italian fashion design objects in comparison to U.S. law. The primary reasons for this are two-fold. First, the United States and Italy have enjoyed their own special relationship which has allowed for the evolution and acceptance of Italian fashion both on the market for it and in other more explicitly cultural spheres. The exploration of this special relationship has certainly occurred in fashion history and fashion studies literature⁷² and in legal scholarship, particularly that exploring cultural property and cultural heritage.⁷³ Such a comparative endeavor still has even more insight and information to contribute. Indeed, how modern and contemporary Italian fashion design objects are cultural property from this comparative law perspective can uniquely answer the “clash of cultures

Europe and the United States, while characterizing European based fast-fashion firms such as H&M as designers and U.S. based ones such as Forever 21 as copiers.)

⁷⁰ For example, NANCY J. TROY, *COUTURE CULTURE: A STUDY IN MODERN ART AND FASHION* (2004) (especially *Chapter 3, Fashioning Commodity Culture*, a historical exploration of the differences between *haute couture* and art and their copying in addition to their protection under intellectual property law in France with reference to Poiret); ALEXANDRA PALMER, *COUTURE AND COMMERCE: THE TRANSATLANTIC FASHION TRADE IN THE 1950s* (2001) (challenging “entrenched mythologies of couture” by historically contextualizing the appearance of *haute couture* dresses with labels from both sides of the Atlantic); Pouillard and Kuldova, *supra* note 17 (an overview of the special issue of the journal exploring from a historical perspective and through cases how “protection of design and fashion creations is situated between high and low authorship, or else, ‘at the edge of intellectual property’, as the lawyers Rochelle Cooper Dreyfuss and Jane C. Ginsburg put it.”)

⁷¹ Although this work lacks an explicit exploration of cultural heritage law. See JEANNE BELHUMEUR, *DROIT INTERNATIONAL DE LA MODE* (Canova, 2000) (exploring the legal protections afforded to fashion from a comparative intellectual property perspective between France, Italy and supranational and international law with reference to fashion history, aesthetics and art; the work is an evolution of Belhumeur’s PhD dissertation at the University of Geneva).

⁷² As but one example, NICOLA WHITE, *RECONSTRUCTING ITALIAN FASHION: AMERICA AND THE DEVELOPMENT OF THE ITALIAN FASHION INDUSTRY* (Oxford: Berg, 2000).

⁷³ Just one example of the work of John Henry Merryman, not only as applied to cultural heritage but also with reference to his considerable comparative scholarship alongside Italian colleagues such as Mauro Cappelletti, will suffice. MAURO CAPPELLETTI, JOHN HENRY MERRYMAN, JOSEPH M. PERILLO, *THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION* (1967).

and notions of property”⁷⁴, which is of fundamental concern to fashion and cultural heritage under the law. The second reason is that, unlike in France, in the United States it is hard to find an exact legal framework comparable to Italian cultural property law as it applies to movable objects of intangible cultural interest. Indeed, the United States, despite its historic preservation law and *sui generis* protections for Native-American movable objects and other laws protecting movable objects found on public lands, does not have a body of law easily identifiable as cultural property law.⁷⁵ Indeed, United States legal scholarship has had in some sense no choice but to follow a comparative and international *fil rouge* when discussing most movable cultural property on its own territory because of this very *lacuna*. Indeed, the lack of a body of law which conceives of movable objects in the United States as national cultural property seems to naturally filter conversations about the cultural significance of objects in the United States into disciplines which deal with similarly situated objects, like art, and therefore into “Art Law”, the field founded by John Henry Merryman and Albert Elsen.⁷⁶ In the face of this *lacuna*, and our American way of implementing the cultural property protections of other jurisdictions⁷⁷, Italy provides an excellent legal toolbox. Italy has already engaged with many of the legal issues at the heart of protecting both a vast cultural heritage and many challenging iterations of cultural property, from Dante’s text to architecture, furniture and even contemporary art. These are sound reasons to look to the Italian jurisdiction as an example.

Exploring the legal links between cultural property and Italian fashion design objects through Italian cultural property law and U.S. copyright law does not mean that these two legal regimes, as they exist in different legal jurisdictions with different histories and contexts, are necessarily the same. At the same time, however, the lack of an obvious cultural property law framework for non-indigenous movable objects of cultural interest in the United States leads to a search for the reasons, purposes and public interest at the heart of Italian cultural property law in unexpected legal regimes in the United States. The work of Patty

⁷⁴ Brewer, *Fashion Law: More than Wigs*, *supra* note 8 at 763.

⁷⁵ As Merryman has said, the United States is an exception to the rule that “[a]lmost every national government...treats cultural objects within its jurisdiction as parts of a ‘national cultural heritage’.” Merryman, *Two Ways*, *supra* note 2 at 832. See also Merryman, “Protection”, *supra* note 42.

⁷⁶ Albert E. Elsen, *In Honor of John Henry Merryman: Founding the Field of Art Law*, 39 STANFORD L. REV. 1086 (1987).

⁷⁷ This references the U.S.’s implementation of the cultural property claims of other source nations, in, for example, enabling legislation such as The Protect and Preserve International Cultural Property Act, 19 U.S.C. § 2601 (2016) and in The Convention on Cultural Property Implementation Act, 19 U.S.C. § 2603.

Gerstenblith and Joseph Sax has already partially provided ways to envision how legal regimes in the United States might be changed, expanded or re-interpreted to protect certain properties of cultural interest in the United States for new categories of objects, such as architecture, public art, books, presidential papers and library collections.⁷⁸ W.W. Kowalski has suggested that while “copyright law should not strive to replace or even compete with cultural heritage law”⁷⁹ it could be seen as “responsible for the protection of valuable works of art in the interim period- before the work of art is considered cultural heritage but when its protection is in the public interest.”⁸⁰ More recent scholarship has, in the face of increased digitization, explored how restrictions on the copying of works in the public domain may “curtail the dissemination of knowledge about artistic works whose materiality hitherto inhibited their circulation.”⁸¹ Other work has imagined how traditional garment design might gain increased copyright protection in part by allowing historic preservation or cultural property terms to inform copyright terms.⁸² Such scholarship, while not explicitly applied to fashion, already implies that there is some connection between legal protections of certain intangible property and certain tangible property across cultural property law and copyright law.

⁷⁸ Gerstenblith, in her article *Architect as Artist: Artists’ Rights and Historic Preservation*, explores what might be a better legal mechanism to “protect the past” of architecture: “architects’ rights in their capacity as artists” or further protection of specific “examples of architecture.” Patty Gerstenblith, *Architect as Artist: Artists’ Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L. J. 431, 432 (1994). Joseph L. Sax’s excellent *Playing Darts with a Rembrandt* looks especially to the specific examples of architectural heritage, presidential papers and library collections to question the deference to private ownership in the United States and reframe the relationship in the United States between public and private interests in property. Shifting the conversation from economic rights to “a right to decide the fate of an object” and the importance of a public domain, Sax links what he sees as the foundation of intellectual property law with a discussion of the regulation of personal property: whereas a “recognition that our accumulated knowledge and insight should be viewed as elements of a common heritage undergirds the basic premise of intellectual-property rules...”, no such notion of a common heritage underlies “ownership of physical things” in the United States. JOSEPH L SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 3, 9 (Ann Arbor : University of Michigan Press, 1999).

⁷⁹ W.W. Kowalski, *A Comparative Law Analysis of the Retained Rights of Artists*, 38 VANDERBILT J. OF TRANSNATIONAL LAW 1141, 1168 - 1169 (2005).

⁸⁰ *Id.*

⁸¹ Charles Cronin, *Possession Is 99% of the Law: 3D Printing, Public Domain Cultural Artifacts and Copyright*, 17 MINN. J.L. SCI. & TECH. 709, 711 (2016).

⁸² Saharah F. Farnazah, *Cultural Appropriation of Traditional Garment Designs in the Post-Star Athletica Era*, 37(2) CARDOZO ARTS & ENT. L. J. 415, 419 (2019) (exploring how indigenous fashion garments may have increased protection post Star Athletica and arguing a court deciding a copyright case could use terms from NAGPRA).

Hence then the comparison between U.S. copyright law and Italian cultural property law. The comparison is small in scope due to its explicit application only to modern and contemporary Italian fashion design objects. It explicitly compares one form of intellectual property- the copyrightable subject matter of pictorial graphic and sculptural works- with one form of Italian cultural property- movable things of historic or artistic interest, or those things which are also testaments having the value of civilization. Contrary to criticisms of the use of the word “property” to identify and protect parts of our cultural heritage under the law⁸³, the dissertation imagines that the use of such a term, in a comparative sense, can be helpful. Helpful primarily because it allows a reconceptualization of dichotomies such as “real, personal, and intellectual...tangible, intangible”⁸⁴ that have hitherto been deemed unnecessary or too problematic.⁸⁵

Of course, the scope of the dissertation’s inquiry is also naturally limited by many of the same practical legal issues that are at the heart of its conclusions about how modern and contemporary Italian fashion designs are cultural property under the law in Italy and in the U.S. Information about and access to modern and contemporary Italian fashion design objects is often controlled, thanks to the law, by the Italian corporations which produce and sell them. This can at times frustrate a study of them by uninterested third parties. Copyright owners are also not the only barrier. The U.S. Copyright Office only allows the images of registered pictorial, graphic and sculptural works deposited to be shown to researchers on site and at cost, with the permission of the copyright holder, during pending litigation, or if the researcher is an attorney representing a party in the case.⁸⁶ Compounding matters is that these modern and contemporary Italian fashion design objects, both in their tangible and intangible parts, may be of fundamental importance to the business activities of Italian fashion corporations. This leads, at the very least, to a confidentiality which at times frustrates a truly transparent academic analysis.

⁸³ Lyndel V. Prott and Patrick O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’?, 1 INT’L J. CULTURAL PROP. 307, 310- 311 (1992) (“ ‘Property’ does nothing to counteract the concentration on commercial value whereas ‘heritage’, while not of course capable of doing away with it, can lessen the impact.”).

⁸⁴ *Id.* at 313.

⁸⁵ *Id.* (noting these dichotomies “[are] largely unhelpful in that cultural complexes often flow across the classifications in a way that the legal system has not been constructed to cope with”).

⁸⁶ E-mail to author from Records, Research and Certification at the U.S. Copyright Office, copycerts@copyright.gov, February 6, 2019 at 2:28 pm (noting “to get copies of registered works you would need permission from the owner or submit a Litigation statement. Applications, registrations, correspondence and recorded documents are public record so we can provide that information.”)

Moreover, given the commercial nature of Italian fashion design objects and the peculiarities of Italian copyright law, most Italian fashion design objects seem to not have been registered as literary, scientific and artistic property at the time of their creation. If they had been they would have appeared on the register maintained by the most comparable administrative agency to the U.S. Copyright Office in the Italian instance, the *Ministero per i beni e le attività culturali* in Italy.⁵⁷ In addition, even fashion museums and other cultural institutions who collect fashion in the public interest and keep records of Italian fashion design objects are affected by the need to maintain good working relations with Italian fashion companies who donate their fashion design objects or sponsor exhibitions. As detailed in the acknowledgements, where possible these natural research restrictions have been circumvented by obtaining information from publicly available archives and registers, such as the Archivio Centrale dello Stato in Rome, the New York Public Library in New York City and the U.S. Copyright Office in Washington, D.C. The generosity of certain museums, including the Museum at the Fashion Institute of Technology, the Archives of The Metropolitan Museum of Art in New York City, and the Galleria degli Uffizi, has been invaluable.

4.. Research Question and Methodology

The primary and overarching research question is

- How are certain modern and contemporary Italian fashion design objects cultural property under Italian cultural property law?

Recently there has been a marked acceptance of Italian fashion's importance as part of Italian cultural heritage. This has been especially so thanks to Italian fashion's inclusion in public and private museums in Italy. Some studies on tourism and in business literature have explicitly entertained how fashion and cultural heritage interact for the

⁵⁷ The Ferragamo legal office has noted they are not aware of Salvatore Ferragamo registering any of his fashion design objects under copyright law during his lifetime. See Interview with Ferragamo Legal Office, Giselle Stoecklin and Avv. Giacomo Bucciarelli (May 11, 2019) (notes on file with author). See also e-mail to author from *Segreteria Ufficio Registro Pubblico Generale delle opere protette, Servizio II - Patrimonio bibliografico e diritto d'Autore, Direzione Generale Biblioteche e Istituti culturali, Ministero per i beni e le attività culturali*, February 19, 2019, 12:23 pm (citing to its duty to maintain a registry open to the public for literary, scientific and artistic works and to periodically publish the list of such works in an official bulletin in "L'art. 41 del Regolamento per l'esecuzione della L. 22 aprile 1941, n.633 per la protezione del diritto d'autore e di altri diritti connessi al suo esercizio (approvato con R.D. 18 maggio 1942, n. 1369)").

benefit of tourism and corporations, in Italy and elsewhere.⁸⁸ In addition, fashion studies has also taken up the link between Italian fashion and Italian cultural heritage.⁸⁹ Some of the literature, especially the work of Daniela Calanca, has come close to fully examining the legal issues surrounding how Italian fashion is part of Italian cultural heritage under the law, especially with regards to private fashion corporations and at times in a way connected to the heritage of even other Italian corporations in the *Museimpresa* group.⁹⁰ Separately, Antonio Leo Tarasco has envisioned how design is a testament having the value of civilization under Italian cultural property law and how fashion shows can be tools of valorization for cultural property.⁹¹ The recognition of Italian fashion as part of Italian cultural heritage has been made in statements by the Director of the Uffizi galleries Eike Schmidt and by past and current Italian Cultural Ministers. In 2016, upon the

⁸⁸ Daniela Calanca, *Italian Fashion History and Cultural Heritage: Data for a Tourist Guide 5* ALMATOURISM: J. OF TOURISM, CULTURE AND TERRITORIAL DEVELOPMENT (2012) (proposing Italian fashion as an Italian cultural heritage that can be promoted for tourism with an excellent overview of the fashion museums and archives in Italy and contextualizing the proposal with reference to the 2003 Convention for the Safeguarding of Intangible Cultural Heritage); Andrade R.M et al, *Fashion and Cultural Heritage in Perspective: 1st Seminar on History and Historiography of Fashion and Dress. University of São Paulo (USP)/Federal University of Goiás (UFG)* (June 2013), 7 ALMATOURISM: J. OF TOURISM, CULTURE AND TERRITORIAL DEVELOPMENT 157 (2013) (also discussing the contribution of Daniela Calanca at the University of Bologna to the presentation of fashion as of historical significance and therefore as cultural heritage); Anne-Sofie Hjemdahl, *Fashion Time: Enacting Fashion as Cultural Heritage and as an Industry at the Museum of Decorative Arts and Design in Oslo*, 8(1) FASHION PRACTICE 98 (2016), doi: 10.1080/17569370.2016.1147695 (a historical analysis of how the fashion industry and fashion museums developed their relationships, “help[ing] to legitimize each other”, using the case study of a 1933 “dress event at the Museum of Decorative Arts and Design in Oslo”). See also MONICA AMARI, I MUSEI DELLE AZIENDE. LA CULTURA DELLA TECNICA TRA ARTE E STORIA (2001) (mapping corporate archives and museums throughout Italy).

⁸⁹ Eugenia Paulicelli, *Fashion: The Cultural Economy of Made in Italy*, 6(2) FASHION PRACTICE 155- 174 (2014). See also CALANCA, *infra* note 90.

⁹⁰ Daniela Calanca and Cinzia Capalbo, *Fashion and Cultural Heritage* 8(1) ZONEMODA VI (2018) (defining cultural heritage according to Article 2 of the Italian Code of Cultural Property and Landscape, citing to DANIELA CALANCA, LA STORIA SOCIALE DELLA MODA CONTEMPORANEA 17- 47 (2014) and mentioning the challenges that can result when a fashion company manages their own heritage). See also Daniela Calanca, *Moda e Patrimonio Culturale* in CALANCA, *supra* at 17- 47 (extensively citing to the Italian Code of Cultural Heritage and Landscape, including Article 10 and Article 13, to note how Italian fashion is cultural heritage as an “*inventario ingente*” and also discussing the European and Fashion: Discover Europe’s Fashion Heritage project in 2012 and intangible heritage more generally).

⁹¹ Antonio Lei Tarasco, *Il disegno quale testimonianza della civiltà italiana nel mondo* [Design as a testament having the value of Italian civilization in the world] in 2 AEDON [Art and Law Online], <http://aedon.mullino.it/archivio/2017/2/tarasco.htm>; ANTONIO LEO TARASCO, IL PATRIMONIO CULTURALE: MODELLI DI GESTIONE E FINANZA PUBBLICA [Cultural Heritage: Models of Management and Public Finance] 70 n. 45 (2017) (also exploring how “*tessuti d’epoca*” are “*beni culturali minori*” *Id.* at 57.).

renaming of the *Museo del Costume* in *Palazzo Pitti* to the *Museo della Moda e del Costume* Eike Schmidt noted the dual role of this new museum vision, one in which

*“il nuovo Museo della Moda di Firenze, oltreché radunare e mettere in mostra il patrimonio storico della moda italiana, con il programma di allestire due grandi mostre l’anno, aprirà le porte a giovani designer e ricercatori, interessati a studiare questi abiti che hanno fatto la storia della moda.”*⁹²

In 2017 the Minister of Culture Dario Franceschini noted, upon the donation of funds for the restoration of the Boboli Gardens by the Gucci company that,

*Anche la moda è parte del patrimonio culturale e della storia del nostro Paese... dove il gusto, l’eleganza e l’educazione al bello fanno parte del nostro quotidiano. Il legame tra moda e arte è sempre stato molto stretto e ha spesso favorito occasioni di incontro suggestive e uniche. Come avviene oggi con un marchio prestigioso dello stile italiano che decide di investire in modo significativo su una grande istituzione culturale nel pieno rispetto della sua missione.*⁹³

Taking an even broader perspective on the cultural value of Italian fashion for Italy grounded in fashion’s value for current Italian creative industries, the previous Minister of Culture Alberto Bonisoli made Italian fashion an integral part of his plan for the Ministry.⁹⁴

The founding of the digital archive, *Archivi della Moda del Novecento* in 2009⁹⁵ [Figure 4] has certainly led to the identification of Italian fashion

⁹² Enrica Roddolo, Schmidt: «Ecco come sarà il nuovo Museo della Moda di Firenze», CORRIERE DELLA SERA, 13 maggio 2016 (modifica il 18 maggio 2016, 12:10), <https://www.corriere.it/cultura/eventi/notizie/schmidt-ecco-come-sara-nuovo-museo-moda-firenze-5dbada30-18ff-11e6-a60e-5fac25fd8ba7.shtml>.

⁹³ [Press Release] Franceschini, *Da Gucci Investimento Significativo per Giardini di Boboli: Anche la moda parte del patrimonio culturale*, Ufficio Stampa MiBACT (4 aprile 2017) http://www.beniculturali.it/mibac/export/MiBAC/sito-MiBAC/Contenuti/MibacUnif/Comunicati/visualizza_asset.html_1737793921.html.

⁹⁴ Perhaps the most recent manifestation of this is the institution of a *Commission to Study the Identification of Public Policies for the Protection, Conservation, Valorization, and Use of Italian Fashion as Cultural Heritage*. See Decreto Ministeriale 12 Dicembre 2018, n. 551 (on file with author). A recent short summary of the Commission’s work is available here http://www.beniculturali.it/mibac/export/MiBAC/sito-MiBAC/Contenuti/MibacUnif/Comunicati/visualizza_asset.html_1132902770.html. As will be discussed *infra* Italian legal scholars like Grisolia and Cassese note the possibility of including parts of the fashion system (namely the traditional arts and customs) into cultural heritage law.

⁹⁵ The archive is available here, <http://www.moda.san.beniculturali.it/wordpress/>.

design *in an archive* as cultural property.⁵⁶ This identification seems not, however, to have fully parsed whether cultural property is fashion in its intangible nature (the images of the fashion designs, the designs themselves, even the digital collection of fashion) or in its tangible nature (shoes, accessories, and other ephemera as properties only later shared through images as a tool for valorization).

Modern and contemporary Italian fashion design objects are not yet, however, explicitly recognized as cultural property in the text of Italian cultural property legislation. This is notwithstanding the awareness of Italian fashion's value as part of a national cultural heritage, its embrace in digital archives, brick and mortar museums, and the history of Italian cultural property law's consideration of the many iterations of cultural property on the Italian territory. Fashion is not a category specifically named like certain iterations of photography or film.⁵⁷ In this sense, the main research question is also beneficial for Italian cultural property and the Italian territory, even outside of the dissertation's comparative framework. Examining how certain modern and contemporary Italian fashion design objects are included or excluded from the proverbial cultural property "box" under Italian law, especially outside the museum or archive, helps to problematize issues for Italian fashion design objects which Italian law has affronted throughout history for other objects. These issues include whether fashion design objects should be conceived *a priori* as part of a cultural activity or as a cultural property, whether public or private ownership of fashion design objects should lead to different legal requirements for its preservation and valorization, whether fashion design objects need to reach a certain time threshold to capture our cultural interest and, most importantly, where and how to identify our intangible public cultural interest in Italian fashion design objects. Indeed, it is not a foregone conclusion that modern and contemporary Italian fashion design objects, outside a state museum collection or public archive, are cultural property under Italian cultural property law at all.

Underneath and at times concurrently to the primary and overarching research question are also other research questions which follow from it:

- What is the relationship between cultural property protection in Italy and copyright protection in Italy, especially for modern and contemporary Italian fashion design objects?
- Is there an overlap between the modern and contemporary

⁵⁶ Donato Tamblé, *Intervento alla Conferenza Nazionale degli Archivi*, Progetto "Archivi della moda del '900", Gruppo di Lavoro Archivi e Moda, Bologna, 20 Novembre 2009 at 3.

⁵⁷ Art. 10(4) and Art. 11, CODICE, D.L. n.42/2004.

Italian fashion design protected by Italian copyright law and U.S. copyright law?

- Is there some common element in the subject matter of Italian cultural property law and U.S. copyright law as these laws are applied to modern and contemporary Italian fashion design objects?
- What might any commonalities or differences mean for the treatment of Italian fashion design objects as cultural property in Italy and in the United States?

Of course, answering the primary and overarching research question as well as the secondary ones entails defining some terms in them, primarily modern and contemporary Italian fashion design objects and cultural property.

Modern and contemporary Italian fashion design objects refers to the union of intangible designs and tangible fabric, clothing, or accessories by Italian designers or Italian fashion companies in Italy or elsewhere which date from the early 20th century to the present day. The primary definition of fashion is as “a social phenomenon affecting the way members of a culture or society behave”⁸⁸ which is characterized by the acceptance by a large number of people for a short period of time.⁸⁹ This large number of people need not be Italian but are rather any large number of people anywhere in the globe who accept a certain Italian fashion design object for a short period of time. A short period of time can refer to the first time an object is accepted by a large number of people. But it must be observed that an Italian fashion design object may be accepted thusly at distinct periods of time for a short while, or it may be accepted once for a short period of time or accepted once, not

* Phyllis G. Tortora, *History and Development of Fashion* in BERG ENCYCLOPEDIA OF WORLD DRESS AND FASHION 159- 170 (Joanne B. Eichner and Phyllis G. Tortora, eds.). Accessed through Bloomsbury Fashion Central. There are, of course, other ways in which to define fashion design and choosing one definition is, as Charles Colman has noted, inherently artificial. See Colman, *History and Principles*, *supra* note 6 at 228, n. 6 (citing to Paulicelli and Palmer). Tortora also notes the differences between costume, clothing, dress and fashion, which the dissertation does not particularly delve into. We could also define fashion according to Valerie Steele, as “the cultural construction of the embodied identity,” and more directly explore the nexus of fashion, identity and cultural property, as Vittoria Barsotti has aptly suggested during the *viva* of this dissertation. See Valerie Steele, *Preface* in THE BERG COMPANION TO FASHION (Berg 2010 (accessed through Bloomsbury Fashion Central)). While acknowledged in a discussion of hierarchies in some parts of this work, a full consideration of fashion, identity and cultural property is beyond the scope of the present dissertation, but certainly an area for future work.

* *Id* (describing these two elements as common across different definitions of fashion). See also MANAGING FASHION, *supra* note 18 at 18 (Milano, Rizzoli, 2009) (noting from a business management perspective how fashion is characterized by change while luxury has comparatively more permanence).

for forever, but for a longer period of time. Recurring Italian fashion design objects are still fashion, but a constant Italian fashion design object may not be fashionable in the classic definition of the term. This may, then, affect a modern and even contemporary Italian fashion design objects' classification as cultural property under the law. Here is the tension between fashion as an embodiment of the past and present and even as meaningful for the future, which other authors have treated from a philosophical point of view.¹⁰⁰

Other authors have deeply engaged with the etymology of the term fashion, both in English¹⁰¹ and in Italian.¹⁰² The term fashion design objects builds on these previous constructions and deliberately acknowledges the unity between form and function that is characteristic of design and that, therefore, also informs fashion.¹⁰³ Indeed, design can be fashion, and fashion is, in our case, most often design.¹⁰⁴ At the same

¹⁰⁰ WALTER BENJAMIN, THE ARCADES PROJECT (Howard Eiland and Kevin McLaughlin, trans., Rolf Tiedemann, ed., 1999); Eun Jung Kang, *The Dialectical Image: The Redemption of Fashion*, 18(3) FASHION THEORY 341 (2014); Ulrich Lehmann, *Tigersprung: Fashioning History*, 3(3) FASHION THEORY 297 (1999). See also Andrade et al, *supra* note 88 (discussing the work of Daniela Calanca).

¹⁰¹ *Etymologies and Definitions of Fashion as Clothing* in BARNARD, *supra* note 37 at 8- 26.

¹⁰² EUGENIA PAULICELLI, WRITING FASHION IN EARLY MODERN ITALY: FROM SPREZZATURA TO SATIRE 5-6 (ASHGATE, 2014); MANAGING FASHION, *supra* note 18 at 4-5.

¹⁰³ Penny Sparke, *Design* in GROVE ART ONLINE, <https://doi.org/10.1093/gao/9781884446054.article.T022395> (also noting “[design] has become increasingly identified with product design for industry...and is seen as an essential part of the process of making, marketing, and selling mass-produced goods.”) Sparke’s entry mainly focuses on the Anglo-American conceptions of design and treats other traditions, including the Italian one, mainly in a comparative light. Loschek also gives an overview of the relationship between fashion and design. INGRID LOSCHEK, WHEN CLOTHES BECOME FASHION: DESIGN AND INNOVATION SYSTEMS 173- 176 (2009), noting fashion is an added layer of social agreement about design. Although Loschek notes the importance of materiality in design, the majority of her chapter *When is Fashion Design?* is devoted to presenting fashion in terms of design styles and eras. Design itself is also increasingly dematerialized and the challenges it presents for law, in its union of tangible things and intangible processes, characterized as “blendy”, is investigated in much of Mark McKenna’s work. See, for example, the work in progress *Investigating Design: A Qualitative Study of Professional Designers* by Mark McKenna and Jessica Silby, presented at the 2019 Intellectual Property Scholars Conference.

¹⁰⁴ Program Report, The Fashion Group’s Fourth International Focus: “In Pursuit of Style, The Fashionable Object”, June 7, 1988, Fashion Group International records. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations, Box 89, Folder 10. Conversations such as these between designers envision fashion as an addition to design which acts on objects and also call out the stratified yet overlapping nature of discussions of fashion. Designed objects can also be fashionable while fashion objects are designed in one way or another. (*From Functional to Fashionable* in Program Report, The Fashion Group’s Fourth International Focus: “In Pursuit of Style, The Fashionable Object” in *Id.* at 2; *The Manufacturing Problem* in Program Report, The Fashion Group’s Fourth International Focus: “In Pursuit of Style, The Fashionable Object” in *Id.* at 3).

time, the relationship between the tangible and intangible that informs fashion design objects is at the heart of its challenging categorization for cultural property law. Italian fashion design objects are at once tangible objects with an intangible design, an intangible design that is necessarily connected to a tangible object, and an intangible social agreement about an intangible design in a tangible object. In addition, Italian fashion design objects are often related to Italian style or to *Made in Italy*, which are intangible concepts that are descriptors of Italian fashion design objects. To engage with this complex nature of Italian fashion design objects and how Italian cultural property law should apply to them, the dissertation refers mainly to fashion studies literature, but also references art historical and business literature. In keeping with the definition of cultural property as a liminal notion¹⁰⁵, descriptions of products by Italian companies themselves, including in patent applications and copyright registrations, official communications and marketing campaigns, and in exhibitions staged with or without museums, also inform the cultural property presentation of Italian fashion design objects.

Cultural property here means movable objects of an intangible public cultural interest, whether historical, artistic or thanks to their ability to be testaments having the value of civilization. These objects can be in public or private ownership. The definition of cultural property is that contained in Articles 2 and 10 of the Italian Code of Cultural Property and Landscape. The dissertation also relies a great deal on Italian legal doctrine as well as on the history of Italian cultural property law and case law, where appropriate, to inform an understanding of the legal notion and of its application to Italian fashion design objects. What the dissertation finds to be legally determinative for individual objects to be classified as Italian cultural property in the greater context of Italian cultural property law is that the object be of some public cultural interest.¹⁰⁶ The importance of this public cultural interest must be balanced with other interests, of, for example, the fashion corporations who already preserve but continue to valorize Italian fashion design objects as part of their business activities. How that public cultural interest is identified and how that balancing act then takes place is a case by case determination that can frame current and future cultural property legislation and even procedures of administrative law. The same methodology is applied to Italian copyright law. While U.S. copyright law is greatly informed by the work of American legal

¹⁰⁵ As will be discussed *infra*. See for example Lorenzo Casini, "Italian Hours" *The Globalization of cultural property law*, 9 ICON 369, 378 (2011).

¹⁰⁶ *Id.* at 375 (citing to Giannini). In other words, a combination of the publicness and immateriality which Casini describes.

scholars the analysis is also informed by copyright circulars, applications found through the U.S. Copyright Register, and case law.

The dissertation also uses the term cultural heritage, the larger category into which cultural property is included as tangible cultural heritage, and intangible cultural heritage, as it is defined in international legal instruments. Intangible cultural heritage is defined as the union of cultural property and the “practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage” which can be manifested in, among other categories, “traditional craftsmanship.”¹⁰⁷ In addition, this dissertation’s work is informed by that of Janet Blake and Prott & O’Keefe on international cultural heritage law. The latter refer to cultural heritage expansively as “manifestations of human life which represent a particular view of life and witness the history and validity of that view.”¹⁰⁸ While other authors have already envisioned how copyright law in the United States unsuccessfully operates as a form of intangible cultural heritage protection¹⁰⁹, as mentioned above, the main research questions choose to, instead, concentrate on the relationship between tangible cultural property and copyright.

5. Structure of the Dissertation

In Italy and the United States today individual fashion design objects are increasingly being displayed as *on par* with other objects of cultural property, from fine art to the decorative arts and other categories of objects.¹¹⁰ At the same time, emphasis is also placed on the artisanship,

¹⁰⁷ For all these definitions see Convention for the Protection of Intangible Cultural Heritage, art. 2, 17 October 2003, UNESCO MISC/2003/CLT/CH/14, http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹⁰⁸ Prott and O’Keefe, *supra* note 83 at 307.

¹⁰⁹ Erin K. Slatterly, *Preserving the United States’ Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law*, 16(2) DEPAUL J. ART & ENT. LAW 201, 229- 236 (2006).

¹¹⁰ Such a display does not, of course, mean that everyone accepts these fashion design objects as like other cultural property. One recent example is comments surrounding the exhibit of Azzedine Alaïa’s work *Couture/Sculpture* at the Galleria Borghese in 2015. For conflicting opinions about the exhibit *Couture-Sculpture: Azzedine Alaïa in the History of Fashion* at the *Galleria Borghese* in Rome see Vanessa Friedman, *Azzedine Alaïa: Blending Fashion and Art in ‘Couture/Sculpture’*, THE N.Y. TIMES, July 15, 2015, available at <http://www.nytimes.com/2015/07/16/fashion/azzedine-alaia-blending-fashion-and-art-in-couture-sculpture.html> (praising the exhibit, noting “What is striking is the way the clothes sneak up on you, processed in the grand scheme of the panorama not as foreign objects but

the craftsmanship, the creative process, and the social participation that characterizes fashion and design. This emphasis on different parts of what we might term the fashion design universe presents challenges. How do we understand the products of fashion, the objects it acts upon and which it creates, as part of cultural heritage under the law, as cultural property? Central to the dissertation's exploration of fashion and cultural heritage are the problematics of categorizing fashion design objects under cultural heritage law, given that cultural heritage law, both at the international level and in Italy, generally distinguishes between intangible cultural heritage and tangible cultural property.

Italy, with its strong tradition of craftsmanship and artisanship, its many fashion brands and luxury brand goods companies, and its historic cultural property legislation which has consistently evolved over the 20th century, provides fertile ground for an examination of how Italian fashion design objects may be classified as cultural property under the law. While not providing a perfect cultural property legislation, Italy helps us frame our discussion of how modern and contemporary Italian fashion design objects are cultural property primarily because it identifies an intangible public cultural interest as at the heart of cultural property as a legal category. At the same time, Italian cultural property law also preserves and regulates entire objects which have both tangible and intangible, or reproducible, elements as cultural property.

Notwithstanding the focus on Italian fashion and Italian cultural property law, Italian fashion design objects are not confined to the Italian territory. One of the hallmarks of fashion design objects is their ability to travel both proverbially and practically. At the same time as fashions and fashion designs may be copied and imitated, so are the objects which form them imported and exported, sold and exchanged. Thinking about where we locate our public cultural interest in fashion design objects in order to classify them as cultural property necessarily involves taking into account this proliferation of Italian fashion design objects in our lives. And this proliferation of objects also includes an awareness of what we might term "counterfeits", "fakes" and "imitations", with great caveats and an awareness of the false dichotomies these terms imply. This awareness, however, does not

rather objects that have earned inclusion on their own merits.") versus Marta Pettinau, *Montanari senza censure sulla mostra di moda alla Galleria Borghese. E Anna Detheridge gli risponde con una lettera aperta: "Sono d'accordo con te, ma..."*, ARTRIBUNE, August 9, 2015, available at <http://www.tribune.com/2015/08/montanari-senza-censure-mostra-moda-galleria-borghese-anna-detheridge-risponde-lettera-aperta/> (describing readers' debate: *"Ha senso che sia un'istituzione culturale ad affermare che tra un marmo di Bernini e una maglia di Alaïa non ci sarebbe differenza?"*).

mean identifying the “real” fashion design object as cultural property. The “real” is not a bright line indicator of authenticity or cultural interest. Indeed, this dissertation is not about fighting against counterfeit fashion design objects or ascertaining which fashion design objects are “real” or not, whatever that means. Instead, an awareness of the multiple Italian fashion design objects made by multiple Italian artisans, brands, designers, and other members of society, is a tool in this dissertation to identify the scope and function of cultural property protection for fashion design objects. As will be shown, this leads to counterintuitive results for those who fight against fakes. Some Italian fashion design objects are potentially so culturally significant generally that “fakes” should not, and perhaps even cannot, be forbidden, either through cultural property law or, as some scholars would like, through copyright law. Other Italian fashion design objects are so culturally significant in their specificity that the very application of the words “fake” to other fashion design objects which attempt to copy it might be practically impossible.

The dissertation proceeds in the following way. The first chapter gives a history of Italian fashion. This history reveals that Italian fashion has been, since its inception, characterized by strong links to Italian cultural heritage, both through its use of craftsmanship and thanks to inspiration from objects of fine art like Renaissance paintings. In addition, this short history reveals that the Italian territory does not lend itself to a homogenous definition of what Italian fashion is. Individual cities and local traditions have strongly shaped the tangible iterations of Italian fashion design objects. This reliance on local traditions continues today in modern and contemporary Italian fashion design objects created by Italian fashion brands and luxury brand goods companies. Both lean on local workmanship and are inspired by specific cities, regions, and traditions in Italy. It also becomes apparent from this short history of Italian fashion that it is difficult, if not impossible, to separate the tangible from the intangible *within an Italian fashion design object itself*. It is hard, for example, to decide whether Missoni’s celebrated chevron shape is tangible or intangible, given that its visual, much like a painting’s composition, may be reproduced in many spaces, and yet is also closely tied to the yarn and fabric of which it is made.

The second chapter explores the *Pandora’s Boxes* of Italian cultural property law: cultural interest, time, and things. It explores the legislative history of Italian cultural property law, its text, its evolution and its application in certain cases and its interpretation by legal scholars. It becomes evident in this chapter that none of these “boxes” resolve the dilemma of what is cultural property on their own. Instead,

cultural interest, mechanisms of time, and an emphasis on tangibles all work together to determine whether the necessary cultural consensus exists to classify an object as cultural property under Italian cultural property law. Moreover, practical realities are also taken into consideration in the preservation and regulation of cultural property and in the very definition of it. Definitions of cultural property which would stifle the evolution of the very cultural consensus which defines cultural property tend to be avoided. This chapter also notes how Italian cultural property law purports to regulate *only the intangible parts of properties in certain circumstances by regulating their commercial reproduction*. This control of the relationship between the public's cultural interest in an object and the *unicum* of intangible elements and tangible elements that characterizes it as a cultural property leads to the question of whether Italian cultural property law might be, at times, inappropriately acting like a copyright regime.

The third chapter turns more explicitly to the assumptions which seem to underlie and shape the categories of Italian cultural property –the assumptions that there are separately identifiable tangible and intangible things. Looking at classic examples of Italian cultural property and also at examples of Italian fashion design objects, this chapter explores how our public cultural interest may converge on intangible elements in tangible property, just as much as it might converge on an entire *unicum* of tangible property with intangible elements. A comparison between different Italian fashion design objects reveals the problem of scope in cultural property law. If we have many different objects which are similar, how do we decide that an object is of cultural interest to us? Where do we decide to locate the cultural interest of objects that exist in multiples? This exercise is a delicate slicing of the proverbial cultural property pie. The chapter asks where we should locate our public cultural interest in Italian fashion design objects - in their intangible elements or in an *unicum* of intangible fashion design and tangible dress, accessory or other material? There are some objects which do not easily fall into the tangible and intangible categories which now characterize conceptions of cultural property, even as those categories exist in the work of such legendary Italian cultural property scholars as Massimo Severo Giannini. Looking to the history of the appearance of written texts and building on the work of previous scholars, the chapter uses text as an example and point out how *not all text is intangible or reproducible in all circumstances*. In other words, some text's meaning and communication is materially dependent and therefore requires the preservation of the material upon which the text is printed in addition to the text itself in order to fully understand the text's meaning. Taking a cue from examples of these types of tangible

text throughout history, the chapter then turns to examples of fashion design that seem materially dependent and, therefore, eligible for inclusion within the cultural property “box”. These fashion design examples challenge the notion that we should always think of all fashion design as intangible. Sometimes, the cultural message of and our cultural interest in a fashion design may need to be understood on a specific material and in relation to a specific object. This means that an *unicum* exists and a fashion design object may be tangible enough to be classified as cultural property. At the same time, however, there are some Italian fashion designs which seem to require proverbial travel and reproduction for their communication or for their cultural interest to exist. Moreover, certain aspects of fashion design objects, characterized with reference to the terms *style* and *schema*, may not need to be preserved as cultural property at all. At the end of the chapter, in the context of this plethora of examples of Italian fashion design objects, a legal standard emerges by which it might be decided whether modern and contemporary Italian fashion design objects are cultural property. Italian fashion design objects that include text might be evaluated according to their particular circumstance, in light of their specific place, support, message, and *at times* context, to determine whether our public cultural interest is sufficiently tied to a design that is materially dependent. If it is determined that a design is sufficiently materially dependent and that our public cultural interest attaches to that design, then an Italian fashion design object may be classified as cultural property as an *unicum* of design and tangible dress, accessory or other material. In this sense, Giannini’s differentiation between intangible text and objects of aesthetic, historic interest or testamentary value that can be classified as cultural property is expanded. *Some text or design is not only of public cultural interest but is also sufficiently materially dependent to be classified as cultural property.* In this sense, there are some so-labeled tangible texts which do not need to be indirectly protected through the preservation of manuscripts as testaments having the value of civilization. Some Italian fashion designs are like tangible text and may, therefore, be considered eligible for classification as cultural property. This legal standard forms the main proposal of the dissertation. Some Italian fashion designs may be considered like tangible text, like visible images or like testaments having the value of civilization. They may, therefore, be protected as cultural property under Italian cultural property law.

The fourth chapter categorizes the objects that exist in the Italian cultural property regime into four categories: tangible text, visible images, intangible text or intangible images, and testaments having the value of civilization. These categories are mapped on to Italian fashion

designs and Italian fashion design objects. Tangible text represents a union of the public cultural interest in certain intangible texts whose meanings are, however, tied to the material upon which they are placed. These “new” tangible texts are cultural property. The original is the text and the object. In a sense, tangible text cannot be copied because its meaning is so materially dependent. The placement of the same text on a different object no longer means the same thing and is not of the same public cultural interest. *Some fashion designs that incorporate text can be identified as like tangible text and therefore as cultural property.* Visible images, on the other hand, represent a union of the public cultural interest in tangible properties which have, however, separable intangible elements. Paintings and compositions are, here, the main example. These visible images are cultural property. The *unicum* of the tangible property with its intangible elements, such as a painting with its composition, is considered the original, while the composition alone is considered a copy. *Some fashion designs that incorporate text or images might be identified as like visible images and therefore as cultural property.* A third category, intangible text or intangible images, which we may in some circumstances term *schema* or *style*, represents a union of the public cultural interest with intangible properties alone. These intangible texts or intangible images are not cultural property. The text or the image is understood as always an original and never a copy, or as copies which always mean the same thing no matter where they appear. *Most fashion designs are like intangible text or intangible images and are therefore not cultural property.* The fourth and last category, testaments having the value of civilization, may be tangible iterations of intangible text or intangible images. These testaments having the value of civilization are cultural property, but they do not preserve the intangible text or intangible image directly. *Some fashion design objects might be testaments having the value of civilization and, therefore, cultural property.*

These categories indicate a fine differentiation between the intangible and the tangible. Because of Italian cultural property’s interest in regulating the reproduction of certain cultural properties, the lack of a similar cultural property legal regime in the United States and the fashion industry’s and legal literature’s general concern with the question of whether fashion design is copyrightable in the United States, the dissertation then turns to explore whether there might be some similarities between U.S. copyright law and Italian cultural property law in the same chapter. Namely, the chapter explores whether the conceptual separability test in U.S. copyright law is about identifying whether a potential intangible public cultural interest attaches to the intangible elements of tangible property. In other words,

it argues that conceptual separability applied to fashion designs is about deciding whether a fashion design is like a visible image.

Caveats exist as part of this comparison. U.S. copyright is seen as primarily economically driven and there is as yet no evidence that its enabling constitutional clause contemplated or contemplates actuating the protection of cultural property. At the same time, however, as we can see through Italian cultural property law, economic concerns do not necessarily preclude or negate the concerns which are characteristic of the preservation and regulation of cultural property. In addition, this comparison and the hypothesis it engenders are limited to one category of objects under U.S. copyright law, namely pictorial, graphic and sculptural works, and more specifically to designs of useful articles that seek to enter the pictorial, graphic, and sculptural works category. In this narrow category of copyrightable subject matter, the chapter argues that U.S. copyright law seems to seek to protect categories of objects that fall into the tangible text or the visible images category.

This suggestion, however, does not explain why U.S. copyright does not apply to certain fashion designs that are like intangible texts, the category it should in fact protect the most. Chapter four explores how this refusal to protect fashion designs which might be like intangible texts or even intangible images may be grounded in the idea/expression dichotomy, as applied to fashion. Fashion designs which are like intangible text seem to not need materials to be understood or communicated. They also seem to need to be outside of copyright protection in order to be preserved and exist. A design of a Birkin bag, to give a French example, or even a design of a Gucci Bamboo Handle, are evocative of the idea of themselves, of their very identity. Such designs are such stereotypes that, in Paola Antonelli's words¹¹¹, U.S. copyright chooses not to apply to them. In this sense, Italian copyrightable subject matter is broader than U.S. copyrightable subject matter *as applied to fashion designs*. As evidenced in recent cases, Italian copyright law protects industrial designs that are of creative characters or artistic value, which is evaluated in cultural heritage terms by considering a fashion design's historic or artistic significance and its iconic value in the *unicum* of the design and object.

U.S. copyright law is certainly not the only legal regime that might partner with Italian cultural property law to apply to Italian fashion design objects for the public's benefit. Chapter five examines how other more traditional historic property legal regimes which are already in

¹¹¹ Paola Antonelli, *Who's Afraid of Fashion?* in ITEMS: IS FASHION MODERN? *infra* note 604 at 20.

place in the United States are more similar to Italian cultural property law in their legislative purpose. It examines how these historic preservation or “Art Law” rules could be expanded to apply to Italian fashion design objects. U.S. historic preservation law, at all levels—federal, State and local—could be amended to include movable objects like fashion design objects. We could contract for rights in fashion design objects, in terms of its *unicum* or its separate parts, for the public, perhaps by attaching easement-like conditions to individual fashion design objects.¹¹² Statutes like the California Art Preservation Act may effectively give certain American communities a way to actuate their public cultural interest in fashion design objects. We might extend moral rights to designers, although this is problematic since moral rights follow a person and not an object. Moral rights might already attach to fashion designs declared to be copyrightable under the Italian *diritto d'autore* regime and may provide a model. Extending moral rights to Italian fashion designers begs the question, however, of whether alterations of certain Italian fashion design objects would be prohibited. Such distinctions might have the effect of erasing the blurred lines in fashion between a vintage dress to be altered for contemporary wear and a vintage dress as an object of historic interest. While perhaps considered a middle ground between cultural property law and copyright law, moral rights may not sufficiently legally distinguish the object as of public cultural interest. Moral rights may instead only allow the designer as artist to control the historical significance or artistic interest in their works after copyright has expired. This deference to the artist seems contrary to the public cultural interest at the heart of cultural property.

We might expand public trust doctrine, or even look to other administrative guidelines like those applying to the National Archives to protect individual objects, in collections or not, as cultural property. *Sui generis* regimes might be crafted to protect our public cultural interest in fashion design objects when they are outside of museums. At the same time, our public cultural interest in certain Italian fashion design objects might be best actuated when protection of the tangible and intangible elements of the object are in a negative space of the law—a Wild West where practically no legal rules or norms apply.

The conclusion proposes an emerging legal framework for fashion design objects as cultural property, with some considerations of what

¹¹² As will be discussed *infra* in Chapter 5 with regards to the proposed Ellis rule. See Adrian Ellis, *Should a Museum Be Allowed to Cash In on Its Art? Yes, But on Two Conditions*, ARTNET, January 18, 2018, <https://news.artnet.com/opinion/deaccessioning-adrian-ellis-ellis-rule-1202147>.

this might mean for overlaps with other legal regimes, the fight against counterfeits, and the preservation of fashion for the future.

CHAPTER 1

THE CULTURAL PROPERTY “FRONTIER”¹¹³ OF ITALIAN FASHION DESIGN

This first chapter gives a short historic presentation of Italian fashion design within the scope of the dissertation’s inquiry as to how modern and contemporary Italian fashion design objects are cultural property under Italian cultural property law. While not an exhaustive history, the goal is to spotlight key historical moments and constant tensions throughout Italian fashion design which should be taken into consideration when any law, whether cultural property law or copyright law, seeks to protect a public cultural interest in the subject matter at its origin or in practice.

1. Fashion on a “Borderland” and Frontier¹¹⁴ of the Cultural Heritage “Map”

Imagine cultural heritage on a map. It might prove difficult to draw distinct boundaries around a place where Italian fashion design objects would appear. In one sense, this is due to the nature of cultural heritage and its connections to culture itself. Often unmoored to any particular territory, place or even people, “*le frontiere culturali (lingua, religione, civiltà) non coincidono quasi mai con le frontiere internazionali.*”¹¹⁵ Indeed, cultural heritage, and even cultural property today, thanks to digitization, travels just as often as it is identified with one physical place. In addition, while individual legal instruments may lay claim to one area of cultural heritage, often the subject matter that those individual legal instruments seek to regulate lend themselves to multiple legal rules or potentially none at all. This is especially so with Italian fashion design objects which could be protected in different parts and in different ways under Italian law as part of an intangible cultural heritage, a tangible cultural property, or as a cultural activity. Spaces within the cultural realm seem to be in constant need of negotiation and re-negotiation; the cultural heritage map is always being redrawn. In this sense, fashion design objects are

¹¹³ See *supra* note 1 for the origins of this term in the literature. See also FEDERICO RAMPINI, LE LINEE ROSSE (2017) (referring to fashion as part of a discussion of the boundaries of globalization).

¹¹⁴ *Id.*

¹¹⁵ ATLANTE DELLE FRONTIERE 48- 49 (Bruno Tertrais and Delphine Papan, eds., Marco Aime, trans., ADD Editore, 2018). The authors include a map which they title *Frontiere di Civiltà?*, while noting that “*il concetto stesso di aree di civiltà è discutibile*” [citing to Bernard Lewis and Samuel Huntington] and that even frontiers of culture may have pockets of different cultures in their midst.

part of frontiers or borderlands on the cultural heritage map.

Both these terms are used primarily for linguistic reasons. Defined in English in part as a region that forms the margin of a settled or developed territory”, as “the farthestmost limits of knowledge...in a particular subject”, and as “a new field for exploitative or developmental activity”¹¹⁶, Marco Aime in the recently published *Atlante delle Frontiere* draws a difference between border and frontier in the English language compared to their descriptors in Italian.

“In inglese...border e boundary indicano delle linee di demarcazione, mentre frontier è lo spazio aperto, quello da conquistare, quello su cui si è costruita l’intera epopea del West”¹¹⁷... [mentre] [n]ella lingua italiana, come in quella francese, confine e frontiera sono diventati sinonimi.”¹¹⁸

Fashion and design have been described as “borderlands ...[which] can better frame the legal problems underlying the very notion of cultural heritage.”¹¹⁹ Indeed, existing on a borderland or on the frontier of cultural heritage, fashion design objects may require the importation, adaptation and drafting of legal rules on a case by case basis to ascertain how certain aspects of them may be legally classified, if at all, as cultural property, one part of the greater *frontiera culturale* of cultural heritage under Italian cultural property law. The following sections explore how Italian fashion design objects have already begun to be treated as part of cultural heritage, as items of cultural property, in recent fashion history. While the main research question of this dissertation is not confined or particularly concerned with how modern and contemporary Italian fashion design objects are cultural property inside the museum, the history begins there since it is a common starting point for much of the fashion studies and fashion history literature. Inclusion in a museum is not definitive for a revelation that individual fashion design objects are of a public cultural interest, however, necessary under cultural property law.

¹¹⁶ See *Frontier* in MERRIAM-WEBSTER DICTIONARY, available at <https://www.merriam-webster.com/dictionary/frontier>. Other definitions of *frontier* include “a border between two countries”, the “obsolete: a stronghold on a frontier” and “a line of division between different or opposed things.”

¹¹⁷ Marco Aime, *Prefazione*, in *ATLANTE DELLE FRONTIERE*, *supra* note 115 at 15; see also *Frontiere Ereditate* in *Id.* at 26.

¹¹⁸ *Id.* at 15.

¹¹⁹ Casini, *The Future*, *supra* note 1.

1.1 Fashion beyond Museums

As foreshadowed in the introduction the general embrace of fashion as part of cultural heritage is not, of course, absolutely new. Indeed, the museum, that treasured space of public trust, has done much to frame the embrace. Suzy Menkes, writing for *The New York Times* in 2011, has dated the “beginning of fashion’s acceptance as not just a decorative art, but as part of cultural heritage” to circa 1983 when Pierre Berger and others began to found fashion house archives after the Yves Saint Laurent show curated by Diana Vreeland at The Metropolitan Museum of Art.¹²⁰ The 1980s is the decade which Daniela Calanca also points to when discussing the founding of “historical archives and company museums.”¹²¹ The *Museo della Moda e del Costume* in Florence also registers a number of donations of Italian fashion design objects from Italian fashion companies beginning in the 1980s, when it too was founded.¹²²

At the same time as the 1980s is deemed the beginning of companies’ explicit preservation of the objects they produce, the 1980s is also a continuation of previous attitudes towards fashion by the wider public. Even prior to individual fashion houses’ explicit preservation of their own individual design objects as a cultural heritage, whether in a museum or an archive, certain museums had already embraced fashion through temporary and permanent museum exhibitions *on par* with other objects they collected and displayed. As another 2011 article written prior to Menkes’ noted

some [museums], including the Museum of the City of New York and the Chicago History Museum, have been doing [fashion exhibitions] for years. It’s not surprising that design museums, like the gallery at the Bard Graduate Center (scheduled to host a Stephen Jones hat show) and the Cooper-Hewitt National Design Museum (now showing Van Cleef & Arpels jewelry and the designs of Sonia Delaunay) regularly work clothing into their rotation...

¹²⁰ Suzy Menkes, *Gone Global: Fashion as Art?*, N.Y. TIMES, July 4, 2011, <http://www.nytimes.com/2011/07/05/fashion/is-fashion-really-museum-art.html>.

¹²¹ Calanca and Capalbo, *supra* note 90 at x.

¹²² Notes taken while visiting the *Museo della Moda e del Costume* and consulting its collections database in the Fall of 2017 (on file with the author). The Museo was founded in 1983, see *History | Museum of Costume and Fashion | Pitti Palace, LE GALLERIE DEGLI UFFIZI*, <https://www.uffizi.it/en/pitti-palace/costume-and-fashion-museum> (last visited July 17, 2019).

*But suddenly it seems as if a world of tomboys just discovered dresses...*¹²³

One year before the Yves Saint Laurent event used by Menkes to date the “beginning of fashion’s acceptance...as part of a cultural heritage”¹²⁴, the Museum at the Fashion Institute of Technology’s 1982 Givenchy exhibition revealed a general acceptance of both fashion’s place in a treasured space of public trust and of a public cultural interest in fashion design objects. This was despite what some criticized as the commercialization of the museum space when fashion entered it. As Valerie Steele has observed, this acceptance was directly related to FIT’s connections to the fashion industry, as a fashion school within the fashion system.¹²⁵ The fuss that surrounded the Yves Saint Laurent show at the Metropolitan Museum of Art did not accompany the Givenchy show, nor apparently the line of Givenchy clothes at Bloomingdales developed especially for the occasion.¹²⁶

If, however, we were to use the establishment of fashion museums and the staging of fashion exhibitions as the dates for the beginning of “fashion’s acceptance...as part of a cultural heritage” we would certainly need to look back even earlier than 1983. Before the establishment of the Design Laboratory, the precursor to the Museum at FIT, the Museum of Costume in

¹²³ Geraldine Fabrikant, *Museums are Finding Room for Couturiers*, N.Y. TIMES, April 20, 2011, <http://www.nytimes.com/2011/04/21/fashion/21MUSEUMS.html?action=click&contentCollection=Fashion%20%26%20Style&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.

¹²⁴ See *supra* note 120.

¹²⁵ First founded as a Design Laboratory in 1969 for the inspiration of the students at FIT and for the use of the faculty, the Museum at FIT’s history is itself a testament to the evolving acceptance of fashion objects as pieces of cultural property which need to be preserved, studied and held in trust and not used as a functioning piece of clothing. For a history of the Museum see *History of the Museum*, THE MUSEUM AT FIT, <http://www.fitnyc.edu/museum/about/history.php>. See also Tentative Proposal of a Design Laboratory, FIT Request and other Memos in Box 5, Folder 15 (Fashion Institute of Technology proposal. October 1962), Costume Institute Records, The Metropolitan Museum of Art Archives (testifying to divergent opinion about the founding of the Museum at FIT by staff at the Metropolitan Museum of Art). The ethical obligations of museums when displaying fashion design objects has been explored elsewhere in Felicia Caponigri, *The Ethics of the International Display of Fashion in the Museum*, 49 CASE WESTERN RESERVE J. OF INT’L L. 135 (2017).

¹²⁶ Valerie Steele, Remarks as part of speech “Exhibitionism: 50 Years of The Museum at FIT” at The Museum at the Fashion Institute of Technology’s Symposium *Exhibiting Fashion* (March 8, 2019) (livestream available at <https://www.fitnyc.edu/museum/events/symposium/exhibiting-fashion/index.php>.)

Bath was established in 1963.¹²⁷ Before that the temporary exhibition of the Museum of Costume at Rockefeller Center in New York was founded in 1937 and later became The Costume Institute at The Metropolitan Museum of Art in 1946.¹²⁸ Before that, the founding of the collection at the Victoria & Albert Museum in London, which dates to the mid to late 19th century or early 20th century.¹²⁹ Still, before that, at the 1906 Universal Exposition in Milan Rosa Genoni first displayed “*abiti...che si ispiravano alla cultura e all’arte italiane.*”¹³⁰ And before that the exhibitions of historic dress at the Universal Exposition in Paris in 1900.¹³¹

Dating or explaining fashion’s status as cultural heritage based on an appearance of fashion in museums is particularly problematic and unhelpful for Italian fashion design objects. As Simona Segre Reinach, Grazia d’Annunzio and Eugenia Paulicelli have already respectively noted, the existence of multiple capitals of Italian fashion and the lack of one national fashion museum in one particular place has frustrated a concise definition of Italian fashion and an ability to critically think through Italian fashion.¹³² In addition, as Simona Segre Reinach has further noted, the proliferation of various cultural spaces inside the museum and outside of it that promote the cultural importance of Italian fashion has led to problematic

¹²⁷ Rosemary Harden, *From Museum of Costume to Fashion Museum: the Case of the Fashion Museum in Bath*, in *FASHION AND MUSEUMS: THEORY AND PRACTICE* 130 (Marie Riegels Melchior and Birgitta Svensson, eds., 2014).

¹²⁸ Harold Koda and Jessica Glasscock, *The Costume Institute at the Metropolitan Museum of Art: An Evolving History*, in *FASHION AND MUSEUMS*, *supra* note 127 at 22-25.

¹²⁹ Lou Taylor, *Doing the Laundry? A Reassessment of Object-based Dress History* 2(4) *FASHION THEORY* 340 - 341 (1998) (Taylor makes a distinction in her article between the collecting of textiles prized for their designs in the mid to late 19th century and the collection of 18th century dress in the early 20th century).

¹³⁰ Figure 17 of Chapter 2, *Per una moda italiana: dall’Esposizione Universale di Milano del 1906 all’insegnamento e design moderno* in EUGENIA PAULICELLI, ROSA GENONI LA MODA È UNA COSA SERIA: MILANO EXPO 1906 E LA GRANDE GUERRA (Deleyva editore, 2015).

¹³¹ *Musée Rétrospectif des Classes 85 & 86, Le Costume et ses Accessoires à l’Exposition Universelle Internationale de 1900 à Paris* in Special Collections at the Fashion Institute of Technology.

¹³² Simona Segre Reinach, Remarks as part of speech "Fashion Exhibitions in Italy" at the Museum at the Fashion Institute of Technology’s Symposium *Exhibiting Fashion* (March 8, 2019) (livestream available at <https://www.fitnyc.edu/museum/events/symposium/exhibiting-fashion/index.php>); Grazia d’Annunzio, *Paris and the Tale of the Italian Cities* forthcoming in *PARIS CAPITAL OF FASHION* (forthcoming, 2019); Paulicelli, *Fashion: The Cultural Economy of Made in Italy*, *supra* note 89.

contaminations and challenges.¹³³ Indeed, this lack of one cultural space perhaps makes control of Italian fashion companies over their Italian fashion design objects even more pronounced, frustrating disinterested evaluations of their importance for the public and an easy or even equitable loaning of them to cultural institutions. Museums are not immune from having to negotiate for loans in the shadow of real and intellectual property law, as deeds of gift from The Museum at the Fashion Institute of Technology make clear.¹³⁴

One agreement governed by the laws of the State of New York entered into between the Museum at FIT and a company incorporated in Italy explicitly removes any intellectual property rights from assignment as part of the donation of a fashion design object, but does allow the Museum at FIT to “publicly display the Objects” without restraint and to “take photographs of the Objects” and distribute them as related to the activities of the Museum without prejudicing or compromising the “high quality” of the Objects or the company itself and its marks.¹³⁵ Shaping behavior between the United States and Italy and its legal regimes that regards a fashion object which is of some type of cultural interest to the museum, this agreement operated in a cultural property law no man’s land in the United States while operating in the shadow of Italian cultural property law and U.S. copyright law, which do not necessarily explicitly apply to the Italian fashion design object in question.

As a first matter here, we see an Italian company ceding control over the tangible object, a hallmark of the Italian cultural property regime. Indeed, preservation of the object is required of private property owners and of not for profits in Article 30 of the Italian Code of Cultural Property and Landscape.¹³⁶ In addition, notwithstanding the right to photograph the object and reproduce that photograph as part of the museum’s “educational, archival and documentary purposes”¹³⁷, the right to reproduce images of the object remains with the private

¹³³ Simona Segre Reinach, Remarks as part of speech “Fashion Exhibitions in Italy” *supra* note 132.

¹³⁴ See “Deed of Gift” Appendix B. These deeds of gift were kindly shared by Sonia Dingillian, Register at The Museum at FIT, who, along with Valerie Steele, gave permission to reproduce them in the hardcopy version of this dissertation.

¹³⁵ Section 2, Intellectual Property Rights in “Deed of Gift” in Appendix B.

¹³⁶ Art. 30(2) and Art. 30(3), CODICE, D.L. n.42/2004.

¹³⁷ Section 2(b) in “Deed of Gift” in Appendix B.

owner. This follows Italian cultural property law to a certain extent, which recognizes that the State may approve commercial reproductions of the cultural property in their possession, excepting the rules given under *diritto d'autore* or Italian copyright.¹³⁸ For this object in this agreement, for this Italian fashion design object copyright law exists alongside cultural property like rights and obligations in Italian cultural property law, even if Italian cultural property law may not yet apply to the object. Individual negotiations between museums and Italian fashion companies shed light on the fact that, notwithstanding an inapplicability of Italian cultural property law, the nature of museum activities¹³⁹ and the nature of intellectual property rights may shape the treatment of certain Italian fashion design objects as *de facto* cultural property for certain rights and duties. This inference, of course, follows some definitions of cultural property under Italian cultural property law, which presume that objects in public and not for profit museum collections are cultural property.¹⁴⁰ At the same time, the rules of the agreement are not completely inspired by Italian cultural property rules, nor are they necessarily in contravention of them. Public display, for example, is not necessarily required of private owners under Italian cultural property law.¹⁴¹ In this sense, museum obligations and activities may also raise the standards of legal duties under Italian cultural property law for certain Italian fashion design objects.

At the same time as this agreement might hint that some modern and contemporary Italian fashion design objects may already be treated like cultural property even in the absence of Italian cultural property law thanks to the activities of a fashion museum, it can also help us parse more clearly where the public cultural interest in Italian fashion design objects may lie. In the tangible Italian fashion design object, in the intangible design caught up in it, or in some combination of the two? The fact that the Italian company keeps certain rights to the design might be indicative of the importance of that design for its business activities but also for some other cultural purpose associated with the company as part of Italian cultural heritage. At the same time, the museum's insistence on certain intangible rights

¹³⁸ Art. 107(1), CODICE, D.L. n. 42/2004.

¹³⁹ Which include references to professional codes of conduct, ethical guidelines, and collecting management policies, as detailed in Section 4 in "Deed of Gift" in Appendix B.

¹⁴⁰ Art 10(1), CODICE, D.L. n.42/2004.

¹⁴¹ Art. 38, CODICE, D.L. n.42/2004.

in the object, such as its reproduction, and its negotiation of the right to publicly display and act on the physical object without interference from the Italian company may also testify to the location of a public cultural interest in the tangible object, with the design in it. While the museum represents one side of this negotiation, such an inquiry about where the public cultural interest lies is not necessarily tied to the modern and contemporary Italian fashion design object's appearance in a museum or its status as part of a museum collection. Indeed, it is perhaps even more important to locate the public cultural interest in modern and contemporary Italian fashion design objects as they exist outside the museum.

1.2 The Acceptance and Timeliness of Fashion Design Objects as Cultural Property Today

Italian fashion design today exists as part of a complex web of images, fashion films, runway shows and, yes, stores, museums, archives, and even foundations. An Italian fashion design object is imagined, created, photographed, displayed, sold, collected, re-bought, displayed, perhaps leveraged as an asset, and perhaps even sold again as part of this complex web. The increasing appearance of Italian fashion design objects in museums is only one part of this greater life of the Italian fashion design object. At some point, however, as an Italian fashion design object ages, as many of them are doing now, it must be imagined how instances of this life of an Italian fashion design object should exist with respect to the public cultural interest we already identify in Italian fashion and design by protecting it as cultural property when it is in a public museum or public archive. In other words, we should consider how the public cultural interest we know is in Italian fashion design objects when they are part of a public museum collection¹⁴² squares with (sometimes the same) Italian fashion design objects we find elsewhere.

There are a few reasons why this squaring of the different ways in which to treat Italian fashion design objects under cultural

¹⁴² One example of the proof of this statement is in the application of Art. 107, regulating the reproduction of cultural property in the possession of the Italian State, to a dress designed by Rosa Genoni in the collection of the *Museo della Moda e del Costume* in the Galleria degli Uffizi. See Nota 398/2018 of the Galleria degli Uffizi in Appendix B (granting the right to use a digital image of Rosa Genoni's Pisanello dress to the Museum at FIT under art. 107(1) and art. 108 of D.L. n.42/2004). Kind permission to cite this form from Susi Piovanelli and the Director of the Gallerie degli Uffizi.

property law is particularly important today. First, Italian fashion design objects, like other fashion design objects or dress or costume, as they may be referred to in dress history and by costume historians¹⁴³, is also understood through its representations and its reproductions in other media.¹⁴⁴ This notion is something that Anne Hollander explored, before the advent of social media and the Instagram platform which has exacerbated the situation, in her book *Seeing Through Clothes*.¹⁴⁵ Representations of dress, costume, and even drapery and nudity convey a “perceptual knowledge” that a tangible dress or costume, even perhaps on a person, may not.¹⁴⁶ This added importance of representation applies to Italian fashion design objects today, especially as they are part of an elaborate image-making process that is individual as well as collective. We might go so far as to say that Italian fashion design objects are not only chosen for how they look on the wearer today in person, but are judged based upon how they will be photographed and how they will be disseminated.¹⁴⁷ Such a digital element, therefore, is not only part of the cultural consensus or collective judgment that Italian doctrine tells us is necessary for fixing our cultural interest on a tangible object and deciding it is cultural property¹⁴⁸, but, as we have seen from the Museum at FIT donation agreement above, it is also crucial to later valorize an Italian fashion design object. In other words, intangible reproduction is crucial both at the identifying stage

¹⁴³ For an explanation of this different terminology, identifying dress as all kinds of adornment and costume as dress or apparel that is in a museum collection, as opposed to fashion which is social in nature, see Tortora, *History and Development of Fashion*, *supra* note 98.

¹⁴⁴ See, for example, *Introduction in FASHION AS PHOTOGRAPH: VIEWING AND REVIEWING IMAGES OF FASHION* (Eugénie Shinkle, ed., 2008).

¹⁴⁵ Cited to *infra*.

¹⁴⁶ *Introduction in ANNE HOLLANDER, SEEING THROUGH CLOTHES* xii (1993) (“...the formal properties of a work of art itself do not mask but, rather, illuminate the basic evidence about what people used to wear...Such formal elements demonstrate not how clothes were made but how they and the bodies in them were supposed and believed to look. Even actual garments themselves, old or new, offer only technical evidence and not perceptual knowledge. In a picture-making civilization, the ongoing pictorial conventions demonstrate what is natural in human looks; and it is only in measuring up to them that the inner eye feels satisfaction and the clothed self achieves comfort and beauty.”)

¹⁴⁷ For explorations of how social media helps to convey not only an individual’s image but the general fashion imaginary see generally the work of Agnès Rocamora, such as Agnès Rocamora, *Mediatization and Digital Media in the Field of Fashion*, 21(5) *FASHION THEORY* 505 (2017), DOI: 10.1080/1362704X.2016.1173349 (exploring, in part, how Instagram, Snapchat, and live-streaming fashions shows, among others, have changed the production of fashion design).

¹⁴⁸ MICHELE CANTUCCI, *LA TUTELA DELLE COSE D’INTERESSE ARTISTICO O STORICO* 100- 103 (1953).

of cultural property law as applied to modern and contemporary Italian fashion design objects and it is also crucial at the valorization stage.

Italian fashion design objects as cultural property may not, therefore, be completely comparable to other cultural properties like pottery, tapestry, furnishings, architecture or even useful articles themselves.¹⁴⁹ At the same time, dissemination through images and the image-making of fashion may also not be completely determinative of a public cultural interest in Italian fashion design objects.¹⁵⁰ If it were, we would arguably not need tangible objects of fashion design at all- a picture would suffice. Museums would be alright with pictures of fashion designs and not the fashion objects themselves. This is not the case- public cultural interest in fashion design seems to focus on various iterations of fashion design objects both as they appear in tangible form and as they are reproduced.

It is important to address this relationship between image and tangible design object for Italian fashion today in order to understand what needs to be preserved and how to accomplish that preservation for the future. The public cultural interest might be spliced into different drawers in the cultural property “box”. An image of an Italian fashion design object may be, in some circumstances, of greater public cultural interest than the Italian fashion design object itself. If this is so, however, what does preserving that image look like? Perhaps dissemination here is a tool of preservation, perhaps valorization alone is preservation enough. But, if valorization and dissemination are a form of preservation of the fashion design object, because its public cultural value is in its intangible image, then are any restrictions on reproduction, especially on sites such as Instagram and Facebook, or on use, justified?

The second reason it is important to square the different ways in which we treat fashion design objects under cultural property law is that the material of fashion design, Italian fashion design objects, are extremely important for diverse

¹⁴⁹ HOLLANDER, *supra* note 146 at xiv (observing the inadequacy of these comparisons for her own argument that “any such [Western] garment has more connection with the history of pictures than with any household objects or vehicles of its own moment- it is more like a Rubens than like a chair”, and giving these examples).

¹⁵⁰ This nuances Hollander’s argument which seems to put primary importance on dress, costume, nudity’s etc. links to and representations in figurative art. *Id.*

players in the fashion industry and in society at large. Fashion design objects, despite being reproduced and captured in digital images and fashion films, are sold and collected in their tangible iterations; they are worn and altered; they are reproduced and re-created. As we have seen in the Museum at FIT donation agreement, control over the object itself, without interference by a number of actors, is crucial to manage it on the basis of a public cultural interest. To deem one specific Italian fashion design object cultural property only based on its ownership, its appearance for example in a museum collection, is to potentially allow private actors, like Italian fashion companies, to treat similar objects that would otherwise be recognized as cultural property in an adverse way. If we deem Italian fashion design objects cultural property no matter to whom they belong, even with specific procedural safeguards like particularly important or exceptional cultural interest¹⁵¹, we might potentially frustrate a valorization of these objects in limited editions by Italian fashion companies or even require Italian fashion companies to become cultural institutions, with preservation obligations that are at odds with certain resale activities they engage in. Gucci, for example, as part of its new Gucci Galleria, sells older bags that it has bought back.¹⁵² The vintage market, which may operate apart from the fashion houses which originally produced the Italian fashion design object, is a prosperous business which, like a market for antique furniture or other antiquities, might be unreasonably restricted if we protect any and all fashion design objects as cultural property, no matter where they are located. On the other hand, not protecting certain fashion design objects might risk the loss of the specific information these objects can provide, which an examination of the explanation of a design alone may not. This is the case with Salvatore Ferragamo's *Invisible Sandals*: although the patent for the shoes describes at least two processes, an examination of the shoes as objects shows that Ferragamo and his artisans overwhelmingly chose to use one of the designs over the other.¹⁵³ Modern iterations of the shoes use

¹⁵¹ As Italian cultural property law does in Art. 10(3) and Art. 13 (dichiarazione). See Art. 10(3) and Art. 13, CODICE, D.L. n. 42/2004.

¹⁵² See images of Gucci Galleria store (on file with the author).

¹⁵³ See Patents n. 426001 (invenzione), of October 17, 1947; n. 26446 (modello d'utilità) of March 29, 1947 and n. 26655 (modello industriale) of May 10, 1947. Archivio Ferragamo. These observations are the result of a close object analysis of the shoes in the Ferragamo Archive in December 2018 and February 2019.

yet another process.¹⁵⁴ We should decide whether we should understand all these differences as dispositive for a classification of Italian fashion design objects as cultural property, or as separate instances of preservation and valorization. Not addressing these questions in a systematic way has the potential to frustrate Italian fashion companies' businesses or to allow Italian fashion companies increased unregulated control over certain objects which should be managed in the public interest, unlike other Italian fashion design objects sold on the market.

The third reason lies in the complex nature of Italian fashion design objects as global and local. Italian fashion design objects may at once be Italian yet of interest to the international community and, at the same time, of interest to the international community, yet identified as Italian. The nature of fashion companies' incorporation and management adds nuance to this issue which is common for many items of cultural property. A French luxury conglomerate, for example, now owns Gucci; the American Michael Kors, as Capri Holdings, now owns Versace.¹⁵⁵ Restrictions we might apply to Italian fashion design objects as cultural property outside the museum have the potential to, like restrictions on other cultural properties, move beyond legal jurisdictions and affect the ways in which fashion companies and cultural institutions around the world handle these design objects and their reproduction. How would protecting Gianni Versace's design objects, for example, as cultural property under Italian law, have affected Donatella Versace's re-creation of them for Spring/Summer 2018¹⁵⁶ and therefore Michael Kors' future bottom line? If we decide the reproduction of such design objects is a preservation

¹⁵⁴ The following information, in the form of answers to my questions posed to the head of the artisanal production of Ferragamo, was kindly shared with me by the Museo Ferragamo on April 16, 2019 (answers to questions on file with author)

¹⁵⁵ For a details on the acquisition of Gucci by PPR, now Kering, see *The Battle for the Gucci Group: "One of the Most Bitter Fights in Corporate History"*, THE FASHION LAW, January 25, 2018, <http://www.thefashionlaw.com/home/the-battle-for-the-gucci-group-part-i?rq=the%20Battle%20for%20the%20Gucci%20Group> (Part I of a three part article). For the acquisition of Versace by Michael Kors see *Game On: Michael Kors Acquires Versace for \$2.1 Billion*, THE BUSINESS OF FASHION, September 25, 2018, <https://www.businessoffashion.com/articles/news-analysis/game-on-michael-kors-acquires-versace-for-2-billion>.

¹⁵⁶ Osman Ahmed, *From Versace to Helmut Lang, the Rise of Re-Issues*, THE BUSINESS OF FASHION, October 12, 2017, <https://www.businessoffashion.com/articles/intelligence/from-versace-to-helmut-lang-the-rise-of-re-issues>.

mechanism, on what grounds might Italian cultural property law restrict it, and through what legal means?

The fourth reason is connected to the third: local and regional craftsmen currently create Italian fashion design objects under contract or as employees of Italian fashion design companies. These same local and regional craftsmen often do similar types of work for non-Italian fashion companies. If we preserve and valorize an Italian fashion design object, we might recognize local and regional craftsmen or we might not. Recognizing Italian fashion design objects as cultural property or recognizing only the reproduction of these objects as of cultural interest, whether as another object or in image form, risks assimilating Italian craftsmanship into Italian fashion and therefore identifying them as one. But not all Italian craftsmanship is Italian fashion, and not all Italian fashion is Italian craftsmanship. This difference is especially important outside of a museum, where geographical marks and indications and fiscal incentives are often used to prop up otherwise unsustainable or barely thriving local Italian businesses or to identify Italian fashion companies as indicative of such traditions.¹⁵⁷ Imagining the differences between Italian craftsmanship and Italian fashion design outside a museum through individual cultural property protections is important so as not to risk conflating, and potentially losing, different and important areas of Italian cultural heritage.

Outside museums Italian fashion companies increasingly found their own archives and exhibit strong control over their fashion design objects, both through intellectual property law and real property law, while equating their fashion design objects with other categories of cultural heritage in campaigns called *Forever Now* (by Gucci) [Figure 5]¹⁵⁸, in fashion shows within cultural properties [Figure 6]¹⁵⁹, in fashion images and marketing

¹⁵⁷ See *Moda Made in Italy. Le Misure Doganali* in MAIETTA, *supra* note 61 at 89- 108. For one example of fiscal incentives and safeguarding mechanisms for artisan business in Italy, which operate as a type of cultural heritage protection, see Legge n. 443/1985 (Legge-quadro per l'Artigianato) and Legge regionale n. 76 del 11 Novembre 2016 (Toscana).

¹⁵⁸ See *Forever Now* in GUCCI: THE MAKING OF 368 (Frida Giannini et al, eds., Rizzoli, 2010).

¹⁵⁹ Ferragamo recently staged its Men's Spring / Summer 2020 show in Piazza della Signoria, while Gucci has staged its Cruise 2018 fashion show in Palazzo Pitti. *Ferragamo al Pitti, la sfilata in piazza della Signoria*, CORRIERE.IT, <https://www.corriere.it/foto-gallery/moda/pitti-uomo-2019/19-giugno-12/ferragamo-pitti-sfilata-piazza-signoria-3b8ca9fa-8cee-11e9-98ba-037337d4fe50.shtml> (last visited July 16, 2019). See also the discussion of Dolce & Gabbana *supra* in Introduction.

campaigns [Figure 7].¹⁶⁰ Along with this, individuals and members of the public are increasingly displaying a cultural interest in Italian fashion design objects both inside the museum¹⁶¹ and outside of it.¹⁶² In the context of fashion exhibitions, some fashion industry publications have already noted that “[p]ublic interest in fashion exhibitions is surging.”¹⁶³ Imagining how Italian fashion design objects are cultural property inside the museum is not enough to fully preserve and valorize a public cultural interest in Italian fashion design objects. For these reasons, like for other categories of Italian cultural heritage like film, photography, and contemporary art, it is crucial to imagine how, or how not, to protect Italian fashion design objects as cultural property outside of the museum.

2. Italian Fashion History between Tradition and Innovation

An imaginary walk through Italian fashion history reveals many of the same dichotomies we identified above as reasons for the timely exploration of how Italian fashion design objects are cultural property under Italian cultural property law outside the museum. Namely, Italian fashion design seems to have always existed at a crossroads

¹⁶⁰ Gucci’s latest fashion campaign for its Pre-Fall 2019 shows Gucci bags in front of ancient temples in Sicily. See *Symposium in Selinunte*, GUCCI, <https://www.gucci.com/us/en/st/stories/advertising-campaign/article/prefall-19-campaign>.

¹⁶¹ The Metropolitan Museum of Art, for example, consistently reports that the Costume Institute’s shows, which also include Italian fashion design objects while not being exclusively about Italian fashion design, are the most highly attended. [Press Release] 1,659,647 *Visitors to Costume Institute’s Heavenly Bodies Show at Met Fifth Avenue and Met Cloisters Make It the Most Visited Exhibition in The Met’s History*, THE METROPOLITAN MUSEUM OF ART, October 11, 2018, <https://www.metmuseum.org/press/news/2018/heavenly-bodies-most-visited-exhibition>.

¹⁶² This conclusion might be drawn by the number of users whose purchases are influenced because of the heritage of a brand. Although an investigation into these numbers is beyond the scope of this dissertation, others have commented on the role of museums, heritage marketing campaigns, timelessness as luxury, and even aesthetics in fashion companies sales generally and in the impact of retail space. See Floriana Iannone and Francesco Izzo, *Salvatore Ferragamo: An Italian heritage brand and its museum* 13(2) PLACE BRANDING AND PUBLIC DIPLOMACY 163 (December 2016, published January 2017), doi: 10.1057/s41254-016-0053-3; Jonathan Deschenes, Anamma Joy, John F. Sherry Jr., and Alladi Venkatesh, *The aesthetics of luxury fashion, body, and identity formation*, 20 J. OF CONSUMER PSYCHOLOGY 459 (2010); Anamma Joy, Jeff Jianfen Wang, Tsang-Sing Chan, John F. Sherry, Jr., Geng Cui, *M(Art) Worlds: Consumer Perceptions of how Luxury Brand Stores become Art Institutions*, 90 J. OF RETAILING 347 (2014).

¹⁶³ BOF Team, *Inside Valentino Garavani’s Virtual Museum*, THE BUSINESS OF FASHION, December 7, 2011, <https://www.businessoffashion.com/articles/digital-scorecard/digital-scorecard-valentino-garavani-virtual-museum>.

between the tangible and the intangible (objects and reproductions; manners and things); the local and the global (especially regional and national).

2.1 From Rosa Genoni to Gucci, Ferragamo and World War II

Before tracing the beginnings of a uniquely Italian fashion on the Italian territory in the early 20th century, it must be admitted that evidence of fashion was present in Italian Renaissance courts and city states before the production of Italian fashion as we recognize it today. Baldassare Castiglione's 16th century *The Book of the Courtier* contains various sections on dress in addition to manners: in the form of a conversation between members at court he recounts not only a description of appropriate dress, but also differences between the French, Germans, Spaniards and Italians, who can improve on the clothes of other traditions and yet be still subject to the same fashions of their locality.¹⁶⁴ With gems such as "*l'abito non fa il monaco*"¹⁶⁵, Castiglione's text and its emphasis on manners as much as clothing in a fashion universe is ripe for a discussion of how habits in fashion¹⁶⁶ should be classified as intangible cultural heritage or through tangible cultural property. While acknowledging the historical underpinning of Italian fashion in the Renaissance, however, the chapter chooses to concentrate, because of the dissertation's emphasis on how Italian fashion produced today may be recognized as cultural property, on the 20th century. Indeed, the fashion products of the Italian Renaissance, because of the passage of time, provide less of a challenge for a classification as cultural property under the law: Venetian shoes such as those in the Palazzo Davanzati in Florence [Figure 8] or Eleonora di Toledo's funerary dress in the *Museo della Moda e del Costume* in Florence, are more readily understood as cultural property and beyond, in some sense, the dilemmas described later.¹⁶⁷

The appearance of uniquely Italian fashion design objects in the early 20th century cannot be understood outside the historical dominance of France and Paris in fashion. Early signs of

¹⁶⁴ BALDASSARE CASTIGLIONE, *THE BOOK OF THE COURTIER* 103- 104 (1528) (Leonard Eckstein Opdycke, trans., Scribner's, 1901), <https://warburg.sas.ac.uk/pdf/enh660b2449259.pdf>

¹⁶⁵ *Id.* at 105.

¹⁶⁶ Already discussed in terms of Castiglione's work in PAULICELLI, *supra* note 102.

¹⁶⁷ See *infra* Chapter 2.

discontent with this dominance are evidenced in Ada Gigli Marchetti's history of fashion which details how, even at the height of "*francomania*" in Italy as French artisans and stylists fleeing the French Revolution catered to the Milanese elite in the late eighteenth century, a group of Milanese called the "*bosnade...lamentava la mania dei milanesi di trovare bello e di voler seguire ad ogni costo tutto ciò che proveniva dalla Francia...*"¹⁶⁸ In the early nineteenth century certain editorials in fashion magazines distributed in Italy began to take up a proverbial call to arms against French and Parisian fashion.

*'Vergogna'- scriveva nel 1804 la compilatrice di uno dei più prestigiosi e longevi giornali femminili editi a Milano, il 'Corriere delle dame', rivolgendosi alle modiste italiane. 'L'Italia, maestra in tutti i tempi ed in tutti i generi dell'arte divina del bello va ad accattare in prestito dai parigini le mode? Allontanatevi una volta da queste dipendenze in fatto di toletta. Se anco la sempre variante invenzione della moda fosse un vizio, e non un bisogno dei ricchi, ed un sostegno delle arti, io vi direi abbiatevi dei vizi italiani senza prenderli altrove...'*¹⁶⁹

Indeed, slowly but surely certain distinctively Italian fashions became noticeable alongside Parisian fashion on the Italian territory. Gigli Marchetti's history notes, in the summer of 1807, the popularity of a straw hat from Florence "*alla Pamela*" and green sunglasses.¹⁷⁰ Such facts shared by Italian fashion historians add nuance to narratives of fashion history in which Paris is dominant. They also, however, raise questions about the relevant Italian community for Italian fashion design objects and the dominance of cities in creating Italian fashion narratives, two questions which are relevant for our exploration of how to classify Italian fashion design objects as cultural property under Italian cultural property law.

Valerie Steele has noted a relationship between political unification in Italy and an identifiable Italian fashion in these

¹⁶⁸ ADA GIGLI MARCHETTI, DALLA CRINOLINA ALLA MINIGONNA: LA DONNA, L'ABITO E LA SOCIETÀ DAL XVIII AL XX SECOLO 40 (CLUEB, 1995) (which was in part for political reasons).

¹⁶⁹ *Id.* at 59 (citing to 'Corriere delle Dame', 7 Ottobre 1804). Marchetti also lists many other periodicals published in Italy in the earlier eighteenth century including *Giornale delle Donne*, *Giornale delle Mode*, *Giornale delle Nuove Mode di Francia e d'Inghilterra*, *Giornale di Mode e Aneddoti*, *Il Giornale delle Dame e delle Mode di Francia*, and *La Donna Galante ed Erudita*, *Giornale dedicato a Bel Sesso*.

¹⁷⁰ *Id.* at 63.

years.

Historical forces delayed the subsequent development of a unified nation state in the Italian peninsula...One of the consequences was that by the eighteenth century, Italian fashion had become derivative of French fashion (for women)...Beautiful clothes were still produced in Italy...but the dominant trends in fashion were set elsewhere. Regional costume enjoyed a revival throughout western Europe in the eighteenth and nineteenth centuries, and Italian folk dress, in particular, was much appreciated by artists, but folk costume was marginal to the course of fashion history, which was essentially the history of urban dress.¹⁷¹

At the same time, however, studies on sumptuary law indicate the existence of a public interest in fashion in early Italian Renaissance-era city states¹⁷² and even the existence of what even Steele calls fashion systems.¹⁷³ Furthermore, as Eugenia Paulicelli has already written, codes of dress, style and comportment produced in Italy in the sixteenth and seventeenth centuries, such as the famous *Book of the Courtier* by Baldassare Castiglione and texts observing differences in dress in other cultures, such as Cesare Vecellio's costume books, indicate that Italy played an important role in shaping fashion even outside of the production of material objects.¹⁷⁴ The emphasis on *Made in Italy* and Italian craftsmanship has, in a way, grown out of the need to emphasize what Italy can uniquely contribute to the greater fashion system given its historical relationship to Parisian and French fashions.

Made in Italy and Italian craftsmanship does not, however, facilitate an easy tool of identification for a cultural interest in Italian fashion design objects, even historically. The term Italian craftsmanship, far from indicating only artisanal, one of a kind products, is in fact a more nuanced term which may also apply to objects produced in a series by large industry. The advent of objects which cross the boundaries between industry and culture in Italy has only increased since the late 19th century when Italy first embraced industrialization. As Luca Cottini has described, the complementary relationship between industrial objects and traditional craftsmanship and art in Italy has been

¹⁷¹ VALERIE STEELE, *FASHION, ITALIAN STYLE* 4 (2003).

¹⁷² KILLERBY, *supra* note 6.

¹⁷³ STEELE, *FASHION, ITALIAN STYLE supra* note 171 at 3-4.

¹⁷⁴ PAULICELLI, *supra* note 102 at 3, 52, 92.

present since the 1880s when objects began to be newly aestheticized by authors such as Serao and d'Annunzio and as products came to represent Italian style at Universal Expositions.¹⁷⁵ The raw materials of fashion design and its production played an important part in Italy's representation of self at the start of the industrial age. Local products such as "silk from Como" and "straw hats from Carpi"¹⁷⁶ were some of the country's most renowned exports and it was in 1878 "*with the passage of [its] first protectionist law on domestic textile products, [that] the Italian state began to openly support the industrial project.*"¹⁷⁷

Fashion design was but one way in which Italians sought to represent themselves in this new era. D'Annunzio himself, the same author who had used descriptions of objects in his novels to communicate specific aesthetic feelings and sentiments in a new modernity filled with commodities¹⁷⁸, designed "*clothes for himself and his lovers...[and] craft[ed] customized pieces.*"¹⁷⁹ Cottini also points to Mario Fortuny and the painter Giovanni Boldini as others for whom "*[i]n parallel with d'Annunzio...the space of art also became an experimental workshop of fashion design...*"¹⁸⁰

In the historical fashion narrative which emphasizes Parisian dominance in this period, the example of the Spaniard Fortuny who settled in Venice often stands out for Italian fashion design, even if his creations are characterized as "*only an artistic alternative to fashionable dress*"¹⁸¹ and not as fashion proper. Perhaps most striking about these early examples of Italian fashion design objects is the use of raw textiles, an increasingly industrial product, as the canvas or material for Italian cultural expression and new aesthetics.¹⁸² Moreover, despite the lack of

¹⁷⁵ LUCA COTTINI, THE ART OF OBJECTS, 14, 18-24 (2018).

¹⁷⁶ *Id.* at 14.

¹⁷⁷ *Id.* at 13.

¹⁷⁸ *Id.* at 19- 20 (describing d'Annunzio's description of objects, including antiquities and collectibles, in his novel *Il piacere*).

¹⁷⁹ *Id.* at 20. Cottini has interpreted this as "an approach...of a designer creatively transforming commercial matter into art and of a style maker fashioning trends around himself and his lovers." *Id.*

¹⁸⁰ *Id.*

¹⁸¹ STEELE, FASHION, ITALIAN STYLE *supra* note 171 at 7.

¹⁸² Giulia Chiostri, a textile conservator at The Metropolitan Museum of Art, has described costume as three-dimensional textile. See Audio, Il Tempo e il Tessuto, Il Tessuto come Arte Public Program, FONDAZIONE PALAZZO TE (November 12, 2017), https://www.centropalazzote.it/wp-content/uploads/2018/10/Il-Tempo-e-il-Tessuto_Summary.pdf (on file with author).

an established or agreed upon Italian fashion at the end of the nineteenth century and early twentieth century, an increasing number of corporations and associations produced shirts, intimates and outerwear in Italy.¹⁸³ Indeed, Ivan Paris notes that a clear approximation of the appearance of *abbigliamento pronto* is not easy, especially given the overlap between sewing and more industrial production at the beginning of the twentieth century in Italy¹⁸⁴ and the false dichotomy between *abbigliamento pronto*/industrial production and *abito su misura*/artisanal product.¹⁸⁵

The porous boundaries between objects, aesthetics, culture and industry in Italy are further evident in other early 20th century examples. As part of a wider “Italian decorative industry”¹⁸⁶ early fashion experiments in Italy benefited from a holistic concept of Italian decorative arts as “an original fusion of aesthetics and production”¹⁸⁷. At times this benefit meant a repudiation of traditional notions of Italian cultural heritage. The Futurists, for example, within the context of their disgust with Italian museums and their characterization of objects of the past as belonging in a cemetery-like space¹⁸⁸, designed and promoted a fashion that, while nationalistic in its embrace of Italy, ruptured with the past. As Eugenia Paulicelli has described, “the Futurist [fashion] project...sought to effect deep ruptures in the symmetry of the cut in order to allow the wearer more movement and dynamism”¹⁸⁹ and to challenge through the most brilliant colors. [Figure 9]¹⁹⁰

In contrast, Maria Monaci Gallenga and Rosa Genoni both created and promoted a fashion that explicitly embraced more traditional Italian cultural heritage, drawing on treasured,

¹⁸³ IVAN PARIS, OGGETTI CUCITI: L'ABBLIAMENTO PRONTO IN ITALIA DAL PRIMO DOPOGUERRA AGLI ANNI SETTANTA 44-46 (2006).

¹⁸⁴ *Id.* at 29-30; 41-42 (describing the statistical and data challenges).

¹⁸⁵ *Id.* at 25-26.

¹⁸⁶ COTTINI, *supra* note 175 at 23.

¹⁸⁷ *Id.* at 22.

¹⁸⁸ See F.T. Marinetti, MANIFESTO DEL FUTURISMO (1909).

¹⁸⁹ EUGENIA PAULICELLI, FASHION UNDER FASCISM 33 (2004).

¹⁹⁰ *Id.* at 34 (quoting from *The Futurist Manifesto of the Italian Hat*). Paulicelli's book also describes the relationship which certain Futurists and their manifestos later had with the Fascist state's promotion of certain textiles and an Italian fashion. See *Id.* at 112-113. Valerie Steele has characterized this Futurist fashion as a recognition of the “cultural significance of fashion.” STEELE, FASHION, ITALIAN STYLE, *supra* note 171 at 11.

recognized items of Italian cultural property¹⁹¹ like Renaissance motifs and paintings, such as Botticelli's *Primavera* [Figure 10] and other Greco-Roman artifacts [Figure 11].¹⁹² In these examples, firmly established Italian cultural expressions and cultural heritage were both the inspiration and, we might say, the raw material for objects considered to be part of an Italian decorative industry that fully embraced beauty and usefulness and "a new idea of 'industrial art' as a serialized form of artisanship."¹⁹³

Within the prevalent and slippery justification that fashion is of cultural interest because it is like art, it must be admitted that the work of the Futurists, Gallenga and Genoni might be considered non-industrial and more susceptible to a classification as "art" and therefore lend themselves to this view. While some of the Futurists' designs were embraced by *avant-garde* French fashion, they were not accepted and adopted by a large collective of people in Italy.¹⁹⁴ Genoni's own fashion designs and products were not necessarily accepted and adopted by a large collective of people in Italy. Notwithstanding this, Genoni was recognized for her work at Expositions in Milan in 1906¹⁹⁵ and also worked for Milanese firms like "Dall'Oro" and Bellotti, creating costumes for *La Scala*, and the prominent fashion house *Maison H.Haardt et Fils*, which copied Parisian designs for an Italian clientele¹⁹⁶, and even created her own designs for celebrities of the time such as Lydia Borelli.¹⁹⁷ Gallenga, after the recognition of her fashion designs and objects at the 1925 Exposition in Paris¹⁹⁸, did go on to open

¹⁹¹ COTTINI, *supra* note 175 at 161 and 24; STEELE, *FASHION, ITALIAN STYLE*, *supra* note 171 at 7; PAULICELLI, *FASHION UNDER FASCISM* *supra* note 189 at 31-32; EUGENIA PAULICELLI, *ITALIAN STYLE: FASHION & FILM FROM EARLY CINEMA TO THE DIGITAL AGE 33* (Bloomsbury, 2017).

¹⁹² As evidenced by Genoni's *Tanagra* dress. See *Drappeggio e taglio: Tanagra, l'abito dinamico* in PAULICELLI, *LA MODA È UNA COSA SERIA*, *supra* note 130 at 58 - 64.

¹⁹³ COTTINI, *supra* note 175 at 23 (citing to Camillo Boito's *Arte italiana decorativa e industriale*).

¹⁹⁴ PAULICELLI, *FASHION UNDER FASCISM*, *supra* note 189 at 33 ("The experiments and creations of painters like Giacomo Balla and others such as Fortunato Depero and Ernesto Thayant (who designed for Madeleine Vionnet), but which did not become part of mainstream fashion at that time, were a far more elitist form of rupture and transgression, that were taken up later in France where there was a more fertile terrain in terms of contamination of the arts.")

¹⁹⁵ PAULICELLI, *LA MODA È UNA COSA SERIA*, *supra* note 130 at 50-53.

¹⁹⁶ *Id.* at 33, 35, 42, 53.

¹⁹⁷ *Id.* at 61.

¹⁹⁸ COTTINI, *supra* note 175 at 161.

her own boutique in Paris in 1928.¹⁹⁹ Similarly other Italians like Elsa Schiaparelli melded art with their design to create fashion in Paris.²⁰⁰ In this sense, notwithstanding their embrace as part of an Italian cultural heritage in museums²⁰¹ and literature, these early examples may not even fit a definition of Italian fashion design objects as cultural property due to their limited adoption.

Notwithstanding this, Genoni's work especially gives us insight into the ways in which Italian cultural heritage was used in an attempt to found a national Italian fashion design. In her collected writings *Per una moda italiana*, which was both a bilingual book, text included with her display of dresses at the 1906 Milan Exposition, and the subject of Genoni's speech at the *Congresso Nazionale delle Donne Italiane* in 1909²⁰², Genoni speaks of an Italian fashion in the context of how Italy was, at the time, "*vigorosamente affermando nelle scienze, nelle arti, nelle industrie, nel commercio, e palpita d'un rigoglioso sangue di rinnovellata vita.*"²⁰³ Citing the example of nature, Genoni encourages a fashion which takes its form from trees, icebergs, waterfalls, leaves and flowers.²⁰⁴ Noting how industry and art could and must complement each other, Genoni used Leonardo da Vinci as an inspirational example of how industry and art can become one.²⁰⁵ Genoni's *La storia della moda attraverso i secoli* from 1925 contains images of ancient Greek vases and sculptures and even patterns for the drapery on the Statue of the Victory of Samothrace.²⁰⁶

¹⁹⁹ *Id.* at 162.

²⁰⁰ For highlights of Schiaparelli's work within a comparison between art and fashion in the Italian cultural context see ACROSS ART AND FASHION (Stefania Ricci, ed., 2016).

²⁰¹ The Futurist vests were displayed as part of the Museo Ferragamo's exhibit *Tra Arte e Moda*. See ACROSS ART AND FASHION, *supra* note 199. Genoni's Primavera dress is part of the collection of the *Museo della Moda e del Costume*. See *The Spring (evening gown)*, LE GALLERIE DEGLI UFFIZI, <https://www.uffizi.it/en/artworks/evening-gown-la-primavera>.

²⁰² PAULICELLI, *LA MODA È UNA COSA SERIA*, *supra* note 130 at 73, 100-103.

²⁰³ Cited to in *Id.* at 48. Genoni's activities as part of the Womens' Congresses or as a Socialist, although it is an important part of the history of her work and fashion design, are beyond the scope here. More information about this part of Genoni's work can be found in Paulicelli's book *LA MODA È UNA COSA SERIA*. For a history of the world through the eyes of women, and a few observations on fashion in medieval times, and the 19th and 20th centuries see GEORGES DUBY AND MICHELLE PERROT, *STORIA DELLE DONNE IN OCCIDENTE* (3rd ed. 1996) (see especially Volumes 2, 4 and 5).

²⁰⁴ PAULICELLI, *LA MODA È UNA COSA SERIA*, *supra* note 130 at 102 (quoting and citing to *Per una moda italiana*. Relazione al I Congresso Nazionale delle Donne Italiane in Roma della Signora Rosa Genoni, delegata della Società Umanitaria di Milano).

²⁰⁵ *Id.* at 104 (quoting and citing to *Vita d'arte nella Moda*).

²⁰⁶ PAULICELLI, *LA MODA È UNA COSA SERIA*, *supra* note 130, images numbered 52 and 53; ROSA GENONI, *LA STORIA DELLA MODA ATTRAVERSO I SECOLI (DALLA PREISTORIA AI TEMPI*

Indeed, long before Anne Hollander examined the importance of drapery in *Seeing through Clothes*²⁰⁷, or Dolce & Gabbana reproduced it in their *Alta Moda*, Genoni made such links evident for her students, and a wider public, in Italy.

The link Genoni makes with the past brings up the issue of the scope of the notion of cultural property in Italian cultural property law. Where new creativity builds on cultural heritage of the past, our cultural interest in it might be amplified or reduced. But Italian cultural property law does not necessarily measure innovation or creativity or originality. In this sense, cultural property law is not, or at least, it should not, be about promoting innovation or about allowing private actors to police the expressions that are part of creative contributions. Italian cultural property law primarily privileges control over objects, although, as we have seen, in some instances it may extend the right to prohibit commercial reproductions of cultural property when it is in the hands of the State. Such reproduction rights are not extended, at least in the Code, to private cultural property owners. There can be as many different iterations of cultural property that are of cultural interest to the public for small to infinitesimal to large reasons, be they historic, artistic, or other. In this sense, the scope of Italian cultural property law is broad—it allows almost every and any cultural interest into its purview, no matter how small of a contribution compared to the giants of the past.²⁰⁸ Modern and contemporary Italian fashion design then need not reinvent the wheel to be classified as cultural property. While a comparison between Botticelli's *Primavera* and Genoni's *The Spring* [Figure 12] may help to identify Genoni's contribution and the historic or artistic interest or testamentary value we assign to it, that comparison does not necessarily limit the scope of design objects which can be classified as cultural property.

This same reasoning of the non-discriminatory nature of cultural property protection under Italian cultural property law also potentially applies to Italian fashion that was made abroad by Italians and which took inspiration from cinema while using a hybrid form of production between artisanship and industrialization. Salvatore Ferragamo, who emigrated to the

ODIERNI) (Bergamo: Istituto italiano d'arti grafiche, 1925) (consulted at the Gladys Marcus Library at the Fashion Institute of Technology).

²⁰⁷ See generally *Drapery* in HOLLANDER, *supra* note 146 at 1- 81.

²⁰⁸ Although as will be explained *infra* in Chapter 2 there are some limits.

United States from his small Italian town of Bonito outside of Naples²⁰⁹, along with many other Italians during the late 19th and the early 20th centuries, is a testament to this. Many of Ferragamo's early shoes were designed for American cinema, but a comparison of them to the *epoque* which they are meant to represent is not meant as a limit on the cultural interest that we fix on Ferragamo's design objects as a public. Rather, such a comparison, under Italian cultural property law, might reveal the nature of our public cultural interest in the object while not reflecting on the validity or scope of the public cultural interest itself. Skipping a bit ahead chronologically will help to elucidate this point. During Mussolini's invasion of Ethiopia in 1935 and the scarcity of raw materials for shoe supports that it engendered, Ferragamo engaged in a creative process, designing shoes with the decorative foil wrapped around chocolates²¹⁰ and, it seemed, inventing the cork wedge soles.²¹¹ In 1950, however, Ferragamo discovered the soles had been worn centuries before thanks to an archeological excavation at Villa di Boccaccio outside Florence.²¹² Rather than penalize Ferragamo for the creation of a sandal actually created centuries before, Italian cultural property law would still protect and valorize a pair of Ferragamo's sandals with cork wedge soles if the public had a sufficient cultural interest in it. In this sense, Italian cultural property law is the opposite of a copyright legal regime. Historic, artistic or cultural interest is not even based on copyright's independent creation doctrine. Rather it is based on context and is judged in relation to the past and present historical moment. Two objects, exactly alike but from different time periods, could both potentially be cultural property.

Genoni's arguments for the importance of an Italian fashion may at first seem complementary to the Italian fascist project of creating a national fashion industry. They were not, however, fully embraced given that Genoni's socialist and pacifist activities did not enthrall the Italian Fascist party or State, nor did Genoni obviously support the party.²¹³ Notwithstanding the tense relationship, one of Genoni's proposals, "*the formation of a*

²⁰⁹ The following details of Ferragamo's life are primarily taken from his autobiography SALVATORE FERRAGAMO, *IL CALZOLAIO DEI SOGNI* 212 (3rd ed, 2010).

²¹⁰ *Id.* at 131- 132.

²¹¹ *Id.* at 132- 134 (the cork in Italian is called "sughero sardo" by Salvatore Ferragamo).

²¹² *Id.* at 134.

²¹³ See PAULICELLI, *LA MODA È UNA COSA SERIA*, *supra* note 130 at 84, 87 (describing early governmental surveillance of Genoni prior to the advent of Fascism in 1919 and later surveillance of Genoni during the Fascist period in 1935).

state-controlled institution charged with organizing the [Italian] clothing and textile industry"²¹⁴, was embraced by the Fascist state.

In 1935 the Fascist government founded the *Ente Nazionale della Moda*, a national association described by Sofia Gnoli as "[d]esigned to promote the progressive establishment of Italian fashion."²¹⁵ Eugenia Paulicelli has more specifically described it as a mechanism through which the Fascist government sought to "control the entire productive cycle of textile and fashion....[and] to persuade female consumers and dressmakers to seek inspiration in Italy's domestic roots and traditions."²¹⁶ The association had grown out of an earlier one meant to in part stage bi-annual fashion exhibitions and shows, and the Fascist regime's awareness of the fashion industry was by no means contained to its founding, nor was it as clear cut as one would think.²¹⁷ The 1927 census indicates the overlaps and fine lines between the regime's definitions of luxury, productions in series, *sartorie*, *sarti*, *fabbriche* and *case di moda*.²¹⁸ A later 1929 study of the fashion industry by the *Confederazione Generale Fascista*, as detailed by Ivan Paris, also reveals the challenge of organizing industrialized and still artisanal productions during this period that were driven by the law of fashion, or the variability of trends.²¹⁹ Other studies of the links between film and fashion during this period reveal that Italian fascism's insistence on a certain type of Italian cultural ideal may not have even been successful in practice.²²⁰

Part of the Fascist state's instruments to protect a new Italian fashion industry and promote an Italian fashion from 1935 to 1937 included creating a register of fashion designers and their

²¹⁴ PAULICELLI, FASHION UNDER FASCISM *supra* note 189 at 28.

²¹⁵ SOFIA GNOLI, THE ORIGINS OF ITALIAN FASHION 1900-45 73 (2012). See also MARCHETTI, *supra* note 168 at 218.

²¹⁶ PAULICELLI, ITALIAN STYLE, *supra* note 190 at 78. The success of this *Ente* can also, however, be debated. Paulicelli cites to a report prepared by Salvatore Ferragamo for a never realized 1940 conference which highlights his ability to continue to sell his shoes abroad, despite the existence of the *Ente*. *Id.* at 137.

²¹⁷ *Id.*; PARIS, *supra* note 183 at 48, footnote 95.

²¹⁸ PARIS, *supra* note 183 at 51 (for example, while "*confezione di lusso*" is presented by Paris as "*l'attività sartoriale svolta nelle sartorie con o senza annessa vendita*" and "*confezione a serie*" as "*una produzione standardizzata realizzata nei cosiddetti 'laboratori di biancheria'*", both activities are classified as "*aziende di stretto tipo industriale*" thanks to the number of workers and their organization in individual *sartorie*).

²¹⁹ *Id.* at 48-49.

²²⁰ See Angela Bianca Saponari's recent presentation "*La vetrina della moda*". *Forms and models of femininity on the pages of fascist movie magazines* at the Journal of Italian Cinema and Media Studies Conference in Rome on June 15, 2019.

designs, a portion of which had to be eligible for “ ‘a mark of guarantee’ that certified the Italian provenance of their design and production.”²²¹ Interestingly, the Fashion Originators’ Guild of America in New York City in the same period attempted to do the same thing, restraining copies of designs registered with their organization and ultimately disbanded in part thanks to a 1941 Supreme Court ruling that the Guild violated U.S. federal anti-trust law by restraining the copying of fashion designs and therefore the production of certain fashion design objects.²²² Similar to the complaints surrounding the Fashion Originators’ Guild, this register of fashion designers and their designs in Italy, and the requirement that a portion of designs be of certified Italian provenance, caused some protest from members of the fashion industry who complained that the measures did not distinguish between “important ateliers” and “retail shops.”²²³ This criticism seems to have had much to do with a hierarchy of imitation and originality. As Gnoli reports

*Ester Lombardo, editor of Vita Femminile.... [wrote] Alongside the dresses and hats of important ateliers we can find the little hats from retail shops and off-the-peg dresses produced by the dozen, so that a lady can be dressed to look almost like her own cook, all in the name of Italy. This is a sacrifice we should not ask of any lady.*²²⁴

Other legislation passed by the Fascist regime included *Textorità*, a “certificate of guarantee for Italian textiles”, sanctions against fashion designers who copied designs registered with the *Ente Nazionale della Moda*, a second “certificate of creation...given only to couture clothing that was particularly outstanding for its originality and italianità”, and still other rules on the quantity of imported fibers that could be used along with innovative fibers produced in Italy.²²⁵ During the same years the Italian

²²¹ GNOLI, *supra* note 215 at 75. Gnoli cites to specific laws instituted by the Fascist regime: Law n. 1293 of 31 October 1935 (“chang[ing] the constitution of the Autonomous Body for the Permanent National Fashion Exhibiting and renam[ing] it the *Ente Nazionale della Moda*”), Royal-Decree Law of 26 June 1936 (“*Disciplina della produzione e riproduzione di modelli di vestiario e accessori per l’abbigliamento*”), and that Royal-Decree’s amendment n. 666 of 18 January 1937. *Id.* at 73- 75.

²²² For a detailed investigation of the case within the context of the United States during the New Deal see Hemphill and Suk, *The Fashion Originators’ Guild of America*, *supra* note 65 at 159- 179. Also explored in THE KNOCKOFF ECONOMY, *supra* note 12.

²²³ GNOLI, *supra* note 215 at 77.

²²⁴ *Id.* [citing to Ester Lombardo, *Il primo esperimento di moda italiana*, VITA FEMMINILE (April 1936) at 9].

²²⁵ PAULICELLI, FASHION UNDER FASCISM *supra* note 189 at 107- 108. While Italy’s colonial practices also affected the conception of an Italian fashion during these years and is of

government also built on a previous 1911 collection of traditional and popular arts in Italy, which included local costumes; the collection would eventually become the museum of the same name still open to the public today in Rome as part of the Museo della Civiltà.²²⁶ The *Ente Nazionale della Moda* also produced thoughts on Italian fashion design as compared to other markets and cultures, as papers written for an unrealized conference in 1940 attest. These papers, written by various members of the fashion industry, argue that Italian fashion could only truly be defined in relation to other cultures; that could address its potential success and identification as such on an international and global market;²²⁷ and proposed that Italian fashion could, moreover, only continue to develop with reference to more inspirations than those only found in Italian cultural heritage.²²⁸

Words and images surrounding fashion were also crucial in the eyes of the Italian government at this time. The *Ente Nazionale della Moda* published Cesare Meano's *Commentario Dizionario Italiano della Moda* in 1936 and then in a second edition in 1938.²²⁹ The primary purpose of this dictionary was to strike any French words from the Italian vocabulary of fashion design. Meano's commentary included a *Guida per la versione delle voci e dei modi stranieri*, which substituted English and French fashion terms with Italian ones.²³⁰ Italian cultural heritage and cultural property was crucial to creating this new imaginary lexicon. As Eugenia Paulicelli has described, Meano's entries and his use of historical vignettes within them harken back to Italian literature and other cultural traditions in an attempt to fix a uniquely

importance for continuing discussions of diversity in fashion, an analysis of that aspect of Italian fashion during the 1930s is beyond the scope of my dissertation.

²²⁶ See *Museo delle Civiltà - Museo nazionale delle arti e tradizioni popolari*, MINISTERO PER I BENI E PER LE ATTIVITÀ CULTURALI,

https://www.beniculturali.it/mibac/opencms/MiBAC/sito-MiBAC/Luogo/MibacUnif/Luoghi-della-Cultura/visualizza_asset.html?id=151314&pagename=151314.

Many of the labels in the museum note that objects were acquired in the 1930s and in the 1940s, likely in preparation for the Universal Exposition in Rome that was supposed to take place in 1942.

²²⁷ PAULICELLI, *FASHION UNDER FASCISM* *supra* note 189 at 141 (citing to a paper by Montano, head of *Casa Ventura*). It is important to note, as Paulicelli details in forthcoming work, that Ferragamo's innovative designs were in many ways an exception to the general plight of Italian fashion designers at the time who were challenged by the lack of raw materials.

²²⁸ *Id.* at 143 (citing to papers by Marcello Dudovich and Ester Sormani).

²²⁹ PAULICELLI, *FASHION UNDER FASCISM*, *supra* note 189 at 61.

²³⁰ CESARE MEANO, *COMMENTARIO DIZIONARIO ITALIANO DELLA MODA* 499- 529 (2nd edition, 1938).

Italian fashion in line with the goals of the Fascist regime and the cultural mores prevalent in 1930s Italy at the time.²³¹ For example, one of Meano's entries, which seems to describe an accessory previously highlighted in Marchetti's history of fashion, is for the "*Pamèla*", which he describes as

*un cappello femminile di paglia, a tesa larga e mole, giovanilmente ricadente fin quasi alle spalle, fu già chiamato Pamèla, nome di donna sempliciotta e casalinga, ma nobilmente d'arte (Goldoni) e asceto a sinonimo di buona figliola sospirosa.*²³²

These actions of the Italian government and its affiliates towards fashion in the 1930s all highlight how a public cultural interest in individual Italian fashion design objects was not easily confined to its material components or to its intangible reproductions, nor to its local elements or its more national ones. Words and images alongside and in addition to material objects were equally important in creating Italian fashion and in the creation of Italian fashion design objects. To acknowledge that all these different facets are equally important in a definition of Italian fashion design objects as cultural property under Italian cultural property law, is to be in a potential conundrum. Preserving everything, inasmuch as Italian fashion design objects are of interest for their tangible and intangible elements, is not possible, especially given Italian cultural property law's emphasis on tangible objects. It may be too much of a stretch to preserve words and images.

In the years after World War I during the advent of the Fascist party and the Fascist state in Italy, two Italian brands were founded which continue to produce premiere examples of Italian fashion design objects to this day: Gucci and Ferragamo. Indicative of the strength of Italian fashion design objects and their continued malleability between the tangible and intangible, the local and the global these two companies in their early years also embodied the issues relevant for a classification of Italian fashion design objects as cultural property today.

In 1921 Guccio Gucci opened his first boutique of leather goods in Florence.²³³ Increasing its stores in the 1930s, Gucci expanded its original location on Via della Vigna Nuova in 1932 and

²³¹ PAULICELLI, FASHION UNDER FASCISM *supra* note 189 at 59-60.

²³² *Pamèla* in MEANO, *supra* note 230 at 326.

²³³ 1921 in GUCCI: THE MAKING OF, *supra* note 158 at 10.

created a separate production facility on Lungarno Guicciardini 11.²³⁴ First known for luggage and travel accessories influenced by stylistic reputational forces outside of Italy- English refinement and elegance- Gucci also seems to have aligned itself with the modernist aesthetic gaining steam in Italy at the time. Rather than supporting a perception of its products as “handicraft”²³⁵,

*Guccio [Gucci] preferred to be associated with technology, and this lead [sic] him to Milan in 1935, where he presented his products at the Italian textile company Linificio & Canapificio Nazionale, an Italian textile company and one of the pioneers of Italian industry of the day.*²³⁶

Salvatore Ferragamo, a shoemaker from Southern Italy, returned to Italy in 1927 from Hollywood, where he had catered to the stars and studios at his *Hollywood Boot Shop*.²³⁷ Creating accessories influenced by American glamour and star power Ferragamo in particular capitalized on his American connections even during these years. In May of 1938 American VOGUE featured a spread on his wedge sole, spotlighting, among other iterations by other designers, two shoes designed by Salvatore Ferragamo for Saks Fifth Avenue.²³⁸

During the 1930s in fact many articles in American fashion periodicals testify to links between the modern Italian fashions produced at the time and Italian cultural heritage. In 1937 an article in American VOGUE entitled *Fine Italian Hand for Shoes* included an image of shoes falling from a shop behind the sculpture of Neptune located in Piazza Signoria in Florence.²³⁹ The article describes the scientific and technical process employed by Ferragamo to produce his shoes and emphasizes the hand-made process over production in series, which Ferragamo also shares in his biography.²⁴⁰ Yet another article in

²³⁴ See *Florence* in *Id.* at 24- 26.

²³⁵ *Id.* at 24.

²³⁶ *Id.* at 26.

²³⁷ For an overview of Salvatore Ferragamo’s journey to Hollywood and return to Italy see two recent exhibitions at the Museo Salvatore Ferragamo in Florence, Italy: *Italy in Hollywood*, May 24, 2018- March 10, 2019 and *1927 The Return to Italy*, May 18 2017- May 2, 2018.

²³⁸ *Fashion: The Wedge has entered!*, 91, VOGUE Issue 9 (May 1, 1938) at 86 and 87.

²³⁹ *Fashion: Fine Italian Hand for Shoes*, 90, VOGUE, Issue 2 (July 15, 1937) at 59.

²⁴⁰ *Id.*; See also FERRAGAMO, *supra* note 209 at 42, 93 (describing rejecting the American manufacturing model and then combining it with Italian artisanship).

American VOGUE in 1938 entitled *Light on your feet* compares a pair of Ferragamo's shoes to Venetian gondolas

*Turned up at the tip, like the prow of a gondola, these suede pumps (which make your foot look inches smaller) demand a sophisticated foot. They are photogenic, too, for the "prow" is more pronounced in the photograph than it is on the foot.*²⁴¹

Other examples from the same year referred to Ferragamo's shoes, alongside others, as "works of art" which readers would collect "... like costume jewelry- special ones for special costumes... One common bond- they all look straight from an artisan's hand."²⁴²

Although Italian fashion may have continued in fits and starts during World War II, Americans, following fashion narratives which cast American fashions as suffering from an imagined case of inadequacy in comparison to their European counterparts²⁴³, still tried to keep track of what their European counterparts were wearing even as they attempted to create a strong American fashion in New York.²⁴⁴ Italian fashion played a part in these observations.

These observations were not always positive. Interestingly, American VOGUE seems to report disparagingly on the cork

²⁴¹ *Fashion: Light on your feet*, Vol. 92, Issue 7, VOGUE, October 1, 1938 at 122. Later also compared to a rhinoceros and to Schiaparelli's hat in ACROSS ART AND FASHION, *supra* note 199.

²⁴² *Fashion: Shoes for Decorations*, Volume 92, Issue 8, VOGUE, October 15, 1938 at 130 and 131.

²⁴³ A number of sources detail the prevalence of copying in the United States, revealing how important following the latest fashion from abroad, namely from Paris, was for an American audience, especially prior to World War II. See, for example, TROY, *supra* note 70 at 234. Licensed copies of French fashions were sold in many New York Department stores in the 1940s. See images in Special Collections, Fashion Institute of Technology.

²⁴⁴ In 1931, for example, the Fashion Group International was founded in New York. As part of their activities to support members of the American fashion industry, the Group not only published booklets about the fashion business but also put on fashion shows and luncheons with guest speakers. In 1938 Winifred Ovitt, the President, reported on the fashion show "'Fashion Futures- American Edition', in which American clothes for the American scene were dramatized." Fashion Group International records. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations, Box 73, Folder 1, President's report: Winifred Ovitt (retiring), 26 January 1938. In terms of Paris' status as a capital of fashion compared to New York, Valerie Steele notes how World War II and the lack of "fashion information from the Paris couture" led Americans to create new trends such as the "Victory Suit" and that "[f]or the first time in history, American designers began to carve out their own sphere of influence, centering on sportswear." STEELE, PARIS FASHION, *supra* note 68 at 236.

shoes of Ferragamo in a report on shoes available in Lisbon in 1944 by noting

[f]or some reason, the texture and the color of the cork [of ready-made shoes in Lisbon] take away the club-foot quality that spoiled the wedge shoes we once imported from the Italian, Ferragamo.²⁴⁵

Soon after the war, however, Gucci and Ferragamo's products were once again center stage in American fashion publications.

2.2 Post War Success and Cultural Interest in Italian Fashion

Promoted as an example of Italy's unique talents and cultural legacy, the United States showcased and embraced Gucci and Ferragamo products as well as Italian fashion more generally soon after World War II. Such a promotion was also embraced by individual designers. In an open letter written in a 1945 issue of the Italian fashion magazine *Bellezza*, for example, Salvatore Ferragamo insists on Italy's and his own ability, to continue, as before the war, to propose shoe designs at the height of fashion.²⁴⁶ After the war, American VOGUE announced the return of Ferragamo's shoes in strategically placed layouts. A November 15, 1946 spread titled *The Italian school* showcased separate images of a Gucci bag and a Ferragamo shoe in front of the Ponte Vecchio [Figure 13] with the accompanying text

This is what Italy makes, and what it has made for centuries: shoes, bags, perfections in leather. Interrupted by war, Italian leather makers have returned to their craft- and from the celebrated school of shoemaking that gave us the wedge sole, the thong-sandal, come these handmade leather accessories.²⁴⁷

Italian fashion objects, indicative of an Italian fashion, were soon embraced wholeheartedly, especially by American audiences who saw them not only as less expensive compared to Parisian fashions but also as uniquely complementary to

²⁴⁵ Marya Mannes, *In Lisbon- 'Dressed for Reaction'*, Vol 104, Issue 4, VOGUE, September 1, 1944, at 140.

²⁴⁶ Open letter from Salvatore Ferragamo, BELLEZZA, November 1945 at 63, reproduced in FERRAGAMO, *supra* note 209 at 177.

²⁴⁷ *The Italian School*, 108 VOGUE No. 9, November 15, 1946 at 166-167 (also reproduced in GUCCI: THE MAKING OF *supra* note 158 at 28) (also referred to in the VOGUE Database as part of a larger article entitled *British Appointments*).

American sportswear.²⁴⁸ It is in post-World War II Italy that the majority of Italian fashion scholarship recognizes the birth of Italian fashion and *Made in Italy*. Nicola White has presented the case that the popularity and very creation of Italian fashion after World War II had much to do with an economic and ephemeral promotional support from the United States.²⁴⁹ Many of the fashion histories written about Italian style during this time emphasize the role which movies played in supporting and amplifying a love for Italian style in America.²⁵⁰ Italian fashion's links with the United States after World War II were also calculated thanks to the Marshall Plan, to a cheaper product relative to France, and to a receptiveness to Italian designs that deliberately incorporated sportswear and a casual aesthetic which Americans appreciated.²⁵¹ The existence of Italian-American communities outside of Italy, and even the presence of Italian workers in New York's garment district, set the stage even before the 1950s for creative dialogue and exchange between the United States and Italy.²⁵² Like earlier moments in Italian fashion history, however, the birth of Italian fashion design continued to be marked not only by links to a wider Italian cultural heritage but also to the unique history of Italy, which frustrated one concise definition of Italian fashion.

While some important Italian fashion shows in the late 1940s strategically emphasized the connections between Italian fashion and Italy's heritage of art and culture²⁵³, the usual given date for the birth of Italian fashion is February 12, 1951 when

²⁴⁸ See STEELE, FASHION, ITALIAN STYLE *supra* note 171 at 1, 16 (observing "Deeply ambivalent about French high fashion, Americans ardently embraced the casual elegance of Italian fashion." and "[while stereotypes of Italian aristocratic women were still seen as not as 'imaginative or arresting' as Paris] Gucci's prestigious bucket bag and Ferragamo's shoes were praised, as were sexy Italian playsuits: 'little-girlish but in no way innocent.' And the prices (about \$100 a dress and \$200 for an evening dress) 'are far lower than in Paris.'").

²⁴⁹ WHITE, RECONSTRUCTING ITALIAN FASHION, *supra* note 72.

²⁵⁰ See, for example, PAULICELLI, ITALIAN STYLE, *supra* note 190; Luigi Settembrini, *From Haute Couture to Prêt-à-Porter in THE ITALIAN METAMORPHOSIS, 1943- 1968* (Germano Celant, ed.) 485 (1994); Valerie Steele, *Italian Fashion and America in THE ITALIAN METAMORPHOSIS*, *supra*.

²⁵¹ Settembrini, *From Haute Couture to Prêt-à-Porter*, *supra* note 250 at 486 (describing Giorgini's guidance to Italian fashion designers on how best to create products marketable to American buyers); STEELE, FASHION, ITALIAN STYLE *supra* note 171 at 16 - 17.

²⁵² PAULICELLI, FASHION UNDER FASCISM *supra* note 189 at 129. See also a video touting the links between Italy and the United States, *Piu che un'amicizia* (1957), <https://patrimonio.archivioluca.com/luce-web/detail/IL3000095783/1/piu-che-amicizia.html>.

²⁵³ STEELE, FASHION, ITALIAN STYLE *supra* note 171 at 17.

the first fashion show was staged by Giovanni Battista Giorgini for American buyers.²⁵⁴ This date also explains why the discussion of Italian fashion design objects as cultural property today is relatively recent. Not even seventy years, the time threshold required for most individual objects under Italian cultural property law, have passed since the first event generally accepted as the beginning of Italian fashion design.

Giorgini's shows, which would go on to be staged in Palazzo Pitti's Sala Bianca in 1952²⁵⁵, the same space which now houses the *Museo della Moda e del Costume*, introduced more Italian fashion objects than just accessories: the designers who showcased at the event included the Sorelle Fontane and Emilio Pucci, among others.²⁵⁶ Other names which debuted at these shows at the Sala Bianca that have also found a place in Italian fashion design history including Roberto Capucci and Emilio Schubert.²⁵⁷ In fashion scholarship that discusses these fashion shows, a continuity with the Italian past and the complex relationships between Italian craftsmanship and Italian fashion are apparent, despite Giorgini's implementation of a new presentation model primarily for American buyers. The local and regional traditions of craftsmanship and the unique aesthetic tied to specific Italian territories exerted its effects. Emilio Pucci's success, for example, derived in great part from his production of patterns "with the help of craftsmen from Capri."²⁵⁸ When Luigi Settembrini discusses the boutique collections presented alongside, and sometimes by the same creators of *alta moda* in these years, he mentions "skirts made of ribbons", "trompe-l'oeil effects" on textiles, and "earrings made of raffia and colored stones."²⁵⁹ Indeed, the Italian innovation which took root in the 1930s and during World War II continued to evolve and affect Italian fashion especially to an American public. In 1947 Salvatore Ferragamo won the Neiman Marcus Fashion award for his *Invisible Sandal*, produced with

²⁵⁴ *The 'Birth' of Italian Fashion at the Sala Bianca in Florence* in STEELE, FASHION, ITALIAN STYLE *supra* note 171 at 17; *La sala Bianca e la nascita della moda italiana*, GOOGLE ARTS & CULTURE, <https://artsandculture.google.com/exhibit/la-sala-bianca/OOLC37-ZgO-wlg?hl=it> (last visited March 23, 2019); Luigi Settembrini, *From Haute Couture to Prêt-à-Porter*, *supra* note 250 at 485. See also GUIDO VERGANI, LA RENAISSANCE DE LA MODE ITALIENNE, FLORENCE, LA SALA BIANCA, 1952- 1973 (Electa, 1993).

²⁵⁵ For this date see Settembrini, *supra* note 250 at 485.

²⁵⁶ *Id.*

²⁵⁷ Settembrini, *supra* note 250 at 485, 487.

²⁵⁸ *Id.* at 486.

²⁵⁹ *Id.* at 487.

nylon thread, and his shoes held a prime place in fashion presentations in the Sala Bianca.²⁶⁰ Again, these examples reveal that Italian fashion design during these years was defined by what we might characterize as an *unicum* of tangible quality and intangible style. In these years when so-called Italian style began to gain ground, Italian fashion design objects were still crucial to that intangible qualifier.

The unique history of the Italian territory with its strong regional identities also affected the presentations in the Sala Bianca soon after their inauguration. *Alta Moda* soon moved its presentations to Rome.²⁶¹ As Italian fashion evolved in the 1960s and 1970s the fragmentation of Italian fashion centers and the establishment of even more small to mid-sized family run manufacturing and designing enterprises shaped it.²⁶² Just as Rome began to show *alta moda* so Milan and Turin began to increasingly compete with Florence for the attention of America. At the same time, the appearance of names in *alta moda* who first debuted in Florence, like Valentino, but would go on to create and contribute just as much to the ready-to-wear world shaped Italian fashion design objects.²⁶³ A complex web of cities, individual designers, manufacturers and cultural influences, Italian fashion very much depended on the city in which it was shown or located and the specific people, association or organization at its helm.

The innovations of design in Italian fashion which made an impression on the United States and the rest of the world from the 1950s on were also part of a much larger context of innovative industrial design. As Valerie Steele has detailed, *Life* magazine reported in 1961 that “ ‘Italy in a few brief years has changed the way the world looks – the cars, buildings, furniture and, most universally, the women.’ ”²⁶⁴ Such a continuity of design across sectors, is in line with Italian design throughout history,

²⁶⁰ For details of the inspiration for the Invisible Sandal, made of an innovative material but not completely related to the deprivations of World War II see FERRAGAMO, *supra* note 209 at 212. For a description and photographs of Salvatore Ferragamo at presentations of Italian fashion at the Sala Bianca, see the recent exhibit *Fashion in Florence* from January 10, 2017 to March 5, 2017 showing images taken by the photographic agency *Foto Locchi* in which Salvatore Ferragamo’s shoe designs accompany dress designs by the Italian designer Schubert.

²⁶¹ STEELE, *FASHION, ITALIAN STYLE* *supra* note 171 at 20.

²⁶² Steele, *Italian Fashion and America* in THE ITALIAN METAMORPHOSIS, *supra* note 250 at 496.

²⁶³ Settembrini notes that Valentino debuted in Florence in 1959. Settembrini, *supra* note 250 at 491.

²⁶⁴ Steele, *Italian Fashion and America* in THE ITALIAN METAMORPHOSIS, *supra* note 250 at 502.

as Cottini has detailed the advent of industrial objects in Italy decades earlier at the beginning of the 20th century. It would seem an Italian legacy exists that is not necessarily connected to specific objects but instead connected to some reproduction across materials. Despite objects' functionality or non-functionality, their use on the market, there is a common creativity in their creation but then, in addition, a common public cultural interest that may attach to them, separate from their use on the market. Often a period of time must pass before this public cultural interest appears, as apparent with appreciations of the historic import of certain Italian fashion design objects during this time but, with others, the historical impact and therefore interest may be evident immediately.

When thinking of Italian fashion design objects individually as cultural property under Italian cultural property law, it may be tempting to subscribe to some sort of hierarchy to facilitate the identification of those objects worthy of the public cultural interest. It might seem reasonable to base decisions of cultural interest on *alta moda* or specific designers, specific places or brands, which might also signify luxury for us. Histories of Italian fashion deny an ability to draw a bright line rule such as this, however. The links between the manufacture and production of ready-to-wear Italian fashion designs bely such easy labels. Walter Albini, for example, a designer who is characterized as anticipating the full beginning of Italian ready-to-wear, began his career in Italy by working for the brand Krizia, founded by Maria Mandelli, which showed boutique collections at the Sala Bianca in the 1950s and 1960s before moving its fashion shows to Milan.²⁶⁵ Later Albini designed for multiple names which all showed on the Sala Bianca catwalk at the same time.²⁶⁶ Notwithstanding this, or perhaps because of it, Albini is often described as the first stylist and as the instigator of the importance of a designer's *griffe* or signature.²⁶⁷ An easily

²⁶⁵ For a description of Walter Albini's early career see *Biography*, WALTER ALBINI, <http://walteralbini.org/en/biografia/> (last visited March 25, 2019) (noting "At Krizia he experimented in industry methods, from knitwear to the study of yarns, from production to garments to the study of fabrics."); see also STEELE, *FASHION, ITALIAN STYLE* *supra* note 171 at 54 (noting Krizia's decision, along with others, to show in Milan beginning in 1964).

²⁶⁶ *Biography*, WALTER ALBINI, *supra* note 265 (noting "Towards the end of the 1960's he was designing for the main Italian fashion houses, for Billy Ballo, Cadette, Cole of California, Montedoro, Glans, Annaspina, Paola Signorini and Trell."); STEELE, *FASHION, ITALIAN STYLE*, *supra* note 171 at 55 ("In 1968, Albini was represented at the Pitti Palace by five collections for five different companies.").

²⁶⁷ Nello Barile, *Made in Italy: da country of origin a metabrand* in FATTO IN ITALIA: LA CULTURA DEL MADE IN ITALY (1960- 2001) 140 (Meltimi, 2006). An exploration of the work

identifiable public cultural interest based on designer, brand, place, or even type of object here is almost impossible.

Still other fashion brands founded in this period, such as Missoni, were, and still are today, indelibly tied to the textiles which make up the material of their fashion product, both in terms of their business model and aesthetically. Such an *unicum* frustrate a bright line rule that public cultural interest in Italian fashion design objects is always in raw materials or the finished product. Founded in 1953 by Rita and Ottavio Missoni, Missoni grew out of Rita and Ottavio's direct work with a factory in Gallarate in which they experimented with yarns and knits of all colors and materials to produce their highly identifiable multi-colored chevron print.²⁶⁸ Notwithstanding descriptions of Missoni's prints as "*an inspired combination of art and industry*"²⁶⁹, separate elements of art and industry are hard to identify in Italian fashion objects which are such an *unicum* of tangible textile and intangible visual color. [Figure 14]

The experiments which grew out of a vertical integration between manufacturing, production and design in Italy in the 1960s and 1970s led directly to the advent of Italian ready-to-wear. According to Elisabetta Merlo and Francesca Polese, this vertical integration was an important factor in the establishment of Milan as the winning Italian fashion capital; the existence of larger "firms" which produced fashion and a strong network of trade associations, international business groups like the Italian-American Chamber of Commerce, and *La Rinascente* supported the city's prominence.²⁷⁰ The importance of textiles,

of Antonio Ratti, crafting designs and silk scarves for Italian brands, still today, also complicates a division between designers, artisans and manufacturers. See TEXTILE AS ART: ANTONIO RATTI ENTREPRENEUR AND PATRON (2017).

²⁶⁸ See *Missoni*, s.P.a., SISTEMA INFORMATIVO UNIFICATO PER LE SOPRINTENDENZE ARCHIVISTICHE, MIBACT, <http://sjsua.archivi.beniculturali.it/cgi-bin/pagina.pl?TipoPag=prodente&Chiave=51367&RicFrmRicSemplice=missioni&RicSez=produttori&RicVM=ricercasemplice> (last visited March 25, 2019); see also Lindsay Talbot, *Inside Angela Missoni's Rainbow Colored World*, N. Y. TIMES, August 14, 2018, <https://www.nytimes.com/2018/08/14/t-magazine/angela-missoni-fashion-designer-inspiration.html> ("Starting with a few simple chevron-patterned wovens produced in a small factory in Gallarate, Italy, Rosita and Ottavio Missoni pioneered the now widely used space-dyeing technique for yarn — still the magic ingredient in the house's signature kaleidoscopic knits.")

²⁶⁹ STEELE, FASHION, ITALIAN STYLE *supra* note 171 at 51 (also quoting Richard Martin).

²⁷⁰ Elisabetta Merlo and Francesca Polese, *Turning Fashion into Business: The Emergence of Milan as an International Fashion Hub*, Vol. 80, No. 3, THE BUSINESS HISTORY REVIEW, 415, 433-434 (Autumn 2006). Merlo and Polese also mention how important trade and business publications were at this time.

manufacturing and general business to Italian fashion introduced many new characters into the Italian fashion design lexicon and even new conceptions of Italian fashion.

Elio Fiorucci who has been characterized as more of a businessman than a designer²⁷¹, created his store as much for a fashion experience as to purvey Italian fashion design objects, which were not necessarily only clothing or accessories.²⁷² The Fiorucci t-shirt with an image of two cherubs has been dubbed, along with the Ferragamo *Vara* and other Italian fashion design objects like Prada's backpack as "must haves."²⁷³ Giorgio Armani, began his career by designing his own line manufactured with the *Gruppo Finanziario Tessile*, a manufacturer of textiles from Turin which decided to continue its historic production line of textiles and clothing while producing designer-named fashion objects.²⁷⁴ In the same time period, Gianni Versace created a similar model of production with the manufacturer Genny after designing under other brand names which showed at Palazzo Pitti.²⁷⁵

While the 1970s is generally seen as a time of growth for Italian ready-to-wear, the 1980s are usually cast as a time of consolidation. Italian fashion was recognized both in the ready-to-wear fashion of Armani's characteristically tailored suits in grey and black and in Versace's Southern Italian sexy and sensual Medusa aesthetic. The 1980s also gave rise to licensing deals and distribution agreements where the intangible logo of an Italian brand attached itself to various types of materials, from ready-to-wear to *alta moda* and other diffusion lines.²⁷⁶ In this sense, intangible logos became synonymous with Italian fashion design, but were not necessarily indicative. Indeed, for

²⁷¹ Simona Segre Reinach, *Fatto in Italia: La cultura Made in Italy (1960–2000)* by Paola Colaiacomo (ed.)/*Oggetti cuciti: L'abbigliamento pronto in Italia dal primo dopoguerra agli anni Settanta* by Ivan Paris [Book Review], 13(1) FASHION THEORY 121, 123 (2009), doi: 10.2752/175174109X381382.

²⁷² See Luisa Valeriani, *Colazione da Fiorucci* in FATTOIN ITALIA, supra note 266 at 26–64; see also FIORUCCI (David Owen, ed., Rizzoli, 2017).

²⁷³ *The Italy of Objects*, ITALIANA, supra note 63 (referring to the wall text in the exhibition).

²⁷⁴ For this characterization of the *Gruppo Finanziario Tessile* see SIMONA SEGRE, *MODE IN ITALY: UNA LETTURA ANTROPOLOGICA* 22 (1999). For observations on Armani and the *Gruppo Finanziario Tessile* see Barile, *Made in Italy: da country of origin a metabrand* supra note 267 at 140–141; *MANAGING FASHION*, supra note 18 at 40, 50, 53–54.

²⁷⁵ *MANAGING FASHION*, supra note 18 at 53; Francesco Bogliari, *La vera storia dei Versace*, BUSINESS PEOPLE, <http://www.businesspeople.it/People/Protagonisti/La-vera-storia-dei-Versace-2961> (last visited March 25, 2019).

²⁷⁶ *MANAGING FASHION*, supra note 18 at 54.

some companies such as Gucci, which found itself increasingly relying both on licensing deals and local production in Tuscany as family disagreements affected the management of the Gucci brand, the link with various manufacturers and a lack of strict vertical integration proved, at times, to be more challenging for the cultural value and interest in the fashion design objects they created than positive.²⁷⁷ In contrast, after Salvatore Ferragamo's death in 1960, Wanda Ferragamo's management of Salvatore Ferragamo, s.P.a., with her children produced a relatively smooth-sailing business which, in the 1960s, provided the environment for the design of the *Vara* shoe, a new logo and identified with a design of the Ferragamo brand only imagined after the founder's death.²⁷⁸

The history of the post-World War II ascent of Italian fashion design objects and the intricate contaminations between designers, brands, manufacturers and cities in Italy only further indicates how the public cultural interest in Italian fashion design objects is hard pressed to confine itself to one facet of Italian fashion design. A public cultural interest in Missoni prints, for example, might be informed by the visual impact of them, which is, however, related to the way in which that print is produced and the fabric of which it consists. To decide to preserve such a print, we must decide whether preserving an image of it to capture the visual impact is enough or if the tangible material of a dress, scarf or even pillow with the design is necessary. Moreover, preservation of the one might affect preservation or valorization of the other.

Complicating matters further is the fact that the Italian fashion design objects first created during these years often survive the life of their designer by being assigned to a brand. Under Italian law, business activities are usually outside the definition of what can be protected as cultural property²⁷⁹: a company or

²⁷⁷ An early disagreement about shares in the Gucci family between Grimalda Gucci, Guccio Gucci's daughter, and her brothers is described in *Guccio Gucci in GUCCI: THE MAKING OF* *supra* note 158 at 16 (Frida Giannini et al, eds., Rizzoli, 2010). Rula Jebreal's *Introduction* in the book makes these disagreements more explicit, noting the communications with licensees between family members about not producing Paolo Gucci's designs for *Flora* dresses in the 1970s and 1980s. *Id.* at 4-6.

²⁷⁸ Constance C.R. White, *Fiamma Ferragamo, 57, Dies; Shoe Designer for the Elegant*, N. Y. TIMES, September 30, 1998, <https://www.nytimes.com/1998/09/30/world/fiamma-ferragamo-57-dies-shoe-designer-for-the-elegant.html> (last visited March 25, 2019).

²⁷⁹ Cons. Stato Sez. VI, Sent., 26/07/2016, n. 3363, LEGGI D'ITALIA (denying the classification of a building historically home to a boutique of men's fashion as a cultural

person cannot be forced to engage in a specific activity or business even if it is of cultural interest.²⁸⁰ Notwithstanding this, we might, however, classify modern and contemporary Italian fashion design objects themselves as cultural property apart from their continued inclusion in the activities of a brand. But we would still need to address our criteria for authorship and the specific time threshold that would operate. A Versace dress, for example, re-issued in 2017, might not qualify at all because it is made today, however the fabric on it, if old enough, may qualify as a cultural property. Drawing these hard lines, and imagining the impact they would have on brands, is what classifying Italian fashion design objects as cultural property under Italian cultural property law entails.

2.3 Contemporary Italian Fashion and Heritage

Since the late 1980s and early 1990s a further implicit recognition of Italian fashion as a part of Italian cultural heritage or as akin to other categories of cultural property has developed both in the fashion industry and in fashion museums. A natural sort of historicization has occurred for continued productions of different Italian fashion design objects which are still accepted by specific groups of people for relatively short periods of time as fashion. This embrace might be contextualized within the changing fashion values rejecting the hedonism and excess of the 1980s which Segre recognizes²⁸¹, and an increasing emphasis on sustainability and style versus fashion trends²⁸² which has continued in fits and starts until today and morphed into green fashion and an increased awareness by Italian fashion companies of the effect their production has on the environment.²⁸³ At the same time, however, read in the greater history of Italian fashion, the historicization of certain Italian fashion design objects seems naturally related to Italian fashion design's links to its territory,

property because the classification was seemingly made on the basis of the business activity occurring inside the building).

²⁸⁰ *Id.*

²⁸¹ SEGRE, *MODE IN ITALY*, *supra* note 274 at 39- 43.

²⁸² *Id.* at 40.

²⁸³ Many Italian fashion companies, for example, have pledged to go fur-free. See Sophia Benson, *Why 2019 Could Be a Watershed Year for Fashion and Sustainability*, ANOTHERMAG, January 8, 2019, <https://www.anothermag.com/fashion-beauty/11404/why-2019-could-be-a-watershed-year-for-fashion-and-sustainability>. In this sense, corporate museums have often been described as social actors with a social function. See Mariacristina Bonti, *The Corporate Museums and their Social Function*, 1 EUROPEAN SCIENTIFIC J. 141 (2014).

to the Italian context and to the unique marriage between artisanship, design and object.

Gucci's recent repositioning under Alessandro Michele's direction is a good example of this. While the Flora print is still sold as a scarf in the almost same iterations as its inception in the 1960s, Michele has re-envisioned the *Flora* print [Figure 15] in a new bohemian style while also re-interpreting classic parts of Gucci's heritage, such as the Bamboo Bag and colored stripes, including them in other fashion design objects.²⁸⁴ The cultural value of individual Italian fashion design objects seems to have uniquely tried to straddle the needs of a current creative market and the needs of those who see Italian fashion companies as cultural institutions. Modern and contemporary Italian fashion design objects are indelibly tied to the creative industry which produces them (textile manufacturers, local artisans, fashion houses and brands, individual designers or creative directors) and the flurry of that industry's complementary tools (fashion films, advertising, trade shows). At the same time, modern and contemporary Italian fashion design objects are held up as objects of artistic and historic and other cultural interest alongside works of art and other museum-worthy objects whether in spaces of aesthetic contemplation or not. Today's Italian fashion world is characterized by an overlap between the fashion industry and fashion museums. At the same time, intangible processes and untouchable creativity define Italian fashion design objects, as do material aspects of the tangible objects in all their materiality and accompanying historic and artistic meanings.

While the discussion of counterfeits and fakes pervades Italian fashion companies' policing of their products, what concerns the dissertation's inquiry is not Italian fashion companies assuring a public trust in the authenticity of their product in the products' materiality through proper stitching or materials or in the use of proper trademarks. Instead, the historical narrative of Italian fashion since the 1980s points to Italian fashion companies' embrace of a public cultural interest and, therefore,

²⁸⁴ For images of Michele's runway styles see *Gucci*, VOGUE, <https://www.vogue.com/fashion-shows/designer/gucci>. For images of a Bamboo Bags with a Dionysus clasp and the green-red-green stripe see Dionysus medium top handle bag, GUCCI, <https://www.gucci.com/us/en/pr/gifts/monogramming/dionysus-medium-top-handle-bag-p-448075CAOHN1065?position=10&listName=SearchResultGridComponent&categoryPath=Gifts/Monogramming>.

trust in their design objects which may not be the same as a public trust in authenticity on the market. Italian fashion companies now increasingly regulate certain iterations of their Italian fashion designs not just for their authenticity but for their ability to convey a cultural message as cultural objects, whether they are bought or not. Increased collaborations with other cultural institutions only highlight this.

This most recent period of time in Italian fashion history also reveals that the question of how Italian fashion design objects are cultural property, or a part of Italian cultural heritage, is not even new or novel for Italians themselves in the sector. At the Florence Biennale *Il Tempo e la Moda* in 1996 the organizers anticipated the issue. "Where are the cultural programs for contemporary fashion that are givens in contemporary art, film, and architecture?"²⁸⁵ In other words, is modern and contemporary Italian fashion a cultural activity, a cultural property, or a property which straddles the two? An essay in the catalog, *Looking at Fashion, with Art* went on to compare fashion to photography.²⁸⁶ Away from a discussion of fakes and counterfeits, this brings an interest in the overlap between intellectual property law and cultural property law full circle. Comparing Italian fashion design objects to photography, which Italian cultural property law preserves in certain aspects like its physical negative that displays rarity and preciousness might prove beneficial for understanding fashion design objects as cultural property.

Today, the current Italian fashion industry and its players as well as museums and their officials around the world shape the public cultural interest in Italian fashion design objects. We might say the Italian fashion industry and fashion museums exist in a symbiotic (and even at times parasitic) relationship.²⁸⁷ The complexities of this relationship are even more pronounced when Italian fashion museums are run by the same Italian fashion houses whose design objects they exhibit. They are also further complicated by digital iterations. In addition, the

²⁸⁵ Germano Celant, Luigi Settembrini, Ingrid Sischy, *Looking at Fashion, with Art in ART/FASHION 10* (New York, Guggenheim Museum SoHo, March 12- June 8, 1997) (catalog of the 1996 Florentine Biennale as repeated at the Guggenheim in NY curated by Germano Celant).

²⁸⁶ See *supra*.

²⁸⁷ There are, of course, different ways of characterizing this relationship, including in museological terms: as "fashion museology" as opposed to "dress museology." Marie Rieghels Melchior, *Introduction, in FASHION AND MUSEUMS*, *supra* note 127 at 9.

behavior of Italian fashion companies towards their design objects which are of public cultural interest is not uniform, resulting in potential losses for the public.

Armani/Silos run by Armani and founded in 2017 is an excellent example of the challenges that occur when a fashion company essentially becomes a cultural institution.²⁸⁸ Without “museum” in its name, the “exhibition space” as it is called on the website²⁸⁹, consists of a permanent display and collection of Armani clothing and accessories from the past forty years on multiple floors. It is divided into sections including Androgynous, Stars, Daywear and Ethnicities, which are linked to Armani’s continued minimalist design output today.²⁹⁰ Films are regularly projected, linking Armani’s history of collaborating with Hollywood, in a screening room on the top floor of the exhibition space, where computers also house the digital archives, sketches and relevant images of Armani’s design objects both as they appear on Hollywood stars and on the hangar. Armani/Silos is certainly an exercise in preserving and valorizing Armani’s design objects which have not yet aged in to the current Italian cultural property “box” under Italian cultural property law because their designer is still living. Operating outside, yet seemingly in the shadow of, Italian cultural property law, it still, however, leaves unresolved the question of how exactly a public cultural interest in Armani’s design objects attaches to these design objects. Presenting a factual narrative still divorced from comparison with other contemporaneous designers and their work, Armani, through Armani/Silos, still allows its individual design objects to be caught up in a designer myth, albeit in an aesthetically pleasing and beautiful Milanese minimalist style where anyone, if they pay the price of admission, may feel welcome. The public cultural interest in these individual Italian fashion design objects here are practically unidentifiable when they are still controlled as real property by their designer.

²⁸⁸ ARMANI/SILOS, <https://www.armanisilos.com>. See also *About Us*, ARMANI/SILOS, <https://www.armanisilos.com/about/>. See also ARMANI/SILOS booklet (on file with author). See also Eric Wilson, *Created to be Curated* INSTYLE 125- 126 (December 2015)

²⁸⁹ Wilson, *Created to be Curated*, *supra*. (spotlighting designer museums in a section “A Fashion Lover’s Guide to Art” and noting “Now major companies with the resources to build up their archives are driving prices for important historical costumes sky-high and taking control of their narratives by curating their own exhibitions.”)

²⁹⁰ Permanent Collection, ARMANI/SILOS, <https://www.armanisilos.com/exhibition/permanent-exhibition/>.

In addition, when Italian fashion museums run by the designers of the design objects they display go digital, as in the case of the online Valentino Garavani Museum launched in 2011²⁹¹, these complexities are amplified by a dichotomy between images of Italian fashion design objects and the material parts of Italian fashion design objects. Whereas in Armani/Silos the digital archive reproducing images of individual design objects and other ephemera amplifies an examination of the design objects in their materiality, here reproductions of Valentino's dresses replace design objects' materiality completely. [Figure 16] While the negotiations which were engaged in founding the digital museum upon Valentino's retirement are unknown²⁹², intellectual property law, especially copyright law, at the very least in the software, plays a role in the creation of these reproductions of the design objects, their perception, and the understanding of the public's cultural interest in them. As the website's general terms section notes

*The Site as a whole, and any single element on this Site, is protected by copyright, trademark rights and other intellectual property rights either owned by AVGA [Association Valentino Garavani Archives] or by third parties licensed to AVGA. Such elements include, among others, photographs, designs, testimonials, images, texts, video and audio clips, logos, trademarks and software programs used for the management and development of the Site. The elements contained in the Site are reproduced for information and/or promotional purposes only. The Site is for personal use only.*²⁹³

Here, albeit likely under more restrictive French law which is outside the scope of this dissertation²⁹⁴, Valentino Garavani

²⁹¹ The Museum can be downloaded and viewed on a computer by visiting <http://www.valentinogaravanimuseum.com>.

²⁹² Silvia Stabile formerly of the Negri-Clementi studio legale and today at Bonelli/Erede in Milan negotiated an agreement for the founding of the online museum between the company and Valentino as a designer but was unable to provide me with copies of it due to confidentiality. Interview with Silvia Stabile, Spring 2017 (e-mails on file with author). For information about Valentino see *Valentino Garavani*, BUSINESS OF FASHION, <https://www.businessoffashion.com/community/people/valentino-garavani>; see also *Inside Valentino's Virtual Museum*, THE BUSINESS OF FASHION, December 7, 2011 <https://www.businessoffashion.com/articles/digital-scorecard/digital-scorecard-valentino-garavani-virtual-museum> (discussing the launch of the virtual museum, noting its funding by Valentino and his partner Giancarlo Giammetti and that the two no longer had any financial stake in the Valentino company).

²⁹³ *General Terms*, <http://www.valentinogaravanimuseum.com/general-terms>.

²⁹⁴ The Credits section, which includes a data sharing notice, notes that at least the Privacy Policy has been drafted "in accordance with the French law CNIL." *Credits*, VALENTINO GARAVANI MUSEUM, <http://www.valentinogaravanimuseum.com/credits>.

effectively presents reproductions of his design objects, and reproductions of their accompanying ephemera, as of public cultural interest, more so or in a way equal to the tangible designs objects which he displayed elsewhere, such as at the Ara Pacis in Rome in 2007, on other occasions.²⁹⁵

The now defunct Gucci Museo and restricted archive is another example. During Domenico de Sole's tenure at Gucci in the 1990s and early 2000s, the company made a point of buying back many early Gucci handbags and other accessories in private hands "with the aim of reconstructing Gucci's history as a fashion house, a brand, and a manufacturer."²⁹⁶ In 2011, on the heels of a *Forever Now* campaign which promoted Gucci as continuing a 90 year tradition of craftsmanship, Frida Giannini opened the Gucci Museo in Florence, Italy.²⁹⁷ Subscribing to a brand museum ideology, Gucci Museo divided the design objects on display into intangible identifiers: *Logomania*, the *Flora* design, and *Bamboo* are just three examples.²⁹⁸ Grouping the objects with the GG logo together, the objects with the *Flora* design together, and purses with bamboo handles together seemed to suggest that the cultural interest Gucci ascribed to these objects was not confined to specific design objects. For a number of years after its opening, the Museo did not display any Gucci design objects by Tom Ford, effectively erasing him from the company's history. Remedied in 2016 with an installation by Maria Luisa Frisa in the Museo²⁹⁹, the Museo was then closed and reinstalled as a gallery in 2018. There is no access to a digital archive of the Museo, nor is there access to corporate ephemera, let alone the tangible design objects for study. These Italian fashion design objects are under the Gucci corporation's lock and key. While the current Gucci Galleria has a store, Gucci Garden, selling design objects from recent

²⁹⁵ *Valentino a Roma, 40 Years of Style, Museo dell'Ara Pacis*, MUSEI IN COMUNE, ROMA, http://www.arapacis.it/it/mostre_ed_eventi/mostre/valentino_a_roma. See also VALENTINO: THE LAST EMPEROR, *supra* note 19.

²⁹⁶ *Historical Archive* in GUCCI: THE MAKING OF, *supra* note 158 at 362.

²⁹⁷ For details of see *Forever Now*, *supra* note 158.

²⁹⁸ MUSEO GUCCI BOOKLET (on file with the author).

²⁹⁹ Akanksha Upadhyay, *Gucci Makes Room for Tom Ford*, LIVEMINT, June 24, 2016 <https://www.livemint.com/Consumer/0S1AMe5WjcHDz8Ek9SeMDI/Gucci-makes-room-for-Tom-Ford.html>; as opposed to Suzy Menkes, *Gucci Feeds Its Florentine Roots*, N.Y. TIMES, September 27, 2011, available at <http://www.nytimes.com/2011/09/28/fashion/gucci-opens-a-brand-museum-in-florence.html> ("As for [Gucci's] quarrelsome family, the collapse of the label into airport duty-free fodder, its revival in the 1990s by Tom Ford and Domenico De Sole — they are simply air brushed out of history.")

collections and vintage Gucci bags, the Gucci Museo had an Icon Store, which sold recreations of the more historic objects displayed in the Gucci Museo³⁰⁰ and emphasized the inclusion of its Gucci moccasin with horse-bit in The Metropolitan Museum of Art.³⁰¹

The comparison between design objects in the collections of these different cultural institutions unmask the real issue: objects which aspire to be cultural property, and their reproductions, are being treated in very disparate manners by different actors on different sides of the Atlantic who pretend to recognize similar types of public cultural interests in these design objects.

The relationship between Italian fashion design objects on the market and Italian fashion design objects as of public cultural interest on a separate yet complementary plane is one that is fraught with negotiation. In a letter from Richard Martin dated July 12, 1997 to Ed Filiposki at the New York public relations firm Keeble Cavaco and Duka about the loan of a Versace dress for the 1997 exhibit *Wordrobe* at The Metropolitan Museum of Art, Martin writes

As I mentioned yesterday on the phone, the next show in The Costume Institute is 'Wordrobe', an exploration of words, letters, and numbers in clothing...It would be sensationally and absolutely to the point of the show to be able to borrow one Versace Atelier piece from the collection show earlier this month in Paris. I know this is asking a very special favor as we would want to have the garment from the end of August to the end of November, effectively removing it from its perfect moment to be sold. (That's the reason I ask you and Gianni to think of one piece you can spare and one piece that is most indicative to you.) Researchers have contacted or will contact you about earlier pieces as well. I just felt that, knowing the very special favor of setting current work aside immediately, I

³⁰⁰ *Icon Store* in MUSEO GUCCI BOOKLET *supra* note 298 (“...la Icon Collection, una linea esclusiva di accessori in edizione limitata appositamente creata per il Gucci Museo. La Icon Collection include una serie di icone molto amate, gli appassionati di borse possono scegliere tra la New Jackie, la New Bamboo- classici reinterpretati in chiave contemporanea...”).

³⁰¹ *Id.* There is also correspondence between attorneys supposedly fighting infringement cases and The Metropolitan Museum in Letter from Patton Boggs to the Museum from August 1, 1997 in Box 53, folder 19 (Harold Koda, Correspondence with Designers), Costume Institute Records, The Metropolitan Museum of Art Archives.

wanted to ask for this one personally.³⁰²

Here, Martin, in his continuing negotiations for a loan of a Versace Atelier dress, emphasizes the significance of the Versace gown for the message of the exhibition he is curating while also admitting the relevance of that gown on the marketplace. The relationship between the ability of the Italian fashion object to be both of cultural interest inside a treasured space of public trust and of an economic interest to its owner, Versace, on the market, as a piece of cultural property would be to a collector, is evident. Such a dual existence requires the balancing of a variety of different interests.

Indeed, examples of Italian trade associations lobbying American museums to stage Italian fashion exhibitions make such balancing acts even more complex. The Italian Trade Commission proposed one such exhibit in 1996 to the Metropolitan Museum of Art entitled *An Exhibition of Italian Renaissance Velvets*.³⁰³ In 2003 the Italian Trade Commission was successful in staging *Italian Style* at the Museum at the Fashion Institute of Technology.³⁰⁴

At times, of course, cultural institutions working with Italian fashion companies can overcome any minefields which would compromise or frustrate the public's appreciation of Italian fashion design objects' cultural interest. This is evidenced in preparations for The Metropolitan Museum of Art's exhibition dedicated to Gianni Versace after the designer's untimely death in 1997.³⁰⁵ In a letter dated November 14, 1997, to Richard Martin prior to the opening of the exhibition, Donatella Versace

³⁰² Letter from Richard Martin to Ed Filiposki, July 12, 1997, Costume Institute Box 203, Folder 8, Costume Institute Records, The Metropolitan Museum of Art Archives.

³⁰³ The proposal is available in Italian Trade Commission 1994- 1996, Costume Institute Box 40, Folder 10, Costume Institute Records, The Metropolitan Museum of Art Archives.

³⁰⁴ For a record of this sponsorship see the Catalogue of the exhibition: Beniamino Quintieri, *Introduction* in STEELE, *FASHION, ITALIAN STYLE* *supra* note 171 at 20 at ix (noting "This exhibit is an important part of the marketing campaign 'Italia- Life in I Style' recently launched to promote Italian products and the Italian lifestyle on the U.S. market. This long-range program not only celebrates a beautiful product, whether it be a scarf, a purse, a pair of glasses, or an evening gown, it is also a wonderful opportunity to discover and celebrate the Italian flair for sophistication, exquisite craftsmanship, and technology."). Records of the exhibition are available in Special Collections, The Fashion Institute of Technology.

³⁰⁵ The correspondence is preserved in folders in Box 204, Gianni Versace (December 11, 1997-March 22, 1998), Costume Institute Records, The Metropolitan Museum of Art Archives.

wrote that she was “confident that we are all working on something that people will not forget easily.”³⁰⁶ Dividing the exhibition in his outline into *The Landmarks, Art, History, Materials, Word and Image, Men* and *The Dream*, Martin mediated and choose between different iterations of cultural significance as applied to specific Versace design objects. Landmarks were, for example, described as Versace’s fashion design objects divorced from “celebrity and star power” which stand as “manifestations of our time”³⁰⁷, such as the dress worn by Elizabeth Hurley in 1994. Standing alone, according to Martin, at least one iteration of this dress is significant for its ability to testify to a moment in history. [Figure 17]

The Museo Salvatore Ferragamo, founded in May of 1995 and still operational today,³⁰⁸ takes a very different approach that seems to balance all these different interests appropriately. Its mission is “to acquaint an international audience with the artistic qualities of Salvatore Ferragamo and the role he played in the history of not only shoes but international fashion as well”³⁰⁹ but the Museo Ferragamo also is not shy about its role in promoting “corporate heritage and celebrating the essence of ‘Made in Italy’”, which has also been analyzed by business scholars.³¹⁰ What sets the *Museo Ferragamo* apart, however, is its program of exhibitions and its openness to researchers. First, the *Museo* organizes yearly exhibits which use both corporate ephemera related to Ferragamo’s designs, life and his time at his eponymous company, in conjunction with tangible objects in their corporate archive to inform wide-ranging and even critical investigations into subjects related to the Ferragamo brand and history also relevant for other cultural spheres. One recent exhibit, *Tra Arte e Moda* did not shy away from the questions of whether fashion is art and the problematics that collaborations between designers and artists imply.³¹¹ In

³⁰⁶ Letter from Donatella Versace to Richard Martin, November 14, 1997, Box 204, Folder 3, Costume Institute Records, The Metropolitan Museum of Art Archives.

³⁰⁷ Catalogue Draft, 1997- 1998, Box 205, Folder 4, Costume Institute Records, The Metropolitan Museum of Art Archives.

³⁰⁸ *History of the Museum*, MUSEO SALVATORE FERRAGAMO, https://www.ferragamo.com/museo/en/usa/discover/history_museum/# (last visited March 25, 2019).

³⁰⁹ *Id.*

³¹⁰ Iannone and Izzo, *supra* note 162.

³¹¹ The exhibit also showcased objects such as Genoni’s Primavera dress and videos of the 1996 Biennale were shown at the exhibition at the Museo Salvatore Ferragamo *Tra Arte e Moda*. For images see ACROSS ART AND FASHION, *supra* note 199. Google Arts & Culture has also digitized the exhibit. See *Salvatore Ferragamo: La moda è arte?*, GOOGLE ARTS &

addition, the Museum's work is supplemented by the Fondazione Ferragamo, founded in 2013 as a separate non-profit entity meant to support programs for young craftsmen and designers following Salvatore Ferragamo's legacy.³¹² Its archive is open to researchers by appointment and it is quite transparent with its materials. While the decision to museify Ferragamo's past products and create an archive of the shoes and other corporate ephemera such as promotional materials, photographs and artisanal tools used during Salvatore Ferragamo's lifetime was, in some senses, the first of a trend for Italian fashion brands, the *Museo Ferragamo's* constancy in its approach and its commitment to preservation and valorization makes it a model for other Italian fashion companies, of which there are now many who are concerned with their heritage.

Within this framework of historical import of Italian fashion design objects, and the differing treatment of the historical interest in them by Italian fashion companies and other cultural institutions, the need to decide whether and how to preserve certain Italian fashion design objects themselves exists.

Some Italian fashion design objects naturally raise this question because of their age. Take a hypothetical discovery of Rosa Genoni's *Tanagra* dress designed in 1909.³¹³ Fashion scholarship on Italian fashion tells us that this dress is culturally significant, but in order for it to enter the cultural property "box", no matter who owns it, under Italian law we need to decide whether it is a testament having the value of civilization, a unique example of Genoni's creativity, or an object of artistic or historic interest whose cultural value is caught up with the material of the object and cannot be just as well preserved in a drawing, for example, or in a recreation of the design.³¹⁴

The Futurist vest with its bright lines and colors is also noted as breaking with tradition by fashion history and, dated to the

CULTURE, <https://artsandculture.google.com/exhibit/salvatore-ferragamo-la-moda-è-arte/kAJycOUu8JEELw?hl=it>. For other discussions of the links between fashion and art from a fashion studies perspective, from an aesthetic and historic perspective in fashion studies, see Sanda Miller, *Fashion as Art: is Fashion Art?* 11(1) FASHION THEORY 25-40 (2007) (connected to Sung Bok Kim, *Is Fashion Art?* 2(1) FASHION THEORY 51-72 (1998).

³¹² *Obiettivi*, FONDAZIONE FERRAGAMO, <http://www.fondazioneferragamo.it/sezioni/102/obiettivi>.

³¹³ *Tanagra 1909* in PAULICELLI, LA MODA È UNA COSA SERIA, *supra* note 130.

³¹⁴ As has been recently done as part of *The Fabric of Cultures: Systems in the Making* exhibition, see <https://vimeo.com/238100852>.

1920s with a non-living author, Fortunato Depero³¹⁵, it could also fulfill the time thresholds and requirements to age in to the cultural property “box”. At the same time, like with Missoni’s prints, it is unclear whether our public cultural interest is in Depero’s unique fiery design alone which could be reproduced on other materials or in the Italian fashion design object in its tangible and intangible design elements.

Ferragamo and Gucci accessories also bring up similar questions. Arguably first designed in 1946³¹⁶, the bamboo handle is again, according to fashion history, important for its innovative qualities³¹⁷, but also for the way in which it is produced. At the same time, this creation of the bamboo handle in bamboo might be a myth- many design patents for the look of the bag or similar bags do not mention bamboo as a material but imitate the famous notches of bamboo.³¹⁸ [Figure 18] With this information we may not identify, therefore, the bamboo handle itself as of interest but, rather, its design which can be reproduced in multiple material iterations and therefore indicates a need to preserve the design for the Bamboo Bag or for a handle of a bag itself.

Ferragamo’s *Invisible Sandals*, designed in 1947, are deemed significant by fashion history for their use of innovative materials and their invention by an Italian designer and his workshop. The shoes are a unique mix of modernity and tradition. Again, Ferragamo described two processes for creating the shoe upper out of nylon thread in his design

³¹⁵ See *Italian Futurism 1909-1944: Reconstructing the Universe*, THE GUGGENHEIM, http://exhibitions.guggenheim.org/futurism/futurist_reconstruction_of_the_universe/.

³¹⁶ One of the earliest design patents found thus far in a search at the Archivio Centrale with a similar handle dates to the 1950s. See Soc.r.l. Guccio Gucci, *Modello Industriale Ornamentale*, n. 4945 of 1958, ARCHIVIO CENTRALE DELLO STATO, although others also reveal similarities with the bamboo shaped handle. Interview, Claudia Pelli, Intellectual Legal Counsel of Gucci, July 3, 2019 (responding that she was unable to answer a question regarding the exact date of the invention of the Bamboo Bag and handle due to confidentiality).

³¹⁷ GUCCI MUSEO BOOKLET (on file with the author).

³¹⁸ For example, *Id* (“Il manico (8) é semicircolare rigido realizzato in legno, parzialmente ricoperto di cuoio nella parte superiore (9) montati su supporti in metallo (10) a duplice forchetta con perno laterale per consentire lo snodo.”) But see Soc.r.l. Guccio Gucci, *Modello Industriale Ornamentale*, n. 92627 of 1961, ARCHIVIO CENTRALE DELLO STATO (“Il modello rappresentato nelle accluse fotografie si riferisce ad una borsetta per signora di forma quadrangolare semirigida caratterizzata dal manico (I) che è formato da tasselli in legno o bambù snodati tra loro ed intercalati l’un l’altro da elementi di metallo.”)

patent³¹⁹, but the material embodiments of the shoe, both in their past and present iterations as part of the *Ferragamo Creations* line clue us in to more nuances of the design process and are even different in their materiality, with the nylon threads existing differently in each iteration depending on the design that is used. Such differences in materiality and such an *unicum* between design and design object may mean we can preserve each *Invisible Sandal* as a cultural property in every iteration or in none.

As we move to our contemporary times, more Italian fashion design objects offer us clues as to how we might negotiate this relationship as required by Italian cultural property law. Jeremy Scott's 2015 design for the Italian label Moschino with the text "I HAD NOTHING TO WEAR SO I PUT ON THIS EXPENSIVE MOSCHINO DRESS" [Figure 19] hints at the relationship between the material elements of an Italian fashion design object and an oft-characterized intangible design which cannot be separated.

Such a complex of Italian fashion design objects not only requires careful application of Italian cultural property law on the books today, but a consideration of how it might be modified in the future if it is to apply to these Italian fashion design objects.

3. Fashion Design Objects as part of Italian Cultural Heritage

Italian fashion design objects' place today in Italy is certainly related to Italian culture generally. *Made in Italy* is celebrated as a product of Italian tradition and innovation and plays a role in how Italy defines and presents itself to the world³²⁰; this applies not only to fashion and design but to food, wine, olive oil and art more generally. Within this general appreciation of *Made in Italy*, Italian fashion brands have deliberately placed themselves as part of a larger Italian lifestyle and cultural tradition. The reasons for this are, in part, economic: Italy has been a purveyor and manufacturer of the raw material for fashion as early as the Renaissance when Lucca merchants provided the velvet for

³¹⁹ See Patents n. 426001 (invenzione), of October 17, 1947; n. 26446 (modello d'utilità) of March 29, 1947 and n. 26655 (modello industriale) of May 10, 1947. Available in the Archivio Ferragamo and at the Archivio Centrale dello Stato.

³²⁰ For some numbers see MINISTERO DELLO SVILUPPO ECONOMICO, *Pride and Prejudice, #theforceofexport*, <https://www.mise.gov.it/images/stories/documenti/MISEUK5.pdf> (last accessed July 17, 2019).

fashions in Europe³²¹, at the time of its unification Italy's cotton production and other textile industries were only growing.³²² Today, Italy's ability to produce the raw material of fashion is still evident. Not only do French fashion brands regularly use Italian manufacturers and artisans, as Christian Louboutin does for his shoes³²³, but manufacturers like Antonio Ratti, S.p.A., who both produce raw silk, continue to design and produce silk accessories for Italian fashion brands, and whose founder amassed his own textile collection, blur the lines between technical and creative culture, and suggest that Italian entrepreneurs and companies can create objects important for civilization.³²⁴

Most recently, Italian fashion brands have made a point of presenting their products within Italian cultural properties, sites and spaces, affiliating themselves with Italian cities and territories along with their respective imaginaries. Apart from the example of Dolce & Gabbana's recent *Alta Moda* show mentioned above, Fendi recently made the Palazzo della Civiltà Italiana in Rome its headquarters³²⁵, and staged its recent Fall/Winter 2019-2020 Couture collection in a runway show in front of the Colosseum in Rome.³²⁶ Ferragamo not only emphasizes its historic relationship with Florence through its location in the Palazzo Spini Feroni but also recently shot a fashion ad on the Ponte Vecchio for its fragrance *Amo Ferragamo*.³²⁷ Gucci, under Frida Giannini's direction, had its *Forever Now* campaign, emphasizing the historic links with Florentine craftsmanship, but even Alessandro Michele has staged a fashion show in Florence's Palazzo Pitti as recently as 2017.³²⁸ The placement of Italian fashion products as part of Italian cultural heritage

³²¹ G.L. Derisseau, *Velvet and Silk in the Italian Renaissance* in 17 CIBA REVIEW 595- 599 (January 1939) (in the Special Collections of The Museum at FIT, the Ciba Review was produced by a Swiss dyeing company as a way to promote the history of fashion as they sold new dyeing mechanisms and colors of textile).

³²² CALANCA, *supra* note 90 at 50- 53.

³²³ IN LOUBOUTIN'S SHOES (Netflix, BBC, Michael Waldman, dir., 2015).

³²⁴ See Stefano Baia Curioni, *Homo Faber- Homo Poeticus, The Relationship Between Business and Culture in the Story of Antonio Ratti* in TEXTILE AS ART: ANTONIO RATTI ENTREPRENEUR AND PATRON 23- 36 (2017).

³²⁵ FRANCO LA CECLA, PALAZZO DELLA CIVILTÀ ITALIANA (Rizzoli, 2017) (describing Fendi's decision to move in to the building and renovate it after signing a rental agreement with the municipal corporation EUR, S.p.A. which owns the building).

³²⁶ Oscar Holland, *Fendi stages couture fashion show amid ruins of ancient Rome*, CNN, July 5, 2019, <https://edition.cnn.com/style/article/fendi-couture-fashion-show-rome-temple-venus/index.html>.

³²⁷ Salvatore Ferragamo, *Amo Ferragamo- The New Fragrance*, YOUTUBE, <https://www.youtube.com/watch?v=uRYb4UcmxeQ>.

³²⁸ Gucci Cruise sfilata a Palazzo Pitti tra fiori colorati e ispirazione rock 'n roll, IL MESSAGGERO.IT, https://www.ilmessaggero.it/moda/sfilate/gucci_cruise_2018_palazzo_pitti_sfilata-2474763.html.

and, more importantly, alongside such pieces of Italian cultural heritage, shows visually equating the two is not new. As early as the 1940s after World War II Gucci and Ferragamo were consciously repositioning their products within the Italian cultural landscape in American publications.

What is new, however, about these links between Italian fashion and Italian culture, Italian fashion design objects and Italian cultural heritage, is that conversations are now deliberately envisioning how Italy's cultural property law can play a role in protecting and valorizing Italian fashion design and its objects. It is true that Italian cultural property scholars had already, as early as the 1930s, deliberately imagined how traditional Italian craftsmanship might be protected as Italian cultural heritage under the law³²⁹ and, in keeping with the historical advent of manners, habits, and customs as part of an early modern fashion in Renaissance Italy had mentioned that customs might also be part of cultural heritage broadly.³³⁰ An importance of laws and norms and social customs in shaping what is fashion has been a hallmark of fashion and fashion studies but also of fashion itself; not only was sumptuary law as early as the Italian Renaissance regulating what was worn based on social status and occasion, but more customary rules dictated by society and not a legislative body have shaped the fashions that have been chosen on the Italian territory. In her social history of contemporary fashion, Daniela Calanca notes how Italy's diversity upon its unification led to codes of manners and social etiquette.³³¹ These codes morph into fashion magazines and periodicals in Italy, which then become part of a fashion network including fashion department stores in urban cities like Milan, which also have a political, nationalistic bent as economic foils to Parisian models.³³² While social norms, customs, laws and cultural heritage have shaped fashion throughout its history in its dynamic evolution, fashion is now *also* contemplated as a distinct facet of cultural heritage, an important part of history, which much be preserved as well as supported in its evolution.

The passing of the 2004 Code of Cultural Property seemed to precipitate a consideration of how fashion in Italy was a part of cultural heritage under Italian law. Daniela Calanca details how with the purpose of

³²⁹ See *infra* discussion of Grisolia in Chapter 2.

³³⁰ See Sabino Cassese, *I beni culturali da Bottai a Spadolini* [Cultural Property from Bottai to Spadolini] [hereinafter Cassese, *da Bottai a Spadolini*], RASSEGNA DEL ARCHIVIO DI STATO [Review of the State Archive] 116, 137 (Jan/Dec 1975).

³³¹ CALANCA, *supra* note 90 at 50- 56.

³³² *Id.* at 68- 70.

cultural heritage protection and valorization in the law as “*preservare la memoria della comunità nazionale e del suo territorio e a promuovere lo sviluppo della cultura*”³³³ it seemed obvious that fashion’s links to history and culture found a philosophy of fashion that aligns it with such legal preservation purposes.³³⁴ In this context projects of preservation and valorization come to fruition. In 2004 the Italian State created a museum network of fashion and costume consisting of already existing museums throughout the Italian territory with a supporting foundation.³³⁵ Supranational initiatives also help to support fashion’s status as cultural heritage outside of Italy and for the European community as with, as Calanca describes with the Mark of Common European Heritage in 2011.³³⁶ The digital archive of Italian fashion of the 20th century went online in 2011.³³⁷ In 2012 the initiative “*Europeana Fashion: Discover Europe’s Fashion Heritage*” digitized information and images of European fashion design objects, designers, materials, and history.³³⁸ In 2019 a Commission was tasked by the Minister of Cultural Heritage with the “identification of policies for the protection, conservation, valorization and use of Italian fashion as cultural heritage.”³³⁹ In its decree instituting the Commission the Italian Ministry of Cultural Heritage defined Italian fashion broadly as “the information, experiences, technical and design knowledge, products, events, publications, hardcopy and audiovisual materials as a whole that testify to the characteristics of the sector.”³⁴⁰

At the same time as fashion and cultural heritage are linked through law in the Italian perspective, so is design. The Museo Triennale in Milan dedicated to design opened in 2007.³⁴¹ As Antonio Leo Tarasco noted at the opening of the exhibit *Serie fuori Serie* in 2017, Superga shoes first designed in 1934, the bottle for Campari designed in 1932, a Borsalino hat from 1932, and Bialetti’s Moka from 1933 are all testaments having the value of civilization as it is understood under Italian cultural property law.³⁴²

³³³ *Id.* at 17 (citing to Art. 1, CODICE, D.L. n. 42/2004).

³³⁴ *Id.*

³³⁵ *Id.* at 21, 22 (describing “legge del 6 febbraio 2004, approvato dalla Camera dei deputati che prevede l’Istituzione del Sistema museale della moda e del costume italiani e interventi per la formazione e la valorizzazione degli stilisti”).

³³⁶ *Id.* at 23.

³³⁷ *Id.* at 25.

³³⁸ *Id.* at 24 (The project can be accessed at <https://www.europeana.eu/portal/en/collections/fashion>. See also <https://pro.europeana.eu/project/europeana-fashion>)

³³⁹ Art. 1(1), D.M. n. 551/2018 (translation my own).

³⁴⁰ Preamble in *Id.*

³⁴¹ Tarasco, *Il disegno supra* note 91.

³⁴² *Id.* (“Proprio perché i beni qui esposti sono stati prodotti industrialmente per un pubblico di clienti-intenditori, la loro larga diffusione nella società italiana testimoniata

These references to and presentations of Italian fashion as part of Italian cultural heritage, alongside the characterization of Italian fashion as a complex of ephemera, products, archives and things in many tangible and intangible forms that testify to fashion history and culture, reveals how complex it is to actually think about how Italian fashion is cultural heritage. Perhaps out of all the things mentioned in the Commission's founding document as definitive of Italian fashion, nothing embodies this complexity more than Italian fashion products, which are, like other design objects such as a Moka or Campari bottle, a complex union of intangible design and tangible property, design knowledge and design execution, information and experience, and still other influences. Unpacking how fashion design objects, these products of Italian fashion, might be classified as Italian cultural property is, given Italian fashion history and its contemporary concerns, a timely endeavor.

dagli acquisti e dal vasto collezionismo confermano sul concreto piano esperienziale che quelle stesse cose costituiscono effettivamente una "testimonianza avente valore di civiltà", al di là di ogni ragionevole dubbio, e pur a prescindere dalla dichiarazione di interesse culturale che, come sopra spiegato, è tecnicamente assente: si pensi alla scarpa Superga risalente al 1934 (che ha raggiunto la produzione di tredici milioni di paia all'anno nel momento di maggiore successo); alla bottiglietta della *Campari Soda* disegnata nel 1932 dall'artista Fortunato Depero, tipica per l'assenza di etichetta e per la stampa in rilievo sul vetro; alla *Moka Express* della Bialetti prodotta ininterrottamente dal 1933 con vendite che hanno superato i 280 milioni di esemplari; al cappello da uomo *Borsalino*, risalente al 1932; al televisore della Brionvega *Algol 11*, disegnato da Zanuso e Sapper nel 1964, superato solo dall'evoluzione tecnologica e non certo per le forme; alla mitica *Lambretta* 125 c.c. della Piaggio, costruita nel 1951, primo esempio italiano di motorizzazione di massa.”).

CHAPTER 2

PANDORA'S BOXES: CULTURAL PROPERTY LAW DILEMMAS IN ITALY AS APPLIED TO FASHION WITH REFERENCE TO THE UNITED STATES

This second chapter explores the major dilemmas of cultural property law- cultural interest, time, and material iterations of properties- which are often characteristic of a definition of cultural property in Italian cultural property law. Exploring these dilemmas leads to some unexpected similarities and overlaps with copyright law.

1. Cultural Property Law between Italy and the U.S.

An awareness of Italy's unique cultural property law in the United States is most often made in the context of the illegal exportation of cultural properties and Italy's claims for the repatriation of its cultural property objects to the Italian territory.³⁴³ Italian laws have been applied in U.S. federal courts under federal statutes and thanks to choice of law principles.³⁴⁴ International treaties at the very least require the United States to respect Italy's definition of what constitutes its cultural property. Other forms of what might be termed "self-help" like bilateral agreements³⁴⁵ allow the definition of cultural property under

³⁴³ For an overview of Italian cultural property law in this context see Lauren Fae Silver, *Recapturing Art: A Comprehensive Assessment of the Italian Model for Cultural Property Protection*, 23 N.Y. INT'L L. REV. 1, 15- 25 (2010).

³⁴⁴ For an application of U.S. statutory law prohibiting importations of goods made under false statements applied to the importation of an antique gold platter from Sicily see *United States v. An Antique Platter of Gold*, 991 F. Supp. 222, 1997 (S.D.N.Y. 1997 (reprinted in JOHN HENRY MERRYMAN, ALBERT EDWARD ELSÉN, AND STEPHEN URICE, *LAW, ETHICS, AND THE VISUAL ARTS* 289 – 296 (Kluwer Law, 2007) [hereinafter *LAW, ETHICS, AND THE VISUAL ARTS*]) For one example of how a U.S. federal court engages in a choice of law analysis in a stolen cultural property case see *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 286- 287 (7th Cir., 1990) (cited to in *LAW, ETHICS, AND THE VISUAL ARTS*, although applying Swiss law in a choice of law exercise which ultimately privileged Indiana law). For some discussion of how Italian law may be chosen in a choice of law scenario see Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUMBIA J. OF L. & THE ARTS 111, 115 (2008) (citing to *Winkworth v. Christie, Manson & Woods, Ltd.*, [1980] 1 Ch. 496. a case in which an English court applied Italian law to apply the good faith purchaser rule to stolen Japanese artifacts found in Italy in the context of the *lex situs* rule). Of course, acknowledging territoriality here is also important. While cultural property rules may be applied in other territories and rules may be imported, as Charles Colman has noted for copyright, this does not strike the inherent territoriality of some legal regimes. Colman, *History and Principles*, *supra* note 6 at 233, n. 22.

³⁴⁵ For a discussion of Italy's bi-lateral agreement with The Metropolitan Museum of Art see *LAW, ETHICS, AND THE VISUAL ARTS supra* note 344 at 404- 413. See also Silver, *supra* note 343 at 36- 39.

Italian cultural property law to affect what Americans and American cultural institutions consider to be their property. Comparative scholarly work in Art Law and awareness-raising campaigns provides perhaps the greatest awareness of Italian cultural property law for an American audience. As one example of scholarly endeavors, John Henry Merryman asked and answered whether and how the legal institute of cultural property could be identified within the United States in his article "*Protection of the Cultural Heritage*", highlighting the differences in terminology between cultural property and *beni culturali*, and United States administrative agencies' inability to take the place of the Italian Ministry of Cultural Heritage.³⁴⁶

Imagine in this light for a moment that certain Italian fashion design objects made prior to 1949 were classified as cultural properties under Italian cultural property law. The restrictions Italy imposes on their cultural property would potentially have wide-ranging direct effects on American cultural institutions and on American individuals' everyday interactions with these design objects. The exportation of Ferragamo's *Rainbow Sandal*, for example, made in 1938 for Judy Garland and owned by Salvatore Ferragamo S.p.A., would have to be approved by the Italian State both under Italian cultural property law and under EU regulations for it to be displayed in an exhibition in the United States as it was in *CAMP: Notes on Fashion*.³⁴⁷ In addition any donation or sale of the *Rainbow Sandal*, any definitive exportation, would require both a certificate of approval for its exportation and an export license under Italian law and EU law³⁴⁸, while also allowing the Italian State to block its exportation from the Italian territory.³⁴⁹ Fashion museums in the United States already need to comply with U.S. customs rules that restrict the importation of fashion design objects incorporating ivory or feathers.³⁵⁰

³⁴⁶ Merryman, "*Protection*", *supra* note 42 at 520 (citing also at 513, n. 5 to S. Rodotà, *The Civil Law Aspects of the International Protection of Cultural Property*).

³⁴⁷ Art. 66 and Art. 67, CODICE, D.L. n. 42/2004.

³⁴⁸ See Decreto Ministeriale 17 Maggio 2018, n. 246 <https://www.altalex.com/~media/Altalex/allegati/2018/allegati%20free/ministero-beni-culturali-dm-17-maggio-2018-numero-246%20pdf.pdf>; For a short overview of these additions and revisions to the Code see Alessandro Tognetti, *Le nuove regole dell'esportazione delle opere d'arte*, ALTALEX, March 1, 2019, <https://www.altalex.com/documents/leggi/2019/02/07/nuove-regole-esportazione-opere-arte>. The applicable EU regulation is n 119/2009. A deeper evaluation of the scope and depth of these exportation provisions is beyond the scope of my dissertation.

³⁴⁹ Art. 65, CODICE, D.L. n. 42/2004.

³⁵⁰ Interview with Sonia Dingilian, Museum at the Fashion Institute of Technology, August 30, 2018 (notes on file with author) (referring to the Endangered Species Act, codified at 16 U.S.C. § 1539 (noting in part that antique objects over 100 years old that incorporate a prohibited material are an exception to the general rule that certain species cannot be imported into the United States). See also Prohibited and Restricted Items, U.S. Customs and Border Protection, <https://www.cbp.gov/travel/us-citizens/know-before-you->

Adding another bureaucratic layer to this process may frustrate knowledge and dissemination of certain Italian fashion design objects in the United States while, at the same time, incentivizing their retention on the Italian territory. These concerns, moreover, do not even begin to address what would happen to a market for vintage fashion goods and whether they should become, under Italian cultural property law, more like a market for contemporary art objects or like a market for antiquities.

At the same time as classifying certain Italian fashion design objects as cultural property might frustrate their ability to physically travel, it would also frustrate their ability to proverbially travel through images and other reproductions. American fashion museums already feel the need to seek permission to reproduce images of Italian fashion design objects due to personal relationships with brands, uncertainty over copyright law, and uncertainty over fair use principles.³⁵¹ This seeking of permission generally also applies to individual scholars, although they may be more apt to argue fair use for academic publications of their work.

When an Italian fashion design object is in an Italian public or not-for-profit collection it is already presumed to be cultural property and Italian museums enforce the rules of Italian cultural property law mandating their approval of the reproduction and payment of a fee.³⁵² The nature of copyright law, both in Italy, where designs of industrial objects having creative character and artistic value are copyrightable

[go/prohibited-and-restricted-items](https://www.fws.gov/endangered/laws-policies/) and Endangered Species Act | Overview, U.S. Fish and Wildlife Service, <https://www.fws.gov/endangered/laws-policies/>.

³⁵¹ This may, of course, be peculiar to fashion museums who find themselves having to cultivate close relationships with fashion houses, unlike libraries of other cultural institutions who may find themselves, because of time and distance, operating more comfortably with fair use principles. See Preservation and Reuse of Copyrighted Works, Hearing before the H. Subcomm. on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, 113rd Congress 41-42, 44 (2014) (Statement of James G. Neal) (arguing fair use which is used for preservation activities sufficiently supplements copyright exceptions for libraries and archives). Such an observation does not even begin to touch the complexity of the layers of rights which also attach to fashion design and its use by museums in images or fashion films. For a discussion of the challenges of attribution this may cause, separate from fashion design, see Preservation and Reuse of Copyrighted Works, Hearing before the H. Subcomm. on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, 113rd Congress 78, 99 (2014)

³⁵² See Nota 398/2018 of the Galleria degli Uffizi, *supra* note 142. For another example of these regulations as applied to specific museums see the Regulations of the CSAC of Parma, https://www.csacparma.it/wpcontent/uploads/2015/01/Regolamento_riproduzioni.pdf;
https://www.csacparma.it/wpcontent/uploads/2015/01/Modulo_riproduzioni.pdf.

subject matter³⁵³, and in the U.S., where fabric designs, images of fashion and, since the *Star Athletica* case certain pictorial, sculptural and graphic features of designs of useful articles like clothing are copyrightable subject matter³⁵⁴, already puts pressure on American cultural institutions and individuals to seek permission to reproduce and display images of Italian fashion design objects from the many people they feel might hold copyright in Italian fashion design objects – from the original designer, to the brand and company, to an archive or library which hold its material aspects. While Italian cultural property law does not extend a right to control reproduction to private owners of cultural property, even when copyright protections expire, physical control of an object often requires interaction and permission from the owner to obtain a publishable or even good image of the property. Physical control over an object and its potential chaining to the Italian territory also risks that it will never be photographed at all and that certain Italian fashion design objects may, therefore, go the route of the *Salvator Mundi*³⁵⁵ or other artworks whose exact location are unknown.

Understanding how Italian fashion design objects are cultural property in Italy under Italian cultural property law has serious ramifications for Italian fashion design objects' presence on the territory of the United States and for Americans' reception of Italian fashion design. This impact can be immediately understood even if the concept of cultural property may, at first, seem too dispersed in the United States.³⁵⁶

Indeed, the general dilemma with speaking about cultural property to an American audience, especially with reference to a subject matter like fashion that is so associated with intellectual property, current times, and an economic market, is that we may be more apt to think of items on our territory in market nations terms, as art, instead of in source nation terms, as cultural property. As John Henry Merryman aptly noted, as a market nation³⁵⁷ the United States does not generally think of

³⁵³ Article 2, clause 10 of *diritto d'autore* L. n. 633/1941. For a recent case classifying an Italian fashion design objects as copyrightable subject matter under the clause see *Tecnica v. Anniel*, Tribunale Sez. Spec. Impresa, - Milano, 12/07/2016, discussed further *infra*.

³⁵⁴ *Star Athletica, L.L.C. v. Varsity Brands, Inc. et al*, No. 15-866, 580 U.S. ____ (2017) (majority opinion) [hereinafter *Star*, No. 15-866, 580 U.S. ____]. Discussed in more detail in Chapter 4 *infra*.

³⁵⁵ Kenny Schachter, *Where In the World Is 'Salvator Mundi'? Kenny Schachter Reveals the Location of the Lost \$450 Million Leonardo*, ARTNET, June 10, 2019, <https://news.artnet.com/opinion/kenny-schachter-on-the-missing-salvator-mundi-1565674>.

³⁵⁶ Merryman, "Protection", *supra* note 42.

³⁵⁷ Merryman, *Two Ways*, *supra* note 2 at 832 (noting "The United States is one of the few nations in the world that does not "treat cultural objects within its jurisdiction as parts of a 'national cultural heritage.'" *Id.* at 833.)

itself in source nation terms. It is still accurate to say that while we might find references to the Liberty Bell as a cultural property³⁵⁸, preserve the original flag which inspired *The Star-Spangled Banner* by Francis Scott Key³⁵⁹, or prominently display the Declaration of Independence within the National Archives Museum³⁶⁰, we are still hard pressed to think, let alone label, these objects as “cultural property” under the law. That having been said, there are still common threads between the United States and Italy’s treatment of certain objects which they consider to be of public cultural interest.

Archeological objects³⁶¹, Native-American objects³⁶², large objects like

³⁵⁸ The Liberty Bell has been referred to as such by Judith Benderson in her Introduction to Cultural Property Law for the United States’ Attorneys Bulletin. See Judith Benderson, *Introduction* 64(2) UNITED STATES ATTORNEYS’ BULLETIN 3 (March 2016), available at <https://www.justice.gov/usao/file/834826/download> (“Just so you remember that there can be cultural property crime and vandalism close to home, here is an item that you will all recognize. [Figure 5 shows an image of the Liberty Bell]. It is the Liberty Bell in Philadelphia, which rang to announce the first public reading of the Declaration of Independence in 1776. In 2001 a suspect struck Liberty Bell several times with an 8 lb. hammer, leaving at least five dents on the flare near the bottom of the bell.”)

³⁵⁹ *About Us*, SAVE AMERICA’S TREASURES, <https://web.archive.org/web/20090801134800/http://www.saveamericastreasures.org:80/about.htm> (a caption notes “The flag that inspired “The Star-Spangled Banner” will be preserved for future generations through the generous support of *Save America’s Treasures* Corporate Partner, Polo Ralph Lauren.”)

³⁶⁰ *Founding Documents*, National Archives Museum, NATIONAL ARCHIVES, <https://museum.archives.gov>. It is interesting to consider how the Declaration of Independence is an American cultural property. One of the earliest laws passed in regards to it dates to 1876, the centennial of its writing, when a joint resolution by both houses of Congress notes it was held in the U.S. Patent Office. No. 19, *Joint resolution providing for the restoration of the original Declaration of Independence*, August 3, 1876, 44th Congress, Session I, LEXISNEXIS. A full analysis of the role the U.S. Patent Office may have played as a repository of U.S. cultural objects is beyond the scope of this paper, but will be acknowledged again in the dissertation’s discussion of the *Mazer v. Stein* case *infra* Chapter 4.

³⁶¹ Archeological objects found on public lands belonging to the federal government cannot be excavated or removed without permission. See The Archeological Resources Protection Act of 1979, 16 U.S.C. §470aa-470mm.

³⁶² For example, the Native American Graves Protection Act of 1990, 25 U.S.C. §3001-3013. For a discussion of the challenges of thinking about cultural property between community property and traditional, ownership-based property in the United States see Carpenter, et al, *supra* note 53 (“offer[ing] a stewardship model of property to explain and justify indigenous peoples’ cultural property claims in terms of nonowners’ fiduciary obligations towards cultural resources”); Brown, *Culture, Property and Peoplehood*, *supra* note 53. See also Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, *Clarifying Cultural Property*, 17 INT’L J. OF CULT’L PROPERTY 581 (2010); Michael F. Brown, *Heritage as Property*, *supra* note 1. It is worth noting that legislation has recently been introduced to stop the exportation of Native-American objects from the United States, a proposal in line with Italian conceptions and treatment of cultural property. See See S. 1400 §2(d), 115th Congress, 1st Session (2017); *Press Release, Members of Congress, Senators introduce Bipartisan, Bicameral STOP Act to Safeguard Tribal Items*, July 18, 2019, [96](https://lujan.house.gov/media-</p></div><div data-bbox=)

statues that are deemed historic property³⁶³, and objects found on public land³⁶⁴, are all treated in ways similar to how Italy treats its own cultural property in public hands identified as objects of historic interest.³⁶⁵ Depending on the object, their removal from land (or excavation), their sale, and their permanence are regulated or, at the very least, in the purview of some sort of U.S. administrative action or guidance. Where the United States particularly falls short in terms of cultural property protection is in its treatment of non-indigenous movable objects not on public lands or otherwise in public possession. Indeed, despite having historic preservation law, local historic ordinances, and even Art Law, which helps us problematize how rights surrounding works of art and the public sphere overlap for public art³⁶⁶, the United States seems not to have a comprehensive set of legal rules, like Italy, that negotiates the boundaries, or in layman's terms, helps to think about³⁶⁷, how movable objects are in or out of an American cultural property "box." Such a thinking through is important for modern and contemporary Italian fashion design objects because these design objects fall through the cracks of so many laws in the United States that currently protect some

[center/press-releases/members-of-congress-senators-introduce-bipartisan-bicameral-stop-act-to-safeguard-tribal-items.](#)

³⁶³ For a description of the definition of objects that can be listed on the National Register and therefore protected as historic property see NATIONAL HISTORIC PRESERVATION LAW IN A NUTSHELL 41 (Bronin and Rowberry, eds., West Academic, 2018) (citing to 54 U.S.C. §30201 and *How to Apply the National Register Criteria*, NATIONAL REGISTER BULLETIN (1990), <https://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf>) [hereinafter NATIONAL HISTORIC PRESERVATION LAW]. Recent discussions surrounding confederate monuments reveal how the classification of some objects as historic property is not only contested but also uncertain in preservationist terms: their classification may not necessarily forbid their removal. For an inside look at the removal of the Beauregard equestrian statue in New Orleans listed on the National Register of Historic Places see generally MITCH LANDRIEU, *MAYOR OF NEW ORLEANS, IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY* (Viking, 2018).

³⁶⁴ See *supra* note 361. See also the Antiquities Act of 1906, 16 U.S.C. §431, although resulting in different case law finding the terms of the Act unconstitutionally vague. See Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage* 28 NEW ENG. L. REV. 63, 67- 68 (1993-1994), available via HEINONLINE (citing to *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) and *United States v. Smyer*, 596 F.2d 939 (10th Cir.), cert. denied, 444 U.S. 843 (1979).) Objects found underground can also result in windfalls to private individuals, however, when there are agreements between the government and private actors. See the description of the Dinosaur Sue case in SAX, *supra* note 78 at 193.

³⁶⁵ See Art 10(1), CODICE, D.L. n. 42/2004. See also Merryman, "Protection", *supra* note 42 at 514- 520 (discussing U.S. rules which largely apply to protect "cultural property" at the state and federal levels).

³⁶⁶ The most prominent example of this may be the Richard Serra case, while the most recent might be the Fearless Girl and Charging Bull debate. See LAW, ETHICS, AND THE VISUAL ARTS *supra* note 344 at 778- 785. For a discussion of the Fearless Girl see Isaac Kaplan, *Fearless Girl Face-off Poses a New Question: Does the Law Protect an Artist's Message?*, ARTSY, April 13, 2017, <https://www.artsy.net/article/artsy-editorial-fearless-girl-face-off-poses-new-question-law-protect-artists-message>.

³⁶⁷ Merryman, *Two ways*, *supra* note 2.

properties like cultural property in source nations. Most fashion design objects are unable to be compared to indigenous objects because of their status as part of a more commercial and what might be termed mainstream or dominant American historical narrative; while regulating a public cultural interest in fashion would likely not mean prohibiting its excavation, for example.

The fact that American public museums collect items of fashion that are of significance to American history also indicates that, like for Italian fashion design objects, it may be time to entertain how American fashion is also part of American cultural heritage and how it is cultural property. As Ralph Lauren and his brand celebrate fifty years³⁶⁵, and American fashion continues to evolve³⁶⁶, understanding how American fashion design objects should or should not be regulated with cultural property like protections outside of the museum in the specific American cultural context may soon be timely.

Understanding American fashion design objects as part of a category of American cultural property leads to fruitful comparisons with other objects that is also beneficial for defining what is American cultural property in general. What makes both the Declaration of Independence historically significant and a painting in the National Gallery significant? What is the difference, if any, between a Monet in the Art Institute of Chicago and a Monet in the National Gallery? Why exactly does the Smithsonian have Jackie O's Chanel suit which she wore on the day JFK was assassinated, and Amelia Earhart's flight suit? Why does the Costume Institute at The Metropolitan Museum of Art display and collect modern and contemporary American fashion objects alongside other objects of its collection? While Italy has a comprehensive legal framework that operates outside the museum, in the United States we usually find ourselves having to answer the tough question of why individual objects are culturally significant to us or not during deaccessioning debates, when these movable objects are set to exit the museum after they have been deemed incompatible with a museum collection policy or mission.³⁷⁰ In some ways, however, this act of

³⁶⁵ Leah Chernikoff, *Inside Ralph Lauren's Epic Star-Studded 50th Anniversary Celebration in Central Park*, ELLE, September 8, 2018, <https://www.elle.com/fashion/a23037985/ralph-lauren-celebrates-50-years-with-an-epic-retrospective-runway-show-in-central-park/>.

³⁶⁶ Cathaleen Chen, *What Tom Ford's CFDA Post means for American Fashion*, THE BUSINESS OF FASHION, <https://www.businessoffashion.com/articles/news-analysis/tom-ford-succeeds-diane-von-furstenberg-as-cfda-chairman> (sharing Ford's comments that "'What American fashion needs to become in order to be more relevant in the world is to think of itself as not just American but as international.'")

³⁷⁰ For a recent example of such a discussion and the uproar it caused see notices of the Berkshire Museum case, Colin Moynahan, *Berkshire Museum's Planned Sale of Art draws*

deaccessioning is much like Italian cultural property law's administrative procedure of *verifica*, in which the public cultural interest of some, but not all, objects presumed to be cultural property belonging to not-for profits is evaluated so that they may potentially exit the proverbial cultural property "box."³⁷¹

Despite the differences between the U.S. as a market nation and Italy as a source nation, there are similarities and commonalities between the laws in each country regulating the public cultural interest in certain objects. These commonalities can help us to think through how cultural property law already decides how properties can enter into a notion of cultural property, how that notion of cultural property is defined, and what changes might have to be made in order for new subject matter, like modern and contemporary Italian fashion objects, to be explicitly regulated as cultural property. We can think through how fashion design objects are cultural property first with reference to Italy under Italian cultural property law and then, as a second matter, with reference to the United States, even under unexpected legal regimes.

2. The interconnected dilemmas of Italian cultural property law

Despite its formulation of a specific theory of cultural property that might be considered unique to its territory, Italian property law reveals specific links and references to the work of U.S. legal scholars in the work of its own legal scholars.³⁷² In this sense, exploring a theory of property in Italian legal scholarship does not negate the fact that U.S. law may have theories of property which support a consideration of the legal institute of cultural property in the United States as applied to

Opposition, N.Y. TIMES, July 25, 2017, <https://www.nytimes.com/2017/07/25/arts/design/berkshire-museum-art-auction-criticized.html>; see also *Rockwell v. Trs. of the Berkshire Museum*, 2017 Mass. Super.

LEXIS 208 (in which Norman Rockwell's heirs attempted to stop the sale and deaccessioning; registering the Attorney General's complaints about the behavior of the trustees', the deaccessioning and the sale, which was ultimately allowed to go forward). Merryman notes that these types of discussions also occur when objects that are unprotected, like a Jackson Pollack painting, leave the U.S. territory. See Merryman, "Protection", *supra* note 42 at 519- 520.

³⁷¹ Art. 12, CODICE, D.L. n. 42/2004. See also CODICE DEI BENI CULTURALI E DEL PAESAGGIO 143 (Maria Alessandra Sandulli, eds.) (Giuffrè, 2012) (citing to the D.M. 23 Gennaio 2005 *Criteri e modalità per la verifica dell'interesse culturale dei beni immobili di proprietà delle persona giuridiche private senza fine di lucro, ai sensi dell'articolo 12 del d.lg. 22 gennaio 2004, n. 42* for criteria to be used in the administrative process).

³⁷² For references and an exploration of, for example, Charles Reich's seminal article *The New Property* in Italian property law scholarship see *La logica proprietaria tra schemi ricostruttivi e interessi reali* in STEFANO RODOTÀ, IL TERRIBILE DIRITTO: STUDI SULLA PROPRIETÀ PRIVATA E I BENI COMUNI 47- 72 (Mulino, 3^a ed. 2013).

fashion design objects.³⁷³ The following exploration is not meant as a simple reiteration of what Italian legal scholars might already know. Rather, the purpose of this section is instrumental, and aims to show the degree of sophistication and refinement with which Italian law has attempted to answer problems which are already evident in U.S. historic preservation law³⁷⁴, and which are crucial for thinking about how fashion design objects may be part of a legal category of cultural property in the United States.

2.1 The boundless public cultural interest

Justifications for why we protect certain properties as cultural property are seemingly rock-solid, but, as other authors have noted before, the reasons we preserve are for a variety of interests³⁷⁵ and can also be linked to politics³⁷⁶, and bring about counterintuitive and contradictory results at odds with preservation itself.³⁷⁷ While we might say that something is historically important, or of artistic merit, what does that really mean and how do we go about deciding it? Italian cultural property law here provides us with detailed answers which, while supporting the idea of a public cultural interest, also reveal a nuanced complexity and far from sanitized way in which public cultural interest is actually decided, located and then protected. Italian cultural property law negates the existence of a common, specific cultural interest that applies across all categories of cultural property, and instead allows for case by case determinations. A nuanced understanding of public cultural interest allows us to embrace complexity within a decision of how modern and contemporary Italian fashion design objects may be placed in the cultural property “box.”

While the majority of Italian doctrine correctly speaks of the prominence of an aesthetic evaluation as the defining barometer for cultural property before the 1966 Commissione Franceschini’s

³⁷³ With the caveat, as Merryman says, that such a question of kinds of property may be too wedded to the legal realist tradition. See Merryman, “Protection”, *supra* note 42 at 521.

³⁷⁴ See discussion *infra*, Chapter 5.

³⁷⁵ John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989) [hereinafter Merryman, *Public Interest*] (giving as types of public interest truth and certainty, memory, survival, pathos, identity, and community).

³⁷⁶ *Id.* at 350.

³⁷⁷ Perhaps best evidenced by the example of the Elgin marbles, which keeps a cultural property in the United Kingdom using a universalist argument. Merryman, *Two ways*, *supra* note 2 at 837, 846 (citing also to John Henry Merryman, *Thinking about the Elgin Marbles*, 83 MICH. L. REV. 1880, 1903-05 (1985)). See also WHOSE MUSE? ART MUSEUMS AND THE PUBLIC TRUST (James Cuno, ed., 2006).

work³⁷⁸, the beginnings of cultural property law on the Italian territory indicate that various cultural interests were deemed to be at stake early in the preservation effort. The earliest preservation edict passed by Cardinal Pacca in Rome in 1820 before the Italian unification, often cited as the beginning of modern cultural property law in Italy³⁷⁹, applied to a variety of objects and justified limits on their exportation through a variety of cultural interests. Only one part of a long evolution of cultural property laws on the Italian territory prior to unification, earlier Papal Bulls in the 15th century before the Pacca Edict had also concerned themselves with limiting the circulation of objects of certain cultural interest.³⁸⁰ Various regions and kingdoms in Italy up to Italian unification had prohibited the exportation of certain objects of cultural interest.³⁸¹ But it is Cardinal Pacca's 1820 edict, often cited among all of these as the model for later Italian cultural property laws passed during the Italian unification and as the inspiration for its contemporaries³⁸², that gives us the first inklings of the breadth of a public cultural interest in objects that would justify their special treatment. Contextualizing the edict within the general loss of antiquities and art objects from the Roman territory and the constant legal activity of the Papal States to combat these losses³⁸³, on its face the edict

³⁷⁸ See Cassese, *da Bottai a Spadolini*, *supra* note 330 at 136; T. ALIBRANDI AND P.G. FERRI, I BENI CULTURALI E AMBIENTALI 25 (Milano, 2001) [hereinafter ALIBRANDI AND FERRI]; DIRITTO DEL PATRIMONIO CULTURALE 31- 32 (Carla Barbati, Marco Cammelli, Lorenzo Casini, Giuseppe Piperata, and Girolamo Sciuillo, eds., Il Mulino, 2017) [hereinafter DIRITTO DEL PATRIMONIO CULTURALE]; CASINI, EREDITARE IL FUTURO, *supra* note 63 at 47-50.

³⁷⁹ ALIBRANDI AND FERRI *supra* note 378 at 4. See also *Editto Cardinal Pacca*, http://www.ssb.vt.it/compendio%20legislativo/EDITTO_CARDINAL_PACCA.pdf.

³⁸⁰ CASINI, EREDITARE IL FUTURO, *supra* note 63 at 27.

³⁸¹ ALIBRANDI AND FERRI *supra* note 378 at 4 (describing laws in the Kingdom of Naples in 1822, Tuscany in 1854, Lombardo Veneto in 1745, 1818, and 1827, Parma in 1760 and Modena in 1857). For an exhaustive compilation of the various edicts and laws emanated in Italian city-states from 1571 to 1860 see ANDREA EMILIANI, LEGGI, BANDIE PROVVEDIMENTI PER LA TUTELA DEI BENI ARTISTICI E CULTURALI NEGLI ANTICHI STATI ITALIANI 1571- 1869 (1996). In his introduction Emiliani notes how even these laws were characterized by the tension between preservation and promotion, safeguarding and use. *Id.* at 11. Despite Alibrandi & Ferri's note that most of the regions followed the Pacca edict's model, Emiliani's analysis also emphasizes the peculiarities of regions' laws and indicates acts strongly connected to the needs of individual territories. *Id.* An examination of these earlier laws is beyond the scope of this dissertation, which primarily concentrates on Italian cultural property law from 1902 onwards in order to compare it to United States law of similar periods and because the history of Italian fashion proper begins in the 20th century.

³⁸² ALIBRANDI AND FERRI *supra* note 378 at 4.

³⁸³ CASINI, EREDITARE IL FUTURO: *supra* note 63 at 27 (citing to even earlier Papal Bulls in the 15th century). See also JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW 2 (Oxford University Press, 2015) and Janet Blake, *On Defining the Cultural Heritage*, 49(1) THE INT'L AND COMP. L. Q. 61 (2001). Some international compilations cite to even earlier

mentions not only ancient monuments and fine art objects, but also objects that are of interest for scholarship.³⁸⁴ It deliberately uses a layered language which refers to objects of antiquity as of both artistic or educational interest³⁸⁵, cites to the potential art historical merit of marble sculptures by non-living authors³⁸⁶, cloths and mosaics³⁸⁷, and the potential merit of certain “*Massi ragguardevoli dei Marmi*” due to their size or presentation of an antique work.³⁸⁸ Far from being interested in only artistic or historic merit, cultural property law on the Italian territory classified properties due to ability to be of multiple cultural interests as early as 1820.

While a comprehensive national law for the protection of cultural property was not passed in Italy until 1902, perhaps thanks to ideological clashes with the principles of private property enshrined in the constitutional document the *Statuto Albertino*³⁸⁹, the importance of preserving Italy’s cultural heritage was apparent in the newly formed States’ agenda. The Italian State passed regulations allowing it to seize uncared for monuments in 1865.³⁹⁰ In 1872 it presented a draft law for the protection of objects of art and antiquity and established a consultative body which interacted with regional commissions on general administrative matters.³⁹¹

Italy’s 1902 law reveals a similar concern with multiple types of

laws in ancient times. See also J. Jokilehto, *Definition of Cultural Heritage: References to Documents in History*, ICCROM Working Group ‘Heritage and Society’,

http://cif.icomos.org/pdf_docs/Documents%20on%20line/Heritage%20definitions.pdf.

³⁸⁴ *Editto Cardinal Pacca*, *supra* note 379 (Noting in reference to past objects which were lost, “Ma quelle stesse passate vicende, che fecero temporaneamente perdere a Roma molti e molto stimabili e preziosi Capi d’Opera per Arte, per Antichità e per Erudizione...”) See also Art. 9 in *Id.* (In reference to those things to which the Edict applies, “Le Commissioni prenderanno cura diligente di visitare generalmente presso qualunque Proprietario e Possessore gli Oggetti di Antichità, e ritrovandone di singolare e famoso pregio per l’Arte o per l’Erudizione, dovranno di essi dare a Noi una speciale descrizione, ad effetto di vincolare i Proprietari e Possessori suddetti a non poter disporre di tali Oggetti...”)

³⁸⁵ *Id.*

³⁸⁶ Art 17 in *Id.* Interestingly, the Edict also draws a line around modern restorations to historic buildings, which are not deemed to be taxable or interfered with since they are “una industria dei moderni Artefici, non vogliamo che ne risentano aggravio.” See Art. 15 in *Id.*

³⁸⁷ Art 20 in *Id.*

³⁸⁸ Art. 18 in *Id.*

³⁸⁹ ALIBRANDI AND FERRI *supra* note 378 at 4.

³⁹⁰ *Id.*

³⁹¹ Guido Melis, *Dal Risorgimento a Bottai e a Spadolini. La lunga strada dei beni culturali nella storia dell’Italia unita* [From the Risorgimento to Bottai and Spadolini, the long road of cultural property in the history of Italian unification], 3 AEDON [ARTE E DIRITTO ONLINE] [ART AND LAW ONLINE] (2016), <http://www.aedon.mulino.it/archivio/2016/3/melis.htm>.

cultural interests on its face. While a catalog and its accompanying lists were the main way in which cultural properties were identified³⁹², the reasons for inclusion on the list were varied. Indeed, not only did the 1902 law apply to movable objects of antique or artistic merit³⁹³, but it also applied to single objects of archeological merit³⁹⁴, and also to collections of things of art and antiquity.³⁹⁵ The inclusion of these different types of objects raises logical questions as to why they are of interest and how. Reasons for inclusion on a list should be justified just as much as reasons for a declaration that an individual object is cultural property.³⁹⁶

Indeed, any argument that a cultural interest in specific cultural properties should result solely from their being on a list is denied by the public and private divide used to classify cultural property in the 1939 law.³⁹⁷ Alongside this, the slow but sure increase in the types of objects to which Italian cultural property law applies over time also points to a varied, complex and nuanced cultural interest at the heart of preservation under the law. The 1909 law expanded the subject matter of Italian cultural property law to movable things that “*abbiano interesse storico, archeologico, paleontologico o artistico.*”³⁹⁸ In contrast, the 1902 law had named as its primary subject matter only “*oggetti mobili che abbiano pregio di antichità o d’arte.*”³⁹⁹ Here, in the 1909 law, we also see the first sign of the word “*interesse*” as definitive of the things to which the law applies. Regulations and decree-laws passed after the 1909 law but before the 1939 law slowly but surely expanded the scope of the subject matter,

³⁹² See *supra*. Art. 23, Legge 12 Giugno 1902 n. 185 in G.U. n. 149, Venerdì 17 Giugno 1902.

³⁹³ Art 1, L. n. 185/1902.

³⁹⁴ Art 2, L. n. 185/1902 (described based on their ownership by mainly ecclesiastical entities).

³⁹⁵ Art 2, L. n. 185/1902. See also Art. 15, L. n. 185/1902. (seemingly combining the categories of objects of antiquity and objects of art when objects were discovered as part of excavations: “*Nei casi di scoperte di monumenti, o di oggetti d’arte antica...*”).

³⁹⁶ The practical challenges of a list were the reason for its eventual death, as evidenced by Rosadi’s presentation of the 1909 law: not only would assigning degrees of cultural interest based on a list be difficult, but it risked giving owners an argument for the exclusion of their property from Italy’s cultural heritage completely. See EMILIANI, *supra* note 381 at 213.

³⁹⁷ See Legge 1 Giugno 1939 n. 1089 in G.U. 8 Agosto 1939 n. 184,

http://augusto.agid.gov.it/gazzette/index/download/id/1939184_P1.

³⁹⁸ Art 1, Legge 20 Giugno 1909 n. 364 in G.U. 150 del 28 Giugno 1909, available at http://augusto.agid.gov.it/gazzette/index/download/id/1909150_PM. According to the legislative history, the use of the term movable things was meant to be expansive, with manuscripts, numismatic items and even gardens included, but the unique needs of these objects were deemed better legislated by sui generis laws. EMILIANI, *supra* note 381 at 205-206.

³⁹⁹ Art 1, L. n. 185/1902.

including to “*i codici, gli antichi manoscritti, gli incunabuli, le stampe e incisioni rare e di pregio e le cose d’interesse numismatico*”⁴⁰⁰ in 1927.

Different objects were increasingly included as of a public cultural interest for different reasons (whether historic, artistic, or other). Historic interest was increasingly perceived as expansive and broad. This highlights an answer to an inherent dilemma of how to understand the public’s cultural interest in different cultural properties. Far from being divorced from the context of their creation or crystalized as cultural property at some point in time, Italian cultural property law shows us that the decision to preserve certain objects is progressively based on a recognition that these properties have something to contribute for our future, because of their life, context or other aspect of their being.

Context and specificity are important when deciding whether the public’s cultural interest exists in a property. Bottai explored this in his presentation of the 1939 cultural property law to the Italian government by using the word “*interesse*”. With the use of the term “*interesse*” with added qualifiers such as “*artistico, storico, archeologico, o etnografico...*”⁴⁰¹, the law intended to refer both to a public concern and also to private rights.⁴⁰² Explaining the reasons that the government should indeed concern itself with this subject matter and the drafting of the rules within the law itself, Bottai emphasized that the State cannot be disinterested in objects of artistic or historic interest because they are a precious spiritual and non-spiritual asset of Italy.⁴⁰³ At the same time, however, the public interest in artistic and historic objects must also exist in tandem with the rights of private citizens and institutions.⁴⁰⁴

Degrees of artistic and historic interest in Italian cultural property law exist in order to balance these public and private interests. While the public interest in these objects is superior to a private one, Bottai explained that an equitable balance between the two is still necessary.⁴⁰⁵ In addition, the public’s cultural interest not only takes various public and private needs into account, but it must also be

⁴⁰⁰ Art 1, Testo coordinato, L. n. 364/1909.

⁴⁰¹ Art 1, L. n. 1089/1939.

⁴⁰² Disegno di legge: “Tutela delle cose d’interesse artistico e storico” (n. 154), *La normativa, La legge sulla tutela delle cose di interesse artistico e storico* in ISTITUZIONI E POLITICHE CULTURALI IN ITALIA NEGLI ANNI TRENTA VOL 1 334, 408-409 (Vincenzo Cazzato, ed., 2001) [hereinafter ISTITUZIONI E POLITICHE CULTURALI].

⁴⁰³ *Id* at. 408.

⁴⁰⁴ *Id*.

⁴⁰⁵ *Id*.

seen in relation to administrative action.⁴⁰⁶

The concept of balancing between public and private interests is particularly important for classifying the category of fashion design objects as cultural property under the law. Restraints on material iterations of Italian fashion design objects, outside of Italian cultural property law, already seemed to negatively affect the development of Italian fashion itself. Seen as forcing women to “dress like their cook”, regulation of Italian fashion designs alone by the *Ente Nazionale della Moda* and other laws were historically criticized as stifling individual creativity and expressive freedom. Recognizing a public cultural interest in a tangible iteration of an Italian fashion design such that it would qualify as cultural property would potentially mean subtracting that object from a market where it could be sold and worn, the real world where it could continue to develop, evolve and even change. Administrative action may unnecessarily stifle public interest in fashion design and in the objects in which it is embodied instead of preserving it. “Freezing” a modern and contemporary Italian fashion design object as cultural property may, in effect, mean “freezing” the very essence of fashion. At the same time, it might not: fashion design might also be just as communicative or useful if it is in a museum or protected individually as an object. These questions are part and parcel of the balancing of public and private interests at the heart of Italian cultural property law.

Various cases in which judges have been called to review administrative designations of cultural property underscore the importance of balancing private and public interests when classifying objects as cultural property. The reasoning in the cases reviewing administrative action emphasize the reasons for designation but also the logic behind it. The cases reveal that when the balancing Bottai presents as part of public cultural interest is put into practice, it may not be as equitable as one would think. For example, a Villa’s classification as a cultural property under the 1939 cultural property law progressively led to an indirect protection of its garden and the prohibition of building a parking garage at a certain distance from the villa and its garden without accompanying acts of reconstitution of the garden.⁴⁰⁷ The court,

⁴⁰⁶ *Id.* at 409 (“la determinazione e l’accertamento dell’interesse storico o artistico che qualifica le cose contemplate dal disegno della legge... può, nei casi concreti, presentare una intensità diversa, dalla quale si deve tener conto, giacché essa traduce in una esigenza di tutela, che varia in relazione alle specifiche forme di ingerenza dell’Amministrazione.”)

⁴⁰⁷ Cons. St., Sez VI, n. 6488/2004 in DEJURE.

deferring to the administration's judgment, noted that the Villa's direct preservation was ensured by an indirect preservation of the garden under the later 1999 Testo Unico "*per consentire anche alle future generazioni la visione e la fruizione dei valori artistici*" and also to "*evitare che, all'interno del complessivo perimetro dell'edificio monumentale, abbiano luogo le alterazioni dello stato dei luoghi incompatibili col loro valore testimoniale.*"⁴⁰⁸ Both the external perspective and the internal view of the Villa served the public interest. If we were to imagine this same reasoning applied to a modern and contemporary Italian fashion design, we might be concerned about what an external and internal point of view might be. Would it translate to protecting the outside of a bag and the inside of a bag? Or would it mean protecting the external view of a dress and the internal way in which it fits the wearer? Could we draw boundaries of intervention on a dress like we could on a villa or on a garden, when people might still live their lives in modern and contemporary Italian fashion objects just as people still inhabit buildings that are cultural property? Such fine line decisions made in the public interest as applied to Italian fashion design objects seem hard pressed to walk an easy road in equity. At the same time, the court in this case seemed convinced that the administration's actions were not beyond its powers, in part thanks to consistent and explanatory administrative action. The fact that the administration would have allowed the construction of the parking garage upon certain conditions, the replanting of certain trees, for instance, drew a sufficient balance in the court's eyes.⁴⁰⁹ Perhaps clear explanations and accommodations would be enough to strike the balancing of interests: individual private owners of Italian fashion design objects might, for example, be allowed to alter the interiors of garments classified as cultural property, as long as the garments looked the same on the outside. At the same time, limits on the destination of use are definitive of cultural property, so an owner could also potentially find themselves unable to wear a dress at all.⁴¹⁰

Still other administrative declarations of how private properties exhibit a cultural interest today reveal interpretative limits to the historical links which the administration will find for private

⁴⁰⁸ *Id.* (at p. 4 of the PDF of the opinion).

⁴⁰⁹ *Id.* (at p. 5 of the PDF of the opinion).

⁴¹⁰ Cons. St., Sez VI, n. 741/1993, in CONSIGLIO DI STATO, I, 1306. Such limits of use as duties of conservation are also already visible, separately, in museum ethical guidelines. In this sense, some fashion museums in the United States are already faced with explaining that the fashion in their collections is *not* available to be worn. See Valerie Steele's comments during *50 Years of the Museum at FIT: Fashion as Cultural Heritage*, March 14, 2019 (video on file with the Museum at FIT).

properties.⁴¹¹ In the *Cinema America* case, the Ministry of Cultural Heritage declared a private movie theater owned by a private real estate company to be of particularly important interest for its reference to history under the current Article 10, clause 3(d) of the Code of Cultural Heritage and Landscape. Italy's highest administrative court, the *Consiglio di Stato*, overturned this determination, noting that the private movie theater could not even remotely be considered of the historical interest referred to in that clause, given that the historical reference should be to the history of public, collective, or religious institutions.⁴¹² General references to the movie theater's place in a resurgence of Cinecittà were not enough.⁴¹³ The nexus between public and private here was a defining line for the courts; it indicated *Cinema America's* placement outside the cultural property "box." But what this might mean for an Italian fashion design object is unclear- would being owned and worn by private persons exempt Italian fashion design objects from classifications as cultural property, at least under Article 10, clause 3(d)? Would this make a difference under Article 10, clause 3(a), which the court noted would allow for a classification of a common

⁴¹¹ For a discussion of this *Cinema America* case and others see Lorenzo Casini, *Jeux avec les frontières: le rôle de la jurisprudence administrative dans la construction du droit italien du patrimoine culturel* in DROIT PUBLIC ET PATRIMOINE LE RÔLE DU CONSEIL D'ÉTAT 199- 212, 205 (2019).

⁴¹² Cons. St., sez. VI, 14/06/2017, (ud. 04/05/2017, dep. 14/06/2017), n.2920

DEJURE ("È fondato anzitutto il primo motivo di appello, che è riferito al capo di sentenza che decide sul ricorso n. 2251/2015 di primo grado, ed è incentrato sull'asserita mancanza dei presupposti di legge per imporre il vincolo. Per chiarezza, si riporta la norma invocata dall'amministrazione. Ai sensi dell'art. 10 comma 3 lettera d) del d. lgs. 42/2004, "Sono ... beni culturali, quando sia intervenuta la dichiarazione prevista dall'articolo 13: ... d) le cose immobili e mobili, a chiunque appartenenti, che rivestono un interesse, particolarmente importante a causa del loro riferimento con la storia politica, militare, della letteratura, dell'arte, della scienza, della tecnica, dell'industria e della cultura in genere, ovvero quali testimonianze dell'identità e della storia delle istituzioni pubbliche, collettive o religiose." Sempre per chiarezza, va evidenziato che l'ipotesi pertinente al caso di specie è quella prevista dalla prima parte della lettera riportata, ovvero il "riferimento con la storia"; si può invece pacificamente escludere, e per vero nemmeno è stato ipotizzato, che il cinema di cui si tratta, una struttura privata destinata allo svago, possa essere in qualche modo collegato con "istituzioni pubbliche, collettive o religiose.")

⁴¹³ *Id.* ("...suggeriscono un possibile valore artistico dell'immobile, che però non viene in nessun modo argomentato o anche solo affermato; viceversa, alla storia della struttura sono dedicati accenni limitati praticamente ad un solo passo, in cui si dice che "negli anni cinquanta e sessanta", intendendosi del secolo scorso, "si assiste a Roma ad una vera e propria espansione dell'industria cinematografica: Cinecittà diventa la seconda capitale mondiale del cinema, preceduta solo da Hollywood", tanto che a Roma si contavano più di 250 sale (sempre doc. 28 in I grado, cit.)...In tali termini, manca del tutto il riferimento ad uno specifico evento storico, quale che ne sia il rilievo nella storia generale della città e del nostro Paese: la struttura è vincolata con riferimento ad un'epoca generica, nemmeno precisamente individuata, tanto nell'estensione temporale, quanto con il richiamo a personaggi o eventi che la contraddistinsero.")

object as cultural property because it revealed a historical connection to a celebrity who owned it?⁴⁴

Such questions also reveal the subjectivity inherent in designations of cultural property and the privileging of certain historical narratives over others. Who is a fashion celebrity that should be recognized as part of a historical narrative? Do we risk privileging mainstream or commercial fashion historical narratives over others? This substantive concern, which pervades other types of cultural and historic property today, might even be seen in Bottai's presentation of the law and his characterization of Italy's cultural property itself, which was, to a certain extent, indicative of the corporative spirit which characterized the Fascist state.⁴⁵ Notwithstanding this, however, the equitable balancing of the superior public interest with private interests in the 1939 law was embraced after the war with changes in its application, subject matter, and administrative institutions and actions brought on by the times. In addition, Italian legal scholars after the war took the opportunity to expand on how to conceptualize the equitable balancing of these interests beyond the specific historical context of its drafting, applying the balance to Italy's present and future cultural property.

Michele Cantucci was one of the Italian legal scholars who helped Italian cultural property to evolve past its 1939 iteration, in part through his book *La tutela delle cose di interesse artistico e storico* in

⁴⁴ *Id.* ("Ciò posto, come è noto, il vincolo appena descritto si distingue tradizionalmente da quello previsto in generale dallo stesso art. 10 a tutela delle cose di "interesse artistico, storico, archeologico o etnoantropologico." Si afferma infatti, in sintesi estrema, che la cosa di interesse per riferimento con la storia di per sé non rivestirebbe alcun interesse culturale, ma lo assume nel caso concreto, perché collegata ad un qualche evento passato di rilievo: si fa l'esempio di un oggetto di fattura comune e di nessun pregio artistico, che però fosse caro al personaggio celebre che ne era proprietario.")

⁴⁵ Mario Serio, *La legge sulla tutela delle cose di interesse artistico e storico* in ISTITUZIONI POLITICHE CULTURALI *supra* note 402 at 335 ("Questo aspetto del contemperamento degli interessi pubblici e privati indusse a definire la legge, fin dalla sua emanazione, come tipicamente corporativa. Prima- affermo il Ministro al Senato- si consultavano soltanto i tecnici, ora si tiene conto anche degli interessi. È appunto perché la legge di ispirazione e portata corporativa 'solo oggi', aggiunse Bottai 'si è potuto redigerla in quanto solo oggi gli organismi corporativi e sindacali hanno raggiunto la loro completa efficienza.'") Cassese also notes the importance of Bottai's and Romani's influence in the law, especially given its short intro to the Camera. Cassese, *da Bottai a Spadolini*, *supra* note 330 at 125. In his study of pre-unification preservation laws, Emiliani also emphasizes this, noting how the 1939 law is in part rooted in the 1909 law's choices to reinforce the collective, community value of art and its importance for Italy's identity; a choice which, therefore, predates Bottai's law and its equations with the government in power at that time. EMILIANI, *supra* note 381 at 19-20 (1996).

1953. In it Cantucci examined the unique characteristics of interest under administrative law as applied to objects of artistic and historic interest contemplated in the 1939 law. Defining interest as made up of both subjective and objective aspects, Cantucci defined interest as

*essenzialmente un fatto soggettivo, in quanto non costituisce un valore assoluto, ma bensì un valore relativo, che è quello che risulta appunto dal giudizio dei soggetti traducendosi, attraverso questa valutazione, in interesse inteso in senso oggettivo.*⁴¹⁶

A thing is understood as being of interest when one or multiple subjects converge their spontaneous attention on it as a result of an economic or spiritual judgment.⁴¹⁷ This convergence makes the object objectively interesting, but people can also have an interest in something at the same time because they themselves feel a specific feeling or state because of it.⁴¹⁸ The subjective part of interest is what can make an interest public: the expansion of this interest across social networks and relationships makes it collective and, therefore, the purpose of satisfying it, public.⁴¹⁹

Cantucci does describe artistic and historic interest as in fact one kind of public interest: both artistic and historic qualifiers fulfill specific aims or satisfy certain collective objectives, such as

*la conservazione dei valori artistici e storici considerati come mezzo per la elevazione della cultura, per l'affinamento dell'attività dello spirito...perché l'individuo possa sviluppare la sua personalità.*⁴²⁰

Like other public interests in health or public order, Cantucci says, this public interest can be relevant under the law. Public interest is relevant under the law inasmuch as it actuates the protection of physical things that are of certain types of artistic or historic interest.

⁴¹⁶ CANTUCCI, *supra* note 148 at 100. See also *Id.* at 103 (describing this as applied to a thing, through which an interest of the collective is satisfied).

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 101. See also Lorenzo Casini, "Italian Hours" *supra* note 105 at 369 (2011) ("[Cultural objects] transmit something that cannot be touched, such as the terrific emotion that visitors may feel once they enter the Colosseum in Rome: 'relics excite a special emotion, even though they have no religious significance.'" (citing to Merryman, *Public Interest*, *supra* note 375).

⁴¹⁹ CANTUCCI, *supra* note 148 at 101.

⁴²⁰ *Id.* at 102.

This artistic and/or historic interest, which we will generally term cultural interest, is certainly however not confined, according to Cantucci, solely to the protection of certain things or properties.⁴²¹ Indeed, art or historic interest is really defined by its connection to the collective and not necessarily to a physical property. When the public cultural interest is applied to things, then its legal significance is as a quality of that specific thing, or property.⁴²² This public historic or artistic quality a property of legal significance is also, however, connected to the greater public historic or artistic interest inasmuch as this quality identifies an intrinsic content through which the public cultural interest of the collective is satisfied. Given this quality's connection to the collective, Cantucci characterizes administrative law's role as stepping in to effectuate the public interest; a property is classified as a cultural property depending upon whether or not it fulfills the unique public cultural interest.⁴²³ Cantucci emphasizes that this administrative decision-making process is, therefore, also context specific

*Infatti sul piano di questa disciplina non esiste un interesse artistico o storico se non in quanto la cosa stessa risponda, per le sue qualità, all'interesse pubblico che è oggetto della tutela legislativa e questa rispondenza varia in ordine a diversi fattori come il tempo, la critica artistica, la valutazione storico-politica, il che importa sempre un giudizio tecnico che deve essere effettuato dall'Amministrazione sulla base di quello che è l'orientamento medio della collettività titolare dei rispettivi interessi.*⁴²⁴

These administrative decisions, for Cantucci, also highlight the importance of not equating any artistic or historic interest with the specific public artistic or historic interest at issue; and the importance of not equating any artistic or historic interest with the tangible property to which it seems to attach. While we may equate artistic or historic interest with a specific quality or aspect of a painting which we can see or easily identify (Monet's brushstrokes or Mona Lisa's smile), in reality this only becomes the public artistic or historic interest under the law when it is understood in relation to the aims and interests of the collective, which are mediated through administrative decision-making.⁴²⁵ In this sense, two identical objects may not be of the same public cultural interest

⁴²¹ *Id.* at 102.

⁴²² *Id.* at 102.

⁴²³ *Id.* at 103- 104.

⁴²⁴ *Id.* at 105.

⁴²⁵ *Id.* at 105.

necessary to designate them as cultural property.

This narrowing of the public cultural interest is actually heartening for an extension of cultural property to modern and contemporary Italian fashion design objects. Any artistic and/or historical interest will not do. Moreover, the presence of identical objects will not result in exponential designations of cultural property. In this sense, not all Italian fashion design objects need to be classified or even understood as cultural property. Artistic or historic significance in the context of a brand may not be enough, and creativity alone may not be enough, even in comparison to what came before. Rather, a classification of a modern or contemporary Italian fashion object as cultural property should be based on the collective's recognition of a broad artistic and/or historical interest in that object. We might, for example, see such an interest in Ferragamo's wedge heels. Created within the historical narrative of the deprivations of World War II, a pair of Ferragamo's wedge soles might fulfill the various parts of collective judgment that Cantucci mentions: time, artistic (or fashion) critique, and a historical-political evaluation.

The technical judgment of the administration which Cantucci mentions also leads to concerns of a battle of the experts. That is, while the administration is actuating a collective public interest, its determinations are naturally made by those with specific knowledge and experience outside the regular collective's. This may lead to results that seem to pull justifications for a property's classification as cultural property out of thin air. At the same time, recent cases seem to have established some limits- experts or employees of the Ministry cannot be too vague or too general in their reasons. In a recent case in which the home and studio of the singer Lucio Dalla was determined to be of particularly important cultural interest, the court reprimanded the Ministry for its generic determination which sought to protect the whole of the building without specification for the owners.⁴²⁶ The required "*elementi di identificazione e di valutazione della cosa*"⁴²⁷ were not satisfied by a simple sentimental judgment.⁴²⁸ Moreover, declarations of a whole also seem suspect when more specific and individual objects are entertained as being of a public cultural interest.⁴²⁹ In this sense,

⁴²⁶ Cons. St. sez. VI, 19/10/2018, (ud. 11/10/2018, dep. 19/10/2018), n. 5986 in DEJURE.

⁴²⁷ *Id.* (citing to Art. 14, CODICE, D.L. n. 42/2004).

⁴²⁸ *Id.*

⁴²⁹ *Id.* (referring to the Soprintendenza's classification of the whole casa-studio and all its furniture and movables when it had imagined that specific items would be of particular cultural interest).

emotional or sentimental judgments about Italian fashion design objects may not be enough to allow them to enter the cultural property “box” under Italian cultural property law.

Cantucci is certainly not the only Italian legal scholar to have contemplated the nature of the public interest and the legal weight, quality and importance it has in Italian cultural property law. Grisolia, after commenting on the purposes of the 1939 law after its passage in the early 1940s⁴³⁰, also discusses interest, albeit from another angle, in his book *Tutela delle cose d’arte*, published practically contemporaneously to Cantucci’s work. Grisolia begins his own investigation of public interest by noting the different categories of things of artistic interest outside of public, or administrative, law, within the Italian Civil Code.⁴³¹

Using the notion of *demanialità*⁴³², Grisolia explores how it seems, when equated with the publicness of all things of artistic interest, fundamentally unable to explain why the protection of certain things of artistic interest in private hands are also protected alongside other objects which are displayed or used by the public.⁴³³ Seeking to craft a unitary theoretical framework⁴³⁴ to define the nature of things of artistic interest across public and private law⁴³⁵, Grisolia explores specific articles of the Civil Code and the 1939 law, comparing and contrasting them, to argue that a public interest pervades all objects of artistic interest, whether they are in private or public hands, and, if the latter, then classified as part of the

⁴³⁰ See various articles by Grisolia in ISTITUZIONI E POLITICHE CULTURALI *supra* note 402.

⁴³¹ MARIO GRISOLIA, LA TUTELA DELLE COSE D’ARTE 159- 167 (1952).

⁴³² Demanialità in English translates to State owned, although it might be debated whether it could also be considered part of the concept of public domain or the commons. Grisolia refers to property thusly whether it is so because of its function, use, or general social utility. See *Id.* at 161- 165. Grisolia also notes how the use of demanialità continued in the 1942 Codice Civile. See *Id.* at 168.

⁴³³ *Id.* at 166- 167.

⁴³⁴ *Id.* at 167 (“Si può a noi sembra, affermare che è mancata finora la visione unitaria del problema; il quale è stato infatti, principalmente sulla base del codice civile, spezzettato in vari settori dalle divergenti tesi della demanialità e della patrimonialità indisponibile delle cose d’arte dello Stato e degli altri enti pubblici, mentre sono stati considerati sempre a parte i beni artistici (mobili e immobili; singoli o complessi) dei privati, per i quali si è di solito parlato di limiti nell’interesse pubblico e talvolta anche di servitù pubblica.”).

⁴³⁵ Grisolia refers to the 1865 Codice Civile and to the new *legge specialistico*, the 1939 law. *Id.* at 162. He also refers to the Codice Civile of 1942 then in effect at the time of his writing. *Id.* at 167. Grisolia also compares and contrasts the 1939 law with rules in the Code, which seem to be at odds. For example, analyzing the protection for series or collections of objects he notes the absurdity of protecting all *raccolte* in public hands in the Code while only certain series or collections of particularly exceptional interest, no matter who they belong to, are protected in the 1939 law. *Id.* at 172.

demanio or as generally *indisponibili*.⁴³⁶ Rather than concentrate on a definition of public interest that focuses on inalienability or the public domain, Grisolia emphasizes that a public interest applies to all things of artistic interest, no matter to whom they belong, and that this interest might be recognized under the law on the basis of a thing's function or based on who controls or owns it in its materiality.⁴³⁷ This function, control, or ownership, is, however, simply a means of actuating the protection of things of artistic interest; these criteria are not the reason for the protection of a thing of artistic interest. The reason for such protection is found, again, in the collective interest which the State represents.⁴³⁸ It is the ability that objects have to fulfill this collective interest that makes objects of artistic interest subject to public law.⁴³⁹ The stratified nature of the collective interests described in the 1939 law is, for Grisolia, just a necessary way of legally addressing the existence of this predominant collective, and therefore public, artistic interest in certain things alongside other private interests in the same thing.⁴⁴⁰

Grisolia's exploration of why objects are of artistic interest is telling. Rather than justifying the protection of works of art based on their specific cultural functions or the roles they play for culture, he too deems them generally goods of public interest because they are related to the collective, to a spirit of the Nation.⁴⁴¹ A public social aim or a public social purpose is what is fundamentally at the heart of the public interest.⁴⁴² In this sense, specific cultural values—whether historic or artistic—are not the barometer, but a greater, common public cultural interest is. In other words, collective interests in objects are not fitted to society, but society itself decides what their collective public interest is in objects, and protects them accordingly. For Italian fashion design objects this is distinctly important because it negates the dictates of fashion as the reason for an Italian fashion design objects' eventual classification as cultural property. That is, Italian fashion companies should not be the ones

⁴³⁶ *Id.* at 183- 185.

⁴³⁷ *Id.* at 193, 199, 202 (“Nel campo nostro, è fin troppo chiaro (e ciò costituisce il primo argomento contro l’assegnazione delle cose d’arte non demaniali alla categoria, di per se stessa tanto incerto ed anomala, dei beni indisponibili) che il profilo della trasmissione del diritto dominicale è solo uno degli aspetti del regime al quale sono oggi sottoposti i beni artistici, la cui destinazione pubblica è invece protetta dalla legge speciale attraverso un complesso congegno, che innanzitutto li investe direttamente nella loro esistenza materiale e nella loro utilizzazione.”).

⁴³⁸ *Id.* at 207.

⁴³⁹ *Id.* at 211.

⁴⁴⁰ *Id.* at 239- 240.

⁴⁴¹ See *Id.* generally.

⁴⁴² *Id.* at 214.

dictating what is or is not of the public's cultural interest in their design objects as a first matter. While Italian fashion companies might propose reasons and then later help to valorize their design objects that are cultural property, it is the collective, the public, and the administration which in Italian cultural property law represents them, that is responsible for determining the objects' cultural interest, over and above what may be fashionable at a given moment.

Discussions of the public interest in objects of artistic or historic interest represented by Grisolia and Cantucci's work are not confined to Italian scholarship in public law. Indeed, Salvatore Pugliatti's work *La Proprietà nel Nuovo Diritto*, published almost contemporaneously to Cantucci and Grisolia's work⁴⁴³, applies the notion of a public interest to property as a category, whether classified as public or private under the law. Indeed, Pugliatti defines property law with reference to the balancing of an inseparable binary of public and private interest.⁴⁴⁴ Existing as complements, in harmony, public and private interests, which are often not the same or even representative of constant values, need to be balanced through property law, which will also in turn vary its rules based on the objects it is regulating.⁴⁴⁵ For Pugliatti, *ex post* categorizations of any property as public or private are not the point: rather, public and private interests (which Pugliatti also refers to as public, given that it is in the public interest to guarantee private interests in property⁴⁴⁶), are applied through a vertical and horizontal analysis, and define the way in which property law treats specific objects in its purview.⁴⁴⁷ The horizontal analysis of public and private interests in property occurs by comparing different objects; the vertical analysis asks what public or private interests are within the same object.⁴⁴⁸

Giving the excavation of archeological objects as an example,

⁴⁴³ Although in parts written and published before the war. *Strumenti Tecnico-Giuridici per la tutela dell'interesse pubblico nella proprietà* in SALVATORE PUGLIATTI, *LA PROPRIETÀ NEL NUOVO DIRITTO* 107 (Milano, Giuffrè, 1954) [hereinafter PUGLIATTI, *LA PROPRIETÀ*] (noting the chapter was previously published in 1939). Pugliatti's work has also provided the foundation for today's works on property in Italian legal scholarship, which examine how the new properties of our age, like the internet, fit into the legal notion of property. See *Concetto unitario e molteplicità degli statuti proprietari: tra storia e sistema* in RODOTÀ, *supra* note 372 at 53 (exploring *beni comuni* in the same work at 459- 498).

⁴⁴⁴ PUGLIATTI, *LA PROPRIETÀ supra* note 443 at 4-5.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 3.

⁴⁴⁷ *Id.* at 8.

⁴⁴⁸ *Id.*

Pugliatti notes that a horizontal division of public and private interests occurs on the various strata of land itself: in some pieces of land, the private interest is determinative, but in others, where archeological objects are found, the public interest is more determinative and leads to prohibitions on ownership of found objects.⁴⁴⁹ The top level of soil is assigned to the private owner thanks to his private interest in it, while the subsoil is assigned to the State, due to the public interest in objects that are found there.⁴⁵⁰ At the same time, when the archeological object itself is found in a specific area of land, that land (and the archeological object itself), are of both public and private interests, and property law must determine how to balance them. This is the vertical dimension. In Italy, for example, the State still owns all archeological objects excavated from the land, while the owner, in the past, was only entitled to recoup any expenses or damages due to a State-run excavation.⁴⁵¹ Pugliatti furthermore casts private and public interests as the activators of certain legal boundaries; these boundaries can be drawn on any property, including intangible ones like intellectual property.⁴⁵²

Far from conceptualizing rigid categories, Pugliatti's work emphasizes the flexibility of property law.⁴⁵³ In some cases, subject-specific laws might best protect public interests in property, while in other circumstances, and even for other objects⁴⁵⁴, the public interest might best be protected by giving way to a private interest or by not regulating the property at all.⁴⁵⁵ In this sense, not only does Pugliatti's work, like Cantucci and Grisolia's, indicate that a broad public interest, intimately related to society as a collective, is the foundation of property law, but it also, through its vertical analysis, foreshadows a discussion of tangible and intangible rights.⁴⁵⁶ Indeed, this idea that a cultural property does not have to be a physical thing opens a discussion of how Italian fashion

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 9-10.

⁴⁵¹ *Id.* at 9-10. Art. 91, L. 42/2004.

⁴⁵² *Id.* at 5-6.

⁴⁵³ *Id.* at 109.

⁴⁵⁴ Cassese, *da Bottai a Spadolini*, *supra* note 330 at 140. See further discussion of objects and physical things *infra* in Section 2.3.

⁴⁵⁵ In this sense, not all cose are beni. See PUGLIATTI, LA PROPRIETÀ *supra* note 443 at 5. See also SALVATORE PUGLIATTI, BENI E COSE IN SENSO GIURIDICO (1962) [hereinafter PUGLIATTI, BENI E COSE] (discussing the difference between beni and cose under the law as the bene being the synthesis of a public cultural interest and a specific situation to be protected under the law, but also exploring the concept of bene in terms of intangible rights and tangible things). See also Cassese, *da Bottai a Spadolini*, *supra* note 330 at 139- 140.

⁴⁵⁶ Beni in PUGLIATTI, BENI E COSE , *supra* note 455 at 14- 58.

designs themselves might, at times, synthesize a specific public cultural interest and the purposes of cultural property protection on its own.

Grisolia's discussion of the public interest in *La Tutela delle Cose d'Arte*, and how it can apply to objects no matter their control or ownership, also foreshadows a discussion of intangible and tangible rights. As Grisolia notes, the notion of a public interest gives the State rights over an object which are not tangible, notwithstanding the fact that these rights allow the State to dictate what may happen to the thing of artistic interest in its materiality.⁴⁵⁷ The private right to protect works of artistic interest, which might later be cultural property- copyright- is in fact an intangible right justified by a public interest. Almost like the right to prohibit the display, copies, public performance and the creation of derivative works, cultural property law essentially sets limits in similar ways.

The implication that cultural property law and intellectual property law are similar because they both conceive of property as fundamentally about intangible rights and not physical things itself, as really "a bundle of relationships"⁴⁵⁸, does not mean, however, that these legal frameworks can act for each other. This inequality between cultural property law and intellectual property law is most evident in American legal scholarship in discussions of how indigenous cultural property should be regulated, if at all, by law. Michael Brown's exploration of the rights of indigenous people to their heritage, for example, doubts very much, in contrast to Scafidi, that intellectual property protections as they stand or as they may be revised to comprise multiple new regulations, would positively actuate indigenous peoples' rights in their culture.⁴⁵⁹ Brown mentions identification of the collective group, the expiration of rights' terms, and the very nature of the proverbial traveling of cultural heritage as reasons to doubt that intellectual property protections are appropriate.⁴⁶⁰ The same criticisms of intellectual property rights as types of cultural property rights might apply for modern and contemporary Italian fashion design objects. It may, after all, be difficult to define the community of Italians to whom Italian fashion design objects are relevant and the community may

⁴⁵⁷ GRISOLIA, *supra* note 431 at 229- 230 (citing to Cammeo and Calamandrei).

⁴⁵⁸ Brown, *Heritage as Property* *supra* note 1 at 58. For the beginnings of a discussion of the economic conception of property as a bundle of rights and how it operates within the greater scheme of Italian property law see RODOTÀ, *supra* note 372 at 61.

⁴⁵⁹ Brown, *Heritage as Property* *supra* note 1 at 56- 60.

⁴⁶⁰ *Id.* at 54, 55, 59.

not even consist of Italians at all. The theory of Italian cultural property law does not present us with a new type of intellectual property law, but its emphasis on the public cultural interest, and not a source community, does give us another way to think about why and how cultural property might match certain intellectual property regimes like copyright that also seem, like cultural property law, to apply to widely intangible cultural expressions and their control in relation to material iterations. In this sense, analyzing the design objects of Italian fashion companies through the public cultural interest of Italian cultural property law may clue us in to how copyright law, for the specific subject matter of Italian fashion design objects, may function as a sort of *ex ante* cultural property regime for actors other than indigenous peoples.⁴⁶¹

Massimo Severo Giannini reviewed Grisolia's *Tutela delle Cose d'Arte* and, as part of his observations, noted how Grisolia referred to all objects of artistic interest as objects of public interest,⁴⁶² long before the term cultural property was incorporated into the law. Giannini's emphasis on Grisolia's discussion of *beni d'interesse pubblico* as of "*appartenenza dominicale*", physically or legally belonging to the public or to a private person and "*appartenenza funzionale*", destined for a public use⁴⁶³, foreshadows Giannini's own discussion of the fundamental publicness of cultural property in Italian law. Indeed, Giannini notes his agreement with Grisolia's presentation inasmuch as it supports an idea of *duplice dominio*- or, we might say, double possession- of property.⁴⁶⁴ In other words, whether certain objects are deemed of public or private property, both private and public rights exist in the object because of a public interest.⁴⁶⁵ For cultural property, this public interest is embodied in an artistic or historic interest in the object, no matter to whom it belongs.⁴⁶⁶

⁴⁶¹ The idea that intellectual property law as a whole acts as another type of legal system, sumptuary law, has already been proposed in Beebe, *Sumptuary Code*, *supra* note 25 (identifying a "sumptuary intellectual property law" that seems not to in practice function well because it does not prevent new forms of distinction, although examining how copyright can effectively prevent dilution of expressions and seeing these expressions as unrelated to materiality).

⁴⁶² Massimo Severo Giannini, *Recensione di Mario Grisolia, La tutela delle cose d'arte, estratto da Rivista trimestrale di diritto pubblico*, III, 1953, n. 1, p. 171-172 [hereinafter *Recensione*] in SCRITTI, Volume 3, 841 (1949- 1954).

⁴⁶³ *Id.* at 841. Grisolia mentions *beni d'interesse pubblico* in GRISOLIA, *supra* note 431 at 223-226.

⁴⁶⁴ Giannini, *Recensione*, *supra* note 462 at 841- 842.

⁴⁶⁵ For an exploration of this with reference to Art. 42 of the Italian Constitution see Massimo Severo Giannini, *Basi Costituzionali della Proprietà Privata* in SCRITTI, Vol 6 187-245 (2005).

⁴⁶⁶ Massimo Severo Giannini, *I Beni Culturali* [Cultural Properties] 31 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO [Trimester Review of Public Law] (1976) [hereinafter *Beni Culturali*].

The public cultural interest that is common across these legal and physical boundaries might at first be thought to be economic. As the Italian legal scholar Piva emphasizes, however, in his 1962 encyclopedic entry on *Cose d'arte*, we do not value works under cultural property law for *valore* – their value on the market.⁴⁶⁷ Rather, it is impossible to only talk about a work of art as it is protected under Italian cultural property law in terms of its economic value: the work must be discussed first in terms of the public's collective interest in it.⁴⁶⁸ In this sense, economic value is not a bar to cultural property protection nor is it informative. Rather, economic value and public cultural interest, in the Italian cultural property legal tradition, exist side by side in the same object while not being the same thing. Here again, we find a foundation for comparisons with other legal frameworks, like U.S. copyright, that American legal scholars also identify as involving aesthetic decisions alongside U.S. copyright's arguably economic purpose.⁴⁶⁹ Economic concerns and cultural interest may indeed exist side by side in certain legal regimes, while not, however, being the same.

For modern and contemporary Italian fashion design objects the identification of a public cultural interest beyond economic value or economic incentives that defines cultural property is important. It helps to divorce these design objects' public cultural interest from their use or value as fashion objects *per se*, at least in theory. Such a definition of public cultural interest would, when modern and

While as a second order the law might decide that properties owned by private entities should be of a greater level of artistic or historic interest, as a first matter, the public interest in these objects justifies crafting a framework for their protection. See also Casini, *Italian hours*, *supra* note 105 at 375. Lorenzo Casini, *I Beni Culturali da Spadolini agli anni duemila* [hereinafter *da Spadolini agli anni duemila*] in LE AMMINISTRAZIONI PUBBLICHE TRA CONSERVAZIONE E RIFORME 423- 447, 425, n. 8 (2009) ("Proprio negli anni Settanta, sono pubblicati alcuni tra i più importanti saggi scritti sul tema. Sono così individuati i capisaldi e fondate le basi teoriche del diritto dei beni culturali ["Si tratta del celebre saggio di M.S. Giannini, *I beni culturali* in *Riv. Trim. dir. pubbl.*, 1976, P. 3 ss, in particolare 31, il quale individua i requisiti comuni a tutti i beni culturali nell'*immaterialità*, legata al valore culturale espressa dal bene, e nella *pubblicità*, intesa sotto l'aspetto non del regime proprietario, ma della destinazione alla fruizione pubblica"]"). At the time of his review of Grisolia's work, Giannini notes that neither the positive law in force at the time, nor legal scholarship could fully justify this theory of double possession. Giannini, *Recensione*, *supra* note 462 at 841. By the 1970s, however, when Giannini elaborated on the quality of publicness in cultural property in his article *I Beni Culturali*, the institution of the Ministry of Cultural Heritage and other legal developments had, at least, opened the door for deeper considerations of the issue.

⁴⁶⁷ G. Piva, *Cose d'Arte* in ENCICLOPEDIA D'ARTE 93- 94 (Giuffrè, Milano, 1962).

⁴⁶⁸ *Id.*

⁴⁶⁹ Glen Cheng, *The Aesthetics of Copyright Adjudication*, 19 UCLA ENT. L. REV 113 (2012); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

contemporary Italian fashion design objects are evaluated as cultural property, encourage evaluations of design objects that are not wedded to their function, use or market value but would allow evaluations that contemplate, perhaps, the historical impact of the design objects and, therefore, protect them accordingly under the law. In addition, thinking about how economics is not the driver of a definition of cultural property in the theory of Italian cultural property law helps us to begin to re-conceptualize cultural property from a presentation of it as just another reified commodity.

Public cultural interest arguably became even more broad after the work of the Commissione Franceschini, which contemplated that numerous objects, from musical instruments to furniture, could be classified as cultural property. The Commission recommended that the term cultural property be used in Italian law instead of things of artistic or historic interest and that cultural property be defined as a material testament having the value of civilization.⁴⁷⁰ Writing after his contributions to the work of the Commission, Giannini identifies *pubblicità*, or publicness, as one of the defining characteristics of this new category of cultural property.⁴⁷¹ Giannini elaborates on the belonging (*appartenenza*) and the function (*funzione*) of cultural property in terms of cultural property's existence as part of a national cultural heritage.⁴⁷² He explores how exactly the public interest manifests itself with reference to this new cultural property category: the State represents the public cultural interest in the physical integrity of the property, and this interest takes priority over a private owner's rights to exercise their economic rights in that property if it is in the private owner's control.⁴⁷³ The publicness that characterizes cultural property is, for Giannini, slightly different than what might be called collective property or property administered in the collective interest.⁴⁷⁴ Giannini's point is to divorce the notion of publicness in cultural property from economic or other rights in the object that are not related to a purpose of manifesting the expressions of civilization.⁴⁷⁵ Cultural property, no matter in whose hands it is, needs to be able to meet the needs of the universal, not just one collective group,⁴⁷⁶ as other properties of

⁴⁷⁰ Giannini, *Beni Culturali*, *supra* note 466 at 31.

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.* at 32.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 31.

⁴⁷⁶ *Id.*

the commons might.⁴⁷⁷ In this sense, the theory of Italian cultural property tells us that cultural property, ideally, is not supposed to be used as an instrument for its source community but is instead meant to be held in what would, in American legal terms, be deemed a trust or a public dedication.⁴⁷⁸

In his own historic assessment of the law a few years after Giannini's writing, Sabino Cassese emphasizes the balancing of public and private interests at the heart of the 1939 law. He also seemingly expands the idea of publicness to an even broader conception of cultural heritage.⁴⁷⁹ Cassese defines the collective or general interests in cultural property in terms not only of use by the community but also as research and valorization.⁴⁸⁰ The public interest at the heart of Italian cultural property is, as Cassese mentions, dynamic.⁴⁸¹

The architectural framework of cultural property law in Italy today, now embodied by the 2004 Code of Cultural Property and Landscape, with its successive modifications, still tracks the division between public and private ownership embodied in the 1939 law.⁴⁸² At the same time the Code's additions and modifications continue to embrace the dynamic notion of publicness and public interest discussed by past legal scholars. Alongside the continued need to preserve cultural property is the need to valorize it, or enhance it.⁴⁸³ The function identified by Grisolia in his work as at the basis of the specific laws for cultural property and its preservation has, we might say, morphed over time into a defined administrative function.⁴⁸⁴ While the Code may decide to divide this function based on public and private actors the action or control by public or

⁴⁷⁷ For this observation see also Lorenzo Casini, "Todo es Peregrino e Raro", 3 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 987, 994 (2015).

⁴⁷⁸ For a discussion of how a common law public dedication could be used in the United States as cultural property protections for individual objects, when a public interest in art, for example, is identified see Note, *Protecting the Public Interest in Art*, 91 YALE L.J., 121, 126 (1981).

⁴⁷⁹ Cassese, *da Bottai a Spadolini*, *supra* note 330 at 127.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* (At the time of his writing, however, Cassese notes that there were relatively few legal fulfillments of such a cultural function required under the law.)

⁴⁸² Art. 10, D.L. n. 42/2004.

⁴⁸³ *Joint Declaration of the Ministers of Culture of G7 on the Occasion of the Meeting "Culture as an Instrument for Dialogue among People"*, http://www.beniculturali.it/mibac/multimedia/MiBAC/documents/1490881204940_DECLARATION-Dichiarazione.pdf.

⁴⁸⁴ Lorenzo Casini, *Pubblico e Privato nella Valorizzazione dei Beni Culturali* [Public and Private in the Valorization of Cultural Properties], 7 GIORNALE DI DIRITTO AMMINISTRATIVO [Journal of Administrative Law] 785, 786 (2005).

private actors does not define cultural property under Italian law. Instead, the fundamentally public cultural interest, manifested in a cultural property's publicness and in various public administrative functions⁴⁸⁵ characterizes cultural property in Italian cultural property law.

Italian cultural property law, as it has evolved throughout history, tells us that cultural property is defined by its relationship to the collective. A public interest is manifested through artistic or historic interests in specific qualities of things and in a things' ability to testify to something that is of public cultural interest to the collective. This public cultural interest is not confined by objective qualities of things. The public cultural interest at the heart of cultural property under Italian law is fundamentally related to how those qualities are understood, perceived and relevant to the public. This interest is boundless- it crosses lines between tangible and intangible property, tangible and intangible rights, types of property, and what is public and what is private. The role of Italian cultural property law, as part of administrative law more generally, is to represent the public's cultural interest across these boundaries, while equitably balancing this interest with others.

There seems to as yet be no legal case or administrative decision classifying an individual Italian fashion design object as cultural property. There is evidence, however, that Italian fashion is of a sufficient public interest to justify the expropriation of property and its use. This is evident in a case in which the Region of Lombardy expropriated a building for fashion: the Region planned, as part of a plan to revitalize an area of Milan, to use the building as a "Museo di Moda e Scuola di Moda" and such a use was deemed part of proper "attrezzature culturali" under the law regulating such expropriation.⁴⁸⁶ The Court referred to fashion as an integral part of the city's economy and cultural events and not just as a symbol of the city of Milan.⁴⁸⁷ Here, at least, fashion with reference to a city

⁴⁸⁵ *Id.* at 787. These public functions may also be, as a second matter, assigned to private actors.

⁴⁸⁶ Cons. Stato Sez. IV, Sent., 18/11/2013, n. 5460 (with the private company who owned the building appealing from a decision by the T.A.R. that held in part "le strutture destinate ad attività espositiva, ad eventi legati alla moda e al design, a sfilate e ad attività scolastica, sempre nell'ambito della moda . . . possono essere considerate come opere di interesse generale, in una città quale Milano, in cui la moda è non solo una realtà industriale e commerciale, ma un simbolo della stessa città." Ne consegue che l'inclusione di 20.000 mq destinati a manifestazioni espositive, sfilate ed eventi collettivi legati alla moda, ben possono essere inclusi tra le aree per funzioni pubbliche...")

⁴⁸⁷ *Id.* ("il Collegio ritiene che la destinazione Museo della moda e Scuola della moda rientra non irragionevolmente tra le "attrezzature culturali", che l' art. 16, co. 8, D.P.R. n.

may provide a foundation for decisions in the public interest.

Far from simply decreeing that a property is of cultural interest because it belongs to a certain decade, historical event, or artistic style, Italian cultural property law decides on a case by case basis why an object is of cultural interest for the public. The public cultural interest is understood within a theory of property which grapples with the expansive nature of property in the face of its original binaries and even its current aspects as non-property.⁴⁸⁸ Italian cultural property law fulfills its function by taking actions in the wider public cultural interest, which exists across boundaries. The reasons for this are based in the public nature of cultural property: "public because it must be accessible to the public and must be known; cultural objects are instruments of culture, civilization, and education."⁴⁸⁹

2.2 The mechanisms of time

A second dilemma that characterizes cultural property is the presumption that cultural property needs to be old or, at the very least, that it needs to apply to objects after they have lived a life and, therefore, been worthy of an application of the public cultural interest we identified in the previous section. In reality, however, the conception and ascertainment in Italian cultural property law of what is colloquially called age belies the notion that one time threshold, across all subject matter, may apply to cultural property. Time thresholds often work alongside other characteristics of cultural property in Italian cultural property law, like the public cultural interest. Time thresholds can also change.

380 del 2001 comprende tra le opere di urbanizzazione secondaria. E ciò a maggior ragione in una città come Milano, che presenta - come richiamato dal I giudice - una particolare vocazione nel settore... Ciò non significa, quindi - come sostenuto dall'appellante - che la qualificazione di infrastruttura di interesse pubblico derivi da un "simbolo" o da una tradizione locale, ma che il concetto di "attrezzature culturali", noto al legislatore, si caratterizza anche per la particolare vocazione di un centro urbano e giustifica non tanto l'attribuzione di fenomeno culturale alla moda (pur sostenibile), quanto la necessità della scelta di una particolare opera di urbanizzazione secondaria, effettuata in sede di pianificazione. Quanto alle aree destinate a "funzioni espositive", non appare irragionevole che esse possano rientrare tra le funzioni di interesse generale, posta la vocazione produttiva della città di Milano, che associa non solo la sua immagine, ma parte importante del suo tessuto economico al settore della moda, nell'ambito della quale le manifestazioni rappresentano sia un richiamo commerciale, sia un evento culturale.")

⁴⁸⁸ As when scholars explore the internet, water and the environment in the context of current climate change, and other hallmarks of our current digital age. RODOTÀ, *supra* note 372 at 459- 498.

⁴⁸⁹ Casini, *Italian hours*, *supra* note 105 at 375.

A short history of Italian cultural property law is again informative here. The first law passed in 1902 post Italy's unification applied to movable objects that were of merit because of their antiquity or artistic nature but excluded objects of artistic merit that were by living authors or less than fifty years old.⁴⁹⁰ As early as 1902 then, notwithstanding the protracted nature of the bill's passage⁴⁹¹, antiquity and time were connected on the face of the law: movable artistic objects were equated with objects of antiquity through a specific time threshold and even through an *unicum* with the death of an author.⁴⁹²

A time threshold has been consistently included in Italian cultural property laws. The 1909 law which followed placed even more emphasis on the age requirement than the 1902 law, given its striking of an exemplary catalog for objects of artistic merit or objects from antiquity.⁴⁹³ While both these laws used 50 years as a marker the reasoning for fifty years is, in fact, not as clear as one would presume, nor as consistent.

Throughout the history of Italian cultural property law, the age requirement has both remained somewhat constant, changed, and also worked in tandem with other requirements under the law. Indeed, the impetus behind modifications and retention of clauses in the 1939 cultural property law had much to do, as we have seen above, with the need to balance private and public interests relative to Italy's extensive cultural heritage and the market for antiquities and art objects. Age was no exception to this balancing act.⁴⁹⁴ The

⁴⁹⁰ Art 1, Law n. 185 of 12 June 1902 in G.U. n. 149, Venerdì 17 Giugno 1902 ("Le disposizioni della presente legge si applicano ai monumenti, agl'immobili ed agli oggetti mobili che abbiano pregio di antichità o d'arte. Ne sono esclusi gli edifici e gli oggetti d'arte di autori viventi, o la cui esecuzione non risalga ad oltre cinquant'anni.")

⁴⁹¹ ALIBRANDI AND FERRI *supra* note 378 at 6-7 (describing how the law, first proposed in 1872).

⁴⁹² The use of the phrase "death of an author" does not mean to enter into discussions of authorship under Italian cultural property law. For a philosophical discussion of authors as no longer as important as readers see Roland Barthes, *THE DEATH OF THE AUTHOR* (1967).

⁴⁹³ Art 4, Law n. 185/1902 noted that "Gli oggetti d' arte e di antichità non compresi fra quelli di sommo pregio nei cataloghi di cui all'articolo 23; ne facenti parte di collezioni, quando appartengono agli Enti di cui all'articolo 2, non potranno alienarsi senza l'autorizzazione del Ministero della Pubblica Istruzione." For a description of the 1909 law's striking of the catalog requirement for most objects see ALIBRANDI AND FERRI, *supra* note 378 at 7; EMILIANI, *supra* note 381 at 211.

⁴⁹⁴ Mario Serio, *La legge sulla tutela delle cose di interesse artistico e storico* in ISTITUZIONI E POLITICHE CULTURALI *supra* note 402 at 334 (noting "La relazione di Santi Romano a Bottai contiene una lucida esposizione dei principi ispiratori della nuova disciplina e richiama le

choice of specific time thresholds in 1939 was still directly related to categories of objects and to the private and public interest in the very circulation of those objects.⁴⁹⁵ The time threshold of fifty years married with a requirement that movable art objects be by non-living authors; this threshold did not, however, apply to other categories of objects.⁴⁹⁶ The purpose of the threshold was to avoid any hindrance of the market for these objects and to facilitate a reliable, unrushed judgment of the public's cultural interest.⁴⁹⁷ Such a threshold would, according to Bottai, leave room for the unique effect which time has on the evolution of works of art into objects of cultural interest.⁴⁹⁸ Bottai specified that while some had lobbied for a free circulation of art objects with the exception of masterpieces, such a freedom had seemed counter to national public interests.⁴⁹⁹

What is revelatory about this short legislative history is how things classified as objects of cultural interest under the law, and therefore protected as such, do not, in the Italian legal tradition, necessarily have to age into the cultural property "box" on their fiftieth birthday. The dilemma of time as applied to cultural property exists in a complex web of public and private interests, and the public cultural interest. Time thresholds are, or at least should be, the product of organic and natural cultural consensus and discussion.

direttive tracciate dallo stesso Bottai nella seduta di insediamento della Commissione. Queste si riassumono 'nella necessità di apprestare un adeguato sistema protettivo del grandioso patrimonio artistico e storico della nostra Nazione, tenendo conto, compatibilmente con questa esigenza, degli altri interessi, pubblici e privati relativi al detto patrimonio, e cercando di agevolare altresì, per quanto possibile, il commercio antiquario nazionale.' (footnotes omitted)).

⁴⁹⁵ *Camera dei Fasci e delle Corporazioni, Riunione del 15 Aprile 1939, Disegno di legge: "Tutela delle cose d'interesse artistico e storico" (n. 154), La normativa, La legge sulla tutela delle cose di interesse artistico e storico in ISTITUZIONI E POLITICHE CULTURALI, supra note 402 at 408-409.*

⁴⁹⁶ As for immovables of historic interest for their reference to political, military and cultural history. *Id* (although the wording of Article 1, paragraph 2 and Article 2 of the law makes it seem as though the *unicum* of non-living author and fifty years old applies to immovables that reference particular moments in history, Bottai's presentation of the law belies that interpretation).

⁴⁹⁷ Serio in ISTITUZIONI E POLITICHE CULTURALI *supra* note 402 at 335 ("Tranne che per questi immobili [il cui interesse deriva dal loro riferimento alla storia politica, militare e culturale], viene mantenuto fermo il principio di non estendere la speciale tutela alle opere di autori viventi o la cui esecuzione non risalga ad oltre cinquant'anni. Una tale estensione – spiega la relazione- non solo avrebbe intralciato il commercio degli oggetti d'arte, ma avrebbe presentato il pericolo di affrettati giudizi sul valore di artisti viventi o di opere di molto recente esecuzione.")

⁴⁹⁸ Disegno di legge: "Tutela delle cose d'interesse artistico e storico" (n. 154), in ISTITUZIONI E POLITICHE CULTURALI, *supra* note 402 at 408-409 ("Una tale estensione, non solo avrebbe intralciato il commercio degli oggetti, ma avrebbe presentato il pericolo di affrettati giudizi sul valore di artisti viventi o di opere di molto recente esecuzione, che il tempo potrebbe molto spesso modificare.")

⁴⁹⁹ *Id.*

The thresholds are also distinctly practical; a time threshold should take traditional public interests in protecting certain objects as much into account as both public and private interests in the marketability of these objects.

These early conception of time thresholds as related to specific categories of objects and as embedded in a greater web of the interests are indicative for how modern and contemporary Italian fashion design objects may be cultural property today. Italian fashion design objects may not need to be fifty years of age in order to be recognized as of a public cultural interest. While we noted above that a public cultural interest in a particular Italian fashion design object would not be the same as identifying fashion trends, that does not mean that an Italian fashion design object could not, like a building where an important treaty was signed or a pen that was used to sign that treaty⁵⁰⁰, be deemed of cultural interest soon after its creation. Here, we might think of Gianni Versace's design objects and the presentation of his designs, soon after his death, as landmarks by Richard Martin. The public cultural interest in Versace's design objects may be considered so evident that we do not need to wait fifty years. Taking this a step further, the non-living author requirement may not even need to apply, as it does not currently for certain objects of public cultural interest for their reference to specific historical moments. Here, we might think of certain design objects by Armani- the suit designed for Richard Gere in *American Gigolo* for example, on view at Armani/Silos. We might consider such a design object sufficiently indicative of a cultural moment in film to classify it as a cultural property.

Time thresholds for cultural property continued to be discussed in Italy throughout the 20th century. Indeed, some legal scholars and cases seemed to suggest that no object of any historic interest should be subject to a time threshold in order to enter the cultural property "box."⁵⁰¹ Indeed, some doctrine did not even accept that non-living authors and a specific time threshold should be an *unicum* in Italian cultural property law. Grisolia, for example, again in his book *La Tutela delle Cose d'Arte*, notes that the requirement of non-living authors and specific time thresholds might plausibly

⁵⁰⁰ Some cases suggest the object's relationship with a historical event, the use of the object in a historical event, or the holding of a historical event within an immovable object to be enough. See Const. St., VI, 28 Febbraio 1990 n. 321.

⁵⁰¹ See ALIBRANDI AND FERRI, *supra* n. 378 at 208- 209 (citing to Cons. di Stato, Sez. VI, 30 Dicembre 1960, n. 1017 in *Cons. Stato*, I, 2185 holding the temporal limit applies to works of artistic interest, but not works of historic interest).

have to depend on the practicalities and unique requirements of the subject matter which, at times, might require them in order to protect living authors.⁵⁰² Grisolia argued that the requirement of a non-living author and a specific time threshold should be able to be overcome, especially for recent works by long-living authors. He grounded such an argument in the very purpose of the protection of movable objects of cultural interest under the law and the strong public interest in protection and preservation.⁵⁰³

Grisolia imagines that time thresholds and non-living author requirements, *analyzing Italian cultural property law and not copyright*, would frustrate a protection of the popular arts (or what would be termed traditional, indigenous or community works in English). For objects of these popular arts, Grisolia explains, the requirements of age and non-living authors is particularly limiting; not only are the popular arts, a strong part of Italy's cultural heritage, created by groups of people and not one author⁵⁰⁴, but they also cannot, therefore, be easily characterized as of a certain age.⁵⁰⁵ Here, Grisolia foreshadows a classic critique of U.S. copyright law as applied to the cultural expressions of indigenous peoples. Preservation, the purpose of Italian cultural property law, finds some common ground with arguments contesting the efficacy of the current copyright framework for certain subject matters.

Here, in applying this Italian doctrine to modern and contemporary Italian fashion design objects, we find ourselves here at a sort of crossroads. As Italian fashion history has shown us, regional costumes and traditions were central to early ideas of what Italian fashion actually was. Italian fashion today, however, is not immediately identified with regional communities. It is instead associated with individual designers who fulfill romantic definitions of an author or who satisfy the notion of one author because these design objects are assigned to a corporation. In this sense, modern and contemporary Italian fashion design objects have potentially succeeded in overcoming the critiques of romantic

⁵⁰² GRISOLIA, *supra* n. 431 at 269- 270.

⁵⁰³ GRISOLIA, *supra* n. 431 at 271, footnote 2 (noting the changing temporal requirements of other laws in the pre-unification Italian states, based on importance of the object) .

⁵⁰⁴ Mario Grisolia, *La tutela delle arti e delle tradizioni popolari* [hereinafter Grisolia, *La tutela*], reprinted in ISTITUZIONI E POLITICHE CULTURALI *supra* n. 402 at 385 (“...per le arte e tradizioni popolari, ... l’artista non è un individuo, ma è un intero gruppo etnico.”) Grisolia also notes that protection for traditional and popular arts could be indirect or not connected to an object, which we will return to *infra*.

⁵⁰⁵ Although note that this is not an inference that Grisolia explicitly draws in his short article, but it is rather implied.

authorship, which Grisolia levied at Italian cultural property law in his discussion of the time *unicum* and which authors like Michael Brown⁸⁶ also critically explore. Effectively embracing and yet denying the complexity of the authorship of their creative process, Italian fashion companies could cheat the system, if you will, and successfully fulfill both the idea of authorship in Italian cultural property law and copyright, which even the traditional seamstresses of regional Italy could not do. Dolce & Gabbana, for example, which takes its inspiration from Sicily and Naples, could effectively stand in as a representative for this regional fashion design cultural heritage in Italy.

While complementary time thresholds might divide cultural property law and copyright law, they also might not provide any barrier if the administration so chooses. Depending into what category one classifies Italian fashion design objects, they could be protected as cultural property as an individual design object at the same time as their dissemination and copying is controlled through copyright, depending of course on what is classified as copyrightable subject matter. In some ways, this is already what is happening in the shadow of the law in the U.S. when Italian fashion companies orchestrate a donation to a fashion museum, allowing the museum to stand in for the administration's role in Italian cultural property law, and then proceed to control the photographing of the dress in the galleries and dissemination of images of the article in promotional materials, notwithstanding an argument that an entire fashion design is not copyrightable. Whether the *unicum* is satisfied or not, museums (especially private ones owned by Italian fashion companies) and Italian fashion companies working together can effectively create a dual cultural property / copyright regime for certain Italian fashion design objects. It seems highly doubtful that such unmitigated control of fashion design objects and aspects of fashion design is how our public cultural interest in fashion should be actuated. Italian fashion design objects may need time thresholds and even other temporal boundaries more than any other subject matter of cultural property.

A time threshold is not, however, constitutionally mandated under Italian law. Ratified in 1948, the Italian Constitution included various articles which both specifically and generally applied to the protection of objects of artistic or historic interest. None of the articles, on their face, mention a temporal requirement. The

⁸⁶ See Brown, *Heritage as Property supra* n. 1 at 55; Brown, *Can Culture supra* note 54 at 197.

exhortation to safeguard Italy's "natural landscape and the historical and artistic heritage" and the duty to "promote the development of culture" in Article 9 do not indicate for how long or even when.⁵⁰⁷ This is, of course, unlike the Intellectual Property Clause of the United States' Constitution, which mandates exclusive rights "for limited times."⁵⁰⁸

The time thresholds applicable to movable objects of artistic or historic interest in the 1939 law continued to apply until the creation of the 1999 Testo Unico, a unification of the many diverse regulations and laws which had worked to protect these objects. During these sixty years, case law and legal doctrine continued to make judgments with reference to the temporal requirements embodied in the 1939 law and some dispel even further the need for specific time thresholds or the *unicum*.⁵⁰⁹

In 1966 the Commissione Franceschini, focusing on a redefinition of the very cultural essence of cultural property following the term's use at the international level⁵¹⁰, also explored time thresholds. The Commissione closely related them to the type of objects to be protected and also valorized. Emphasizing objects' historical interest over their artistic interest, the Commissione noted that the principal of differentiation upon which they based their presentation of what should constitute cultural property under Italian law meant that "*ogni categoria di bene culturale porta l'indicazione dei particolari caratteri la cui riconosciuta consistenza consente di emettere la dichiarazione.*"⁵¹¹ Certain or fixed time

⁵⁰⁷ Art. 9, Costituzione [Cost.] (It.) (for the English translation see https://www.senato.it/application/xmanager/projects/leg18/file/repository/relazioni/libreria/novita/XVII/COST_INGLESE.pdf.)

⁵⁰⁸ United States Constitution, Article I, §8, cl. 8.

⁵⁰⁹ For a discussion of these past cases see ALIBRANDI AND FERRI *supra* note 378 at 209-210.

⁵¹⁰ CASINI, EREDITARE IL FUTURO *supra* note 63 at 48, n. 4 (citing to GRISOLIA, *supra* n. 431 at 145 (1952).

⁵¹¹ PER LA SALVEZZA DEI BENI CULTURALI IN ITALIA: ATTE E DOCUMENTI DELLA COMMISSIONE D'INDAGINE PER LA TUTELA E LA VALORIZZAZIONE DEL PATRIMONIO STORICO, ARCHEOLOGICO, ARTISTICO E DEL PAESAGGIO Vol. 1, 10-11 (Casa Editrice Colombo, Roma, 1967) [hereinafter PER LA SALVEZZA]. While the term *dichiarazione* is used today to refer to declarations that certain private property is cultural property under Italian law, the Commissione Franceschini used the term to refer to all determinations that a property was a cultural property, whether in public or private hands: "Per l'esercizio di tutti gli altri poteri e per l'assoggettamento agli obblighi specifici ulteriormente previsti, è necessario per contro un apposito 'atto di riconoscimento' di tale qualità (*Dichiarazione di Bene culturale*), che serve sì può dire ad innescare le varie situazioni soggettive. Innovando profondamente si è inoltre ritenuto che ad un tale procedimento non vi debbano essere eccezioni: l'atto di riconoscimento, o dichiarazione, è quindi sempre necessario anche nei

thresholds here do not exist for some objects, such as archeological ones; they are superfluous.⁵¹² For newly created objects, however, the Commissione Franceschini still recommended a fifty year time threshold.⁵¹³ Still other objects required time thresholds not for protection, but for their use: documents of public entities were recommended to be opened to the public within forty years, while private documents were to be open to the public only after seventy years.⁵¹⁴ Here we see a similarity to how the Library of Congress or the National Archives treat presidential papers and other sensitive correspondence, even without an American cultural property law for movable objects.⁵¹⁵ We also see an implicit exchange between copyright and cultural property law through the imposition of specific time thresholds at either end of the life of an object.

As part of their expansion of the historical criteria under which property could be classified as cultural property under the law, the Commissione Franceschini also addressed the circumstances under which contemporary art and decorative and applied arts could be of particular significance

*Di massima le cose d'arte contemporanea non sono assoggettabili a tutela prima di 50 anni dalla loro produzione tuttavia, quando siano particolarmente significative per valori rappresentativi o intrinseci, cose d'arte, anche decorativa o applicativa, possono essere assoggettate a dichiarazione ancor prima di tale termine.*⁵¹⁶

The 1999 Testo Unico incorporated many of the Commissione Franceschini's recommendations. For movable objects of artistic and historic interest it kept the requirement of more than fifty years old and a non-living author.⁵¹⁷ At the same time, it incorporated other time thresholds based on the category of subject matter: codifying

confronti degli altri organi dello Stato: e ciò per esigenze di chiarezza e soprattutto di ordine (Dichiarazione IV)." *Id.*

⁵¹² *Id.* at 11-12.

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ SAX, *supra* note 78 at 84 - 116. The Library of Congress' actuation of its mission "to support the Congress in fulfilling its constitutional duties and to further the progress of knowledge and creativity for the benefit of the American people" includes "preserving, and providing access to a universal collection of knowledge and the record of America's creativity." Preservation and Re-Use of Copyrighted Works, Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representative, 113rd Congress, April 2, 2014 at 9.

⁵¹⁶ *Id.* at 64- 65 (Dichiarazione XXXIII).

⁵¹⁷ Art. 2, comma 6, Decreto Legislativo 29 ottobre 1999, n. 490, G.U. 27 Dec. 1999 n. 302 (It.), available at <http://www.liguria.beniculturali.it/PDFs/normativa/DLGS.490-99.pdf>.

other laws and regulations, including those from 1939, the Testo Unico allowed photographs and other material examples of film or music to be classified as cultural property if they were at least twenty-five years of age.⁵¹⁸ Time thresholds also played a role in deciding when copies of works of art sold on the market were subject to specific record-keeping and procedures.⁵¹⁹ On the other hand, time thresholds did and still do not play a role for the forgery of works, or the ascertainment of their provenance, which is regulated no matter how old the work of art is.⁵²⁰ This imposition and lack of a time threshold also indicates the purpose of Italian cultural property – preserving the public cultural interest not just in specific properties, but in the relationship between specific tangible properties and the intangible cultural interests that are connected to them. As foreshadowed with the mention of property as a “bundle of relationships” above, Italian cultural property law seems concerned with regulating the relationship between the public and an object through the relationship between intangible cultural interests and tangible objects. This is, perhaps, similar to how copyright is concerned with regulating the relationship between authors and the public through the relationship between cultural expressions and their fixations in various material.

The Code of Cultural Property and Landscape came into effect in Italy in 2004. Codifying the Testo Unico and operating within the long history of the regulation of cultural property in Italy, one of the things the Code did over time was create two different time thresholds for movable and immovable objects. At the time of its passage the Code applied the time threshold of fifty years and of a non-living author to all individual works of artistic or historic interest, whether immovable or movable.⁵²¹ In 2011, however, a decree-law related to public contracts⁵²² raised the temporal limit: immovable objects in public property needed to be seventy years of

⁵¹⁸ Art. 3, comma 1(d), D.L. 490/1999.

⁵¹⁹ The buying and selling of copies of original works of sculpture which were over fifty years old and made in the same way as their original had to be, for example, made note of in registries sent to the field offices of the Ministry of Culture. Art 62, D.L. 490/1999. See also Allegato A, D.L. 490/1999.

⁵²⁰ DIRITTO DEL PATRIMONIO CULTURALE *supra* note 378 at 42-43. See also Art. 64 and 65 in today’s CODICE DEI BENI CULTURALI E DEL PAESAGGIO, D.L. n. 42/2004, available at <http://www.altalex.com/documents/news/2014/09/15/codice-dei-beni-culturali-e-dell-ambiente-parte-ii-beni-culturali#titolo2>. The T.U. contained this rule in Art. 178. See DIRITTO E GESTIONE DEL PATRIMONIO CULTURALE 31 (Barbati et al, eds., 2011).

⁵²¹ See Art. 10(5) of the CODICE DEI BENI CULTURALI E DEL PAESAGGIO, D.L. 42/2004, prior to changes, available at <http://www.bncrm.beniculturali.it/getFile.php?id=466>.

⁵²² Decreto-legge 13 maggio 2011, n. 70, G.U. 13 May 2011, n. 110.

age in order to be classified as cultural property.⁵²³ The goal of this change was to reduce the time of public works' construction and to generally simplify the process.⁵²⁴ Individual movable objects, however, as well as immovable objects in private property excluded from the scope of public works projects, kept the temporal requirement of fifty years.⁵²⁵

Here, the practical needs to properly execute and regulate public contracts affect the imposition of a time threshold. The efficacy of contract takes a backseat to preservation. Time does not operate in a vacuum, but is malleable. Time is also related to specific categories of objects and to the types of people or institutions who own the objects. Once again, there is a distinct concern with the relationship between age and public and private interests in our contemporary times which echoes the description by Bottai in his presentation of the 1939 law to the government. These interests profoundly shape time thresholds under Italian cultural property law.

In 2018 the temporal requirements for cultural property were changed once again. After increasing comments by members of the antiquities markets and the awareness that many works of contemporary artists from the post-war era were set to potentially age in to the cultural property "box" as individual works, the time threshold in Italian cultural property law for individual movable things of cultural interest, whether in public or private hands, was raised to seventy years, matching the previous increase for immovable things of public property.⁵²⁶ This change was also related

⁵²³ See art. 4(1)(r) and art. 4(16)(a), D.L. n. 70/2011. See also the Opinion rendered by the Ministry of Cultural Heritage: Parere del 3 agosto 2016, MIBACT-UDCM LEGISLATIVO 0023305-03/08/2016 Al Segretariato Generale CI. 02.0100/64.5. See also *Immobili pubblici vincolati, 50 o 70 anni la soglia per considerarli vincolati?*, BIBLUS-NET, 6 Ottobre 2016, <http://biblus.acca.it/immobili-pubblici-vincolati-50-o-70-anni-la-soglia-per-considerarli-vincolati/>.

⁵²⁴ Art. 4(1)(r), D.L. n. 70/2011 ("Per ridurre i tempi di costruzione delle opere pubbliche, soprattutto se di interesse strategico, per semplificare le procedure di affidamento dei relativi contratti pubblici, per garantire un più efficace sistema di controllo e infine per ridurre il contenzioso, sono apportate alla disciplina vigente, in particolare, le modificazioni che seguono...").

⁵²⁵ Art. 4(16)(a), D.L. n. 70/2011 ("Salvo quanto disposto dagli articoli 64 e 178, non sono soggette alla disciplina del presente Titolo le cose indicate al comma 1 che siano opera di autore vivente o la cui esecuzione non risalga ad oltre cinquanta anni, se mobili, o ad oltre settanta anni, se immobili, nonché le cose indicate al comma 3, lettere a) ed e), che siano opera di autore vivente o la cui esecuzione non risalga ad oltre cinquanta anni").

⁵²⁶ For an open letter from some prominent art historians protesting such a change, with arguments that it would lead to a loss of the works of many post-war artists from the Italian territory see *L'Appello a Mattarella- "I beni culturali non sono commerciali: presidente non firmi il Dl Concorrenza"*, IL FATTO QUOTIDIANO (4 Agosto 2017),

to, and made at the same time as, changes to the exportation of artworks under Italian cultural property law.⁵²⁷ Time thresholds for individual works and monetary limits were instituted with an awareness of how they would interact and comply with European Union regulations.⁵²⁸ At the same time as this time threshold was made for movable objects, another potential category of things that could qualify as cultural property was codified. Things that are of an exceptional artistic, historical, archeological or ethnoanthropological interest for the integrity and completeness of Italy's cultural heritage need to be by a non-living author and more than fifty, not seventy, years old.⁵²⁹ Once again, time in Italian cultural property law is not a bright line rule, but is rather deeply connected to types of things, the public cultural interest in them, and even market forces and practicalities.

Italian cultural property law shows us that time and its inclusion as an *unicum* with a non-living author requirement is but one way to solve the dilemma of when certain objects are cultural property. Time as applied to cultural property is highly context dependent and specific to the intangible public cultural interests that surround tangible objects. It is striking how much this legacy of time opens the door for modern and contemporary Italian fashion design objects. An argument that Italian fashion design is of the moment or changing need not bar the classification of Italian fashion design objects as cultural property altogether. While we may wish to take market practicalities and requirements into account, time alone is not a determinative factor and is a resolvable dilemma.

2.3 The tyranny of “things”

Perhaps the biggest dilemma in Italian cultural property law is the

<https://www.ilfattoquotidiano.it/2017/08/04/lappello-a-mattarella-i-beni-culturali-non-sono-commerciali-presidente-non-firmi-il-dl-concorrenza/3774966/> (“Ne consegue la perdita immediata e diretta di tutti i beni culturali realizzati fra il 1947 e il 1967, di proprietà pubblica o di persone giuridiche private senza fine di lucro, che il Codice dei beni culturali e del paesaggio ha finora tutelato in virtù del combinato disposto degli artt. 10 comma 1 e 12 comma 1, nonché l'impossibilità di proteggere in futuro tutti i beni realizzati nello stesso torno di anni.”) See Art. 175, L. 124 del 4 Agosto 2017 in G.U. 14-08-2017 n. 189 (updating Art. 10, D.L. 22 Gennaio 2004 n. 42). For a detailed explanation of these changes within the legislature see Legislatura 17^a - Dossier n. 494 2, https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/0/1029805/index.html?part=dossier_dossier1-sezione_sezione13-h2_h266 or Schede di lettura luglio 2017 Legge annuale per il mercato e la concorrenza, A.S. n. 2085-B (Luglio 2017) at 237 – 248.

⁵²⁷ Legislatura 17^a - Dossier n. 494 2, *supra* n. 527.

⁵²⁸ *Id.*

⁵²⁹ Art. 10(3)(d-bis), D.L. 42/2004.

dichotomy between the tangible and the intangible. At the international level cultural heritage law distinguishes between intangible cultural heritage and tangible cultural heritage, or cultural property.⁵³⁰ There are some things, the narrative goes, that are so intangible, that are so susceptible to cultural exchange, that they are not tied to one material and therefore cannot really be possessed or controlled; rather their safeguarding needs to be actuated through other ways, such as through lists or incentives or other supportive mechanisms.⁵³¹ While we can of course identify properties which are more tangible than others, the dichotomy between tangible and intangible property when property is conceived of as a “bundle of relationships” or “rights”, frustrates a clear distinction between the two different types of cultural heritage.⁵³² Such a theory of property also frustrates a clear distinction between cultural property law and other legal regimes, like copyright, that apply to the same types of subject matter as cultural property (works of art, literary works, etc).

Understanding the legal notion of cultural property is further frustrated by much of the literature focusing on intangible cultural heritage: this literature turns to copyright to resolve the inefficacy of safeguarding mechanisms and other forms of self-help or explores

⁵³⁰ Cultural property as a term is used in the 1954 HAGUE Convention for the Protection of Cultural Property in Armed Conflict (defining cultural property in terms of its relevance to all mankind) and in the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property (allowing individual nations to define cultural property). Intangible cultural heritage is defined in the 2003 Convention for the Safeguarding of Intangible Cultural Heritage. Other relevant conventions at the international level also include the 1972 World Heritage Convention, which takes the different criteria of outstanding universal value to examine natural and cultural heritage. For an overview of this with regards to nationalism see Lorenzo Casini, *International regulation of historic buildings and nationalism: the role of UNESCO* 24(1) NATIONS AND NATIONALISM (2018), <https://doi.org/10.1111/nana.12377>.

⁵³¹ See generally, 2003 Convention for the Safeguarding of Intangible Cultural Heritage. This is also the same type of argument that is made for cultural activities under Italian law. See DIRITTO DEL PATRIMONIO CULTURALE *supra* note 378 at 36 (“Per altre entità in campo culturale si configura una disciplina pubblicistica distinta da quella relativa ai beni culturali in senso proprio. È il caso delle attività culturali, che ‘riguardano tutte le attività riconducibili alla elaborazione e diffusione della cultura’ (citing to Corte cost., sent. 19 Luglio 2005, n. 285, and 21 Luglio 2004, n. 255). Menzionate separatamente dall’art. 117, comma 3, Cost. non sono soggette al regime giuridico dei beni culturali perché non riconducibili ai tipi di cui agli art. 10 e 11 Cod. La loro proiezione verso il futuro (la formazione e la diffusione della cultura e dell’arte) le differenzerebbe, sul piano sostanziale, dai beni culturali, materiali e immateriali (aventi oggetto attività), da intendersi come ‘memorie ereditate dal passato.’”)

⁵³² Italian cultural property law has also been characterized in the past as apposite of the traditional evolution of property and property law towards individual property rights, making an ascertainment of its legal nature even more complex. Camera dei Deputati, Seduta del 15 Maggio 1909 in EMILIANI, *supra* note 381 at 201-202.

whether copyright can be a solution for intangible cultural heritage protection due to the nature of cultural exchange.⁵³³ Studies of copyright or intellectual property itself that properly imagine the cultural control and dialectical conversation the law allows or frustrates⁵³⁴, can also muddy the cultural property waters.

Italian cultural property law gives us ways to think through the comparisons between the tangible and the intangible. It also provides tools with which to consider the dilemma of how to regulate (or not) certain seemingly unregulable aspects of our culture. Italian cultural property law shows us that cultural property is in fact not just about tangible objects. Preservation of tangible objects may be the result of the application of cultural property law, but the preservation of a thing is not what defines cultural property under Italian cultural property law in the first place. In this way, Italian cultural property law is not, in fact, so separate from other legal regimes, like copyright, that seek to protect cultural expressions that are fixed somewhere. In addition, the way in which Italian cultural property law sometimes acts, forbidding the reproduction of certain cultural properties, is like a copyright regime. The division that is made at the international level between intangible and tangible cultural heritage is at times hard to draw in Italian cultural property law. At other times, however, the division between the tangible and intangible, or what is in or out of the cultural property “box”, seems clear. Indeed, notwithstanding an, at times adamant, statement that it only protects tangible property, Italian cultural property law seems to embrace a shifting boundary between the tangible and intangible in its conception of property on a case by case basis.

Historically, while imposing duties of conservation and exportation prohibitions that may be characterized as exercises of intangible rights, Italian cultural property law was characterized by tangibility in the law itself through the use of the term *cosa* or “thing.”⁵³⁵ The use of “thing”, notwithstanding the intangible rights and duties mandated by Italian cultural property law which applied to the object and affected the scope of cultural property, has created a lasting legacy of tangibility.⁵³⁶ What is now understood as protected

⁵³³ See Brown, *Can Culture*, *supra* note 54, as one example with responses by Rosemary J. Coombe, among others.

⁵³⁴ See ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* (1998).

⁵³⁵ See *supra* L. n. 185/1902 and L. n. 364/1909.

⁵³⁶ CASINI, *EREDITARE IL FUTURO*, *supra* note 63 at 48- 49.

and valorized under Italian cultural property law as a cultural property is still understood as what is tangible property alone. As evidenced by case-law on the subject⁵²⁷, the subject matter of Italian cultural property law is circumscribed by tangibility, and even specific tangibility at that. Cultural activities, for example, or activities of artisanship can be protected at the regional level and only at the State level through fiscal incentives and programs, but not as cultural properties under Italian cultural property law.⁵²⁸

At the same time, however, Italian cultural property law identifies a

⁵²⁷ Cort. Cost. N. 118/1990, *cortecostituzionale.it* (“*Allorché l’importanza storico-culturale di un bene dipenda dalla sua utilizzazione progressiva, quest’ultima non assume rilievo autonomo, separato e distinto, ma si compenetra nelle cose che ne costituiscono il supporto materiale e, quindi, non può essere protetta separatamente dal bene.*”). But see Cort. Cost. n. 94/2003 (holding the Lazio region’s protection of historic places not to be contrary to the State’s exclusive power to identify and protect cultural property in Italy because “[l]a legge regionale del Lazio n. 31 del 2001 non pretende... di determinare una nuova categoria di beni culturali ai sensi del d.lgs. n. 490 del 1999, ma prevede semplicemente una disciplina per la salvaguardia degli ‘esercizi commerciali ed artigianali del Lazio aperti al pubblico che hanno valore storico, artistico, ambientale o la cui attività costituisce testimonianza storica, culturale, tradizionale, anche con riferimento agli antichi mestieri.’... [la] qualificazione [come locale storico] rende semplicemente ad essi applicabile la speciale disciplina della legge regionale in tema di finanziamenti per la loro valorizzazione e per il sostegno delle spese connesse all’aumento dei canoni di locazione, senza produrre alcuno dei vincoli tipici della speciale tutela dei beni culturali...”). On the subject of the scope of cultural property protection as it is defined in Italian law between the State and the regions see L. Casini, *Le parole e le cose: la nozione giuridica di bene culturale nella legislazione regionale* in 3 *GIORNALE DI DIRITTO AMMINISTRATIVO* (2014).

⁵²⁸ An example of a regional law which valorizes artisanship is Legge regionale n. 76 del 11 Novembre 2016 (in which the region of Tuscany “*dispone interventi a sostegno del tessuto culturale dell’identità toscana, nonché di attività che si svolgono in contesti caratterizzati da un’identità socio-commerciale e storico-culturale stratificata nel tempo.*”). While this split between protection by the State and valorization by both the State and the regions is found in Art. 117 of the Italian Constitution, Art. 45 of the Italian Constitution also provides that “*La legge provvede alla tutela e allo sviluppo dell’artigianato.*” In 1985 the State passed a law which provided a framework for the region’s valorization of craftsmanship. See Legge n. 443/1985, *Legge-quadro per l’artigianato*, G.U. n. 199 of 24 Agosto 1985. See also Decreto del Presidente della Repubblica n. 288/2001 in G.U. n. 164 of 17 Luglio 2001 (defining artistic craftsmanship and clothing made to measure for the purposes of Law n. 443/1985). Some valorization activity at the State level has been contested by the regions. See Cort. Cost. n. 285/2005 (holding that valorization of cinematic and theatrical activities was properly legislated at both the State and regional level). See also *DIRITTO DEL PATRIMONIO CULTURALE supra* n. 378 at 36 (citing to the case to define attività culturali as those which “*riguardano tutte le attività riconducibili alla elaborazione e diffusione della cultura*”). Giannini also explains the division between protection at the State level and concurrent valorization between the State and regional levels as one which is grounded in preventing the polarization of cultural property: “*in Toscana si dichiarerebbe beni culturali tutti i vasi, in Sicilia si dichiarerebbe tutti i carretti, e questo non si potrebbe ammettere, perché l’individuazione del bene culturale non può rispondere che a criteri unitari e, quindi, occorrono uffici unitari in grado di dire quando è che un bene ha natura culturale.*” Massimo Severo Giannini, *I beni culturali tra principi e società; Beni culturali e interessi religiosi. Atti del Convegno di studi Napoli, 1981, (1983)* in *SCRITTI*, Vol 7, 899 (2005).

relationship as at the core of its definition of cultural property. This relationship is one between the public cultural interest, which is intangible, and a tangible object. Italian cultural property law, while emphasizing tangibility, recognizes that it is a unique combination of the intangible, public cultural interest with tangible things that makes certain property cultural property.

Some chipping away at the emphasis on cultural property as a physical thing was evident in the early 20th century. Early Italian cultural property laws contain references to collections and groups of things as early as 1902.⁵³⁹ Including groups of things, to a certain extent, denies that things alone are important to the definition of cultural property. Indeed, it implies that a relationship between different things in reference to something is what counts. Recent administrative decisions deciding when series or collections of objects are cultural property highlight this.⁵⁴⁰ While the 1909 law refers only to things, in the 1920s complementary laws slowly but surely enlarged the category to include ancient manuscripts, rare prints and engravings, and even villas, parks and gardens of artistic or historic interest.⁵⁴¹ Here, rarity is the evaluative criteria for objects that exist in multiples, and parks, which are by nature changeable, are also deemed sufficiently tangible. The laws passed in 1939, while splitting the regulations between movable objects of historic interest in law n. 1089 and landscape and immovable objects in law n. 1497⁵⁴², added series of things and collections of things of exceptional interest belonging to anyone.⁵⁴³ A slow but sure evolution of subject matter, before the inclusion of the term cultural property in the law, begs the question of what these different things had in common such that they could all be regulated as of artistic or historic, or still other, public interest. Certainly it is not simple materiality or tangibility alone.

This is not to say that, as the scope of objects of artistic or historic

⁵³⁹ Art 2, L. n. 185/1902.

⁵⁴⁰ See T.A.R. Sez. II, 8 Ottobre 2008, n. 8824 (deciding that a private collection of paintings created a collection worthy of a declaration as cultural property because of a common characteristic, the fact that they had been mentioned in a 1790 catalog).

⁵⁴¹ See L. n. 364/1909, Testo Coordinato (included modifications from L. 23 giugno 1912, n. 688 (G.U. 8 luglio 1912, n. 160), R.D.L. 24 novembre 1927, n. 2461 (G.U. 7 gennaio 1928, n. 5), convertito, nella L. 31 maggio 1928, n. 1240 (G.U. 18 giugno 1928, n. 141).

⁵⁴² For a description of this separation and the aestheticized judgment influenced by Benedetto Croce see T. Alibrandi, *L'evoluzione del concetto di bene culturale* [hereinafter Alibrandi, *L'evoluzione*], relazione al Convegno di Gubbio 26-27 novembre 1999 su Il Testo unico in materia di beni culturali e ambientali, FA, 1999 at 2703.

⁵⁴³ See discussion by Bottai in Disegno di legge: "Tutela delle cose d'interesse artistico e storico" (n. 154), in ISTITUZIONI E POLITICHE CULTURALI *supra* note 402.

interest was expanding, cultural property law conceived of itself as protecting rights that would *not* follow objects. In his book *Tutela delle cose d'arte*, Grisolia, as part of his broader analysis of real property rights and public domain rights within administrative law⁵⁴⁴, emphasizes that laws protecting works of art for the distinct public function dictated by the collective interest in the object need that tangible object.⁵⁴⁵ Italian cultural property law, in this sense, is distinctly about rights to a tangible, about real property rights, and cannot be characterized, for example, as personality rights, which would not follow an object, but, rather a specific person.⁵⁴⁶ In this sense, tangibility is a limit to an expanding notion of cultural property in Italian cultural property law. It is not, however, tangibility alone that defines the legal notion of cultural property.

As the category of cultural property expanded in Italy, the limit of tangibility proved important. Grisolia, for example, considered whether traditional and popular arts should be included in the legal category with reference to tangibility. The inclusion of an ethnographic interest in article 1 of l. n. 1089 of 1939, alongside the artistic and historic interest, opened the door for the protection of such traditional arts and crafts.⁵⁴⁷ Foreshadowing discussions about indigenous cultural heritage today, Grisolia noted that before protecting these “*manifestazioni artistiche, letterarie e religiose...le espressioni più caratteristiche della loro attività marinara, agricola, industriale, commerciale e, in genere, professionale, in quanto, s'intende, abbiano carattere paesano*”⁵⁴⁸ under a special law, drafters and legislators should think about whether these traditional arts and crafts were already protected through indirect means in the past or even through other means of and tools developed in the ways of life which had produced these traditional arts and crafts in the first place.⁵⁴⁹ For Grisolia, when “*per l'arte e tradizioni popolari, la sfera di tutela non può restringersi alle cose, come invece accade per l'arte antica, i monumenti e le bellezze naturali*”⁵⁵⁰ other forms of non-cultural property protection were needed.

⁵⁴⁴ Grisolia's observation about how important the *bene* is to the Public Administration's rights to a work of artistic interest is made in the context of his examination of the differences between *la natura del diritto reale*, which has internal and external components, and *la natura del diritto demaniale*. See GRISOLIA, *supra* note 431 at 216- 218.

⁵⁴⁵ *Id.* at 219.

⁵⁴⁶ *Id.* at 219, footnote 1.

⁵⁴⁷ See the article in Grisolia, *La tutela*, *supra* note 504 at 384.

⁵⁴⁸ *Id.* at 386.

⁵⁴⁹ *Id.* at 386.

⁵⁵⁰ *Id.* at 385.

The reasons for which “*la sfera di tutela*” could not comprise things that were not *cose* under Italian cultural property law fundamentally had to do with the nature of preservation. Far from a “freezing” of objects across the board, the point of preservation in Italian cultural property law, gleaned from these sources, is to protect the cultural relationship which the public has with an object. If that relationship, the fixing of the public’s interest, is not tied to the object but to an intangible property, an activity, a sharing, if the object is not needed, then that relationship may be protected in ways separate from Italian cultural property law.

Giannini’s work best exemplifies the shift from cultural property as a tangible thing to cultural property as a relationship based on an assignment of an intangible public cultural interest to a tangible thing. Prior to Giannini’s work on the topic the Commissione Franceschini had expanded the definition of what constituted cultural property by defining it as a material testament having the value of civilization.⁵⁵¹ It had also examined categories of objects, beyond contemporary art⁵⁵², and their particular qualities. Although the Commission did not address fashion specifically, it did mention works which exhibit similar overlaps of form and function, contemporary use, historic or artistic importance, and testamentary value. Two of these categories were musical instruments and furniture.⁵⁵³ The descriptions of a public cultural interest in these objects, while not couched in intangible and tangible terms, were based, for musical instruments, on musical and artistic importance and their ability to testify to the artistic development of civilization.⁵⁵⁴ For furniture, historical interest, in part because of these objects’ use and role in households and other human habitats, was important.⁵⁵⁵

In his article *I Beni Culturali*, Giannini sets up a comparison between different objects that are all cultural property.

...com’è che sono beni culturali Palazzo Pitti, che è bene demaniale dello Stato, il Palazzo della Signora, bene patrimoniale indisponibile del Comune di Firenze, ed il palazzo di proprietà privata che si trovi nella medesima città, e come mai le alture del Golfo della Spezia, dichiarate

⁵⁵¹ PER LA SALVEZZA, *supra* note 511 at 6, 22.

⁵⁵² *Id.* at 64- 65.

⁵⁵³ *Id.* at 372- 375 (discussing musical instruments); 376- 379 (discussing furniture).

⁵⁵⁴ *Id.* at 372 (“Il valore di essi è duplice, in quanto va considerato nei suoi due aspetti: artistico e musicale. Fin dalle più lontana antichità gli strumenti musicali hanno seguito molto da vicino lo sviluppo artistico delle varie civiltà e delle varie epoche...”)

⁵⁵⁵ *Id.* at 376.

*bellezza paesistica, comprendano insieme beni del demanio militare, beni statali e comunali del patrimonio indisponibile e beni privati? Qual è l'elemento comune fra tutte queste cose, per cui esse sono beni culturali?*⁵⁵⁶

Elsewhere in the same article, Giannini also envisions a similar comparison between tangibles and intangibles in light of the inclusion of testaments having the value of civilization alongside more classic objects of historic or artistic interest:

Approfondendo e spiegando: le "Rime" di Petrarca appartengono al patrimonio culturale letterario del mondo; le tante edizioni di libri che di esse sono state fatte le riproducono e ne permettono la conoscenza diffusa, ossia sono moltiplicatori di circolazione materiale. A meno che non presentino particolare caratteri, quando al soggetto o all'oggetto, per cui possano divenire beni librari, i libri delle "Rime" sono cose costituenti supporto di beni patrimoniali, le "Rime" bene immateriale letterario: tra essi non vi è relazione diretta, ma solo la relazione indiretta che sorge allorché si ha una vicenda qualsiasi di riproduzione documentale. I manoscritti delle "Rime" sono invece una cosa contenente gli enunciati immediati della creazione letteraria, e per essere testimonianza materiale avente valore di civiltà, sono bene culturale (non importa come classificato o classificabile), ma in quanto cosa sono altresì supporto di un bene patrimoniale, oltretutto di presumibile elevatissimo valore. Se non esistessero, il patrimonio culturale sarebbe privo del manoscritto di un'opera letteraria eccelsa; ciò sarebbe un impoverimento ma non una mancanza irreparabile, poiché di tante grandi creazioni letterarie mancano i manoscritti. Peraltro, esistendo, sono un bene immateriale a sé e in più; bene che - si rilevi - è distinto dal bene immateriale letterario "Rime."⁵⁵⁷

For Giannini, then, what defines a cultural property under Italian law is the intangible public cultural interest we may identify in these properties. The way in which that intangible public cultural interest is negotiated with reference to the tangible object is what allows it to enter the cultural property "box" under Italian cultural property law. All the tangible buildings Giannini mentions above are seen as actuating, in their materiality, the public's cultural interest, whereas texts, like Petrarca's "Rime" are seen as actuating the public cultural interest at all times, no matter where they are placed. Some properties, like manuscripts, may be prized because, in their tangibility, apart from being the physical support of an

⁵⁵⁶ Giannini, *Beni Culturali*, supra note 466 at 21- 22.

⁵⁵⁷ *Id.* at 33.

intangible cultural property like text, they also actuate a public cultural interest because of their ability to testify to something- the physical touch of an author, or a community, a spark of creativity. These manuscripts are, for Giannini, still fundamentally intangible because the public cultural interest is still not completely tied to the book in its tangibility, but rather to its ability to reference something else- a creative process. Objects that are of artistic and historic interest, on the other hand, are understood as displaying a relationship between intangible public cultural interest and tangible object that is inseparable and therefore this allows them to be in the legal cultural property “box”, at the same time as they might still be the subject of economic rights or value.⁵⁵⁸

Apart from breaking down the tyranny of things, Giannini’s words also give us a way to connect cultural property and copyrightable subject matter that other authors have only explored from other angles.

Cultural property is defined by an intangible cultural interest or value exhibited by and for the public. Italian cultural property law decides to act to preserve that intangible cultural value which is of the public’s interest when that cultural value is tied to a specific property. There are ways in which items of cultural property can be classified as such while not completely exhibiting such an *unicum* between intangible cultural interest and tangible property, but these examples are limited to properties which we might note as testaments having the value of civilization like manuscripts, musical instruments, pieces of furniture, and even, at times, audiovisual material.⁵⁵⁹ Here, it is not a specific link that actuates the

⁵⁵⁸ *Id.* at 22, 27 (“Nei beni artistici e storici l’entità immateriale valore culturale inerisce anche alla cosa bene patrimoniale, ma di solito non è da questa separabile....Il pregio artistico o storico infatti è, in natura e prescindendo dalle qualificazioni giuridiche, inerente alla cosa: un quadro di grande autore, un mobile firmato, un palazzo abitabile...”)

⁵⁵⁹ *Id.* at 29 (“Infine i beni librari sono...cose non classificabili né come bene archivistici né come beni storico-artistici, ma cose per le quali essere beni culturali è legato all’essere strumenti di diffusione della cultura, in quanto documenti di manifestazioni del pensiero e dell’arte. Tali sono, infatti, i libri, gli stampati, i manifesti, le incisioni, conservati in biblioteche, emeroteche, gabinetti delle stampe, e così via. Se poi si estende l’attenzione ai mezzi audiovisivi, parimenti è evidente il loro essere strumenti di diffusione della cultura...non è che, come tali, questi documenti incorporino espressione d’arte o ne permettano la riproduzione; la parte maggiore delle espressioni conservate in questi documenti, fruibili o riproducibili, non hanno valore artistico o pregio di altra sorta; sono però pure sempre documenti di manifestazioni che aspirano a raggiungere valori culturali, e che per ciò solo si reputa vadano conservati dai pubblici poteri alla valutazione che ne potranno fare generazioni future.”) Giannini’s characterization of audiovisual materials in 1970s Italy finds a supportive partner in 2014 Congressional testimony

public's cultural interest, but a referral to something else. This is similar to the way a *belvedere* allows the actuation of a public's cultural interest in a vista.⁵⁶⁰ Because intangible public cultural interests might be actuated by properties no matter where they are placed, like with texts, then not only are they not protected but their physical supports are not either. These physical supports are not of public cultural interest- the text is, no matter where it is placed. In Giannini's presentation, these properties, in which an intangible public cultural interest attaches solely to an intangible, should not be in public law's purview, but in private law's:

...gli ordinamenti positivi si occupino solo di alcune, di quelle cioè per le quali si pongono ragioni pratiche di tutela pubblica...Per i beni delle altre specie può non porsi alcun problema di tutela (non è necessario, p. es. tutelare l'Illiade o le Partite di J.S. Bach), oppure possono porsi problemi di tutela privata o interprivata (ed è in questo il caput delle normazioni sulla proprietà letteraria, artistica, scientifica). È chiaro che il giorno in cui si ponessero, per volgersi di eventi della nostra società, problemi di tutela pubblica di altre specie di beni culturali oltre quelle per le quali già vi è una normazioni apposita, occorrerebbe provvedere.⁵⁶¹

For Giannini, for items like text there is no need for cultural property law to apply because the public cultural interest is protected without protecting the text itself as a cultural property. Copyright law, on the other hand, applies to these texts as a way to negotiate private relationships in these intangible objects of public cultural interest. The texts are not cultural property because there is, as yet, no need to protect them as such. This does not of course mean that they may not be regulated in the future, should the need arise.

Added to this placement of intangible text, or the relationship between intangible public cultural interest and intangible object, outside of the cultural property "box" in nations which do have

shedding light on the quantity of heritage that is lost when audiovisual materials cannot be preserved. Preservation and Re-Use of Copyrighted Works, Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representative, 113rd Congress, April 2, 2014 at 12- 14. There are also some U.S. cases that indicate an equation of a tangible property with an intangible intellectual property. See, for example, *Pushman v. New York Graphic Society*, 39 N.E. 2d 249, Jan. 15, 1942) (holding, when applying a common law copyright, that copyright in a painting passed with the sale of a tangible painting, "an artist must, if he wishes to retain or protect the reproduction right, make some reservation of that right when he sells the painting.").

⁵⁶⁰ *Id.* at 30.

⁵⁶¹ *Id.* at 34.

cultural property laws is Giannini's note that nations which do not have a cultural property legal regime at all, whether for tangible or intangible objects, allow objects to be goods held in common, or, we might say, goods in the public domain.⁵⁶² So what does this mean for intangible texts outside the cultural property "box" which find themselves in jurisdictions without cultural property law? We might think of these intangible properties like text, that are the same no matter where they are placed, as public domain items after copyright *because they actuate a public cultural interest*, after copyright's term limits have expired.

This proposal, that certain intangible properties age out of copyright and into a public domain because they are recognized as of public cultural interest, may, however, not be limited to copyright's expiration. A public cultural interest in certain copyrighted works may be evident and even actionable before the copyright term expires. Fair use provisions are a good example of how copyright law recognizes this and allows for the commenting and even celebration of works in an educational environment or not.⁵⁶³ Preservation in Section 108 of the 1976 Copyright Act is another example: cultural institutions may copy and make available to the public works they deem to "be of great historical, cultural and research importance."⁵⁶⁴ Like a time threshold is not necessarily a bright line rule for cultural consensus in cultural property law, so term limits are neither bright line rules for cultural interest.

Notwithstanding an expansion of the definition of cultural property in Italian law in the 1999 Testo Unico which seemed to include intangible text⁵⁶⁵, Italian cultural property law has not yet

⁵⁶² *Id.* at 27 ("...[U]n quadro di grande autore, un mobile firmato, un palazzo abitabile che siano beni culturali, come cose hanno valori commerciali talora altissimi, ovunque si trovino, ossia, per quanto qui interessa, tanto in un ordinamento la cui legislazione conosce la figura giuridica dei beni culturali, quanto in un ordinamento la cui legislazione ignora tale figura. Dal punto di vista giuridico, nel primo paese essi sono beni culturali, nel secondo sono beni, mobili o immobili, comuni.")

⁵⁶³ See for example, in a music case, the seminal *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵⁶⁴ Preservation and Re-Use of Copyrighted Works, Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representative, 113rd Congress, April 2, 2014 at 17 (proposing that such an exception begin twenty years before the expiration of the copyright term).

⁵⁶⁵ Alibrandi, *L'evoluzione*, *supra* note 542 at 2708- 2709 (the T.U. defined beni culturali as "quelli che compongono il patrimonio storico, artistico, monumentale, demotnoantropologico, archeologico, archivistico e librario e gli altri che costituiscono testimonianza avente valore di civiltà così individuate in base alla legge", seemingly, according to Alibrandi, opening the door for the protection of intangible cultural heritage like Dante's text of the *Divina*

found the need to, as Giannini says, regulate intangible properties of intangible public cultural interest. The inclusion of Art. 7-bis in the 2004 Code, which protects examples of intangible cultural heritage only insofar as they exhibit all the characteristics of cultural properties, in which the intangible public cultural interest is actuated by a tangible object, affirms that tangibility, notwithstanding the importance of a public's intangible cultural interest, is still a limit to the notion of cultural property under Italian cultural property law.

Some cases add nuance to this. A business activity, for example, might *be de facto* protected, but not required to be exercised, through the protection of a historic building⁶⁶. This is much as protecting manuscripts, to some extent, controls the protection of the text that is in them. Italian cultural property law has not yet, however, seen fit to definitively expand its purview to marriages of intangible public cultural interest and intangible objects like text in today's Code.

To sum up, in Italian cultural property law the tangible object is overwhelmingly protected because there is a unique relationship between a tangible object and our intangible public cultural interest. Other properties may be protected in their tangibility because they lead to something else: a beautiful vista, listening to a song, or learning about a movement. At the same time, however, there are certain properties which cannot be, even with the most tenuous links, related in their tangibility to the intangible cultural interest. Here the intangible public cultural interest attaches only

Commedia. In this sense, Alibrandi notes “*Si finisce così per invadere l’ambito di settori giuridici tradizionalmente diversificati dalla materia dei beni culturali (as esempio il diritto d’autore).*”)

⁶⁶ Cort. Cost. n. 118/1990 (“Il valore culturale dei beni di cui all’art. 2 su richiamato, al cui genere appartengono quelli di cui trattasi, è dato dal collegamento del loro uso e della loro utilizzazione pregressi con accadimenti della storia, della civiltà o del costume anche locale. In altri termini, essi possono essere stati o sono luoghi di incontri e di convegni di artisti, letterati, poeti, musicisti ecc.; sedi di dibattiti e discussioni sui più vari temi di cultura, comunque di interesse storico-culturale, rilevante ed importante, da accertarsi dalla pubblica amministrazione competente. La detta utilizzazione non assume rilievo autonomo, separato e distinto dal bene ma si compenetra nelle cose che ne costituiscono il supporto materiale e, quindi, non può essere protetta separatamente dal bene, come si pretenderebbe. L’esigenza di protezione culturale dei beni, determinata dalla loro utilizzazione e dal loro uso pregressi, si estrinseca in un vincolo di destinazione che agisce sulla proprietà del bene e può trovare giustificazione, per i profili costituzionali, nella funzione sociale che la proprietà privata deve svolgere (art. 42 della Costituzione). Il vincolo non può assolutamente riguardare l’attività culturale in sé e per sé, cioè, considerata separatamente dal bene, la quale attività, invece, deve essere libera secondo i precetti costituzionali (artt. 2, 9 e 33).”)

to the intangible object. For these things, like text, but also cultural activities, activities of artisanship, or even some traditional arts and crafts, our intangible public cultural interest is, in Giannini's interpretation and in other contemporary Italian legal doctrine, always attached to an intangible property. It is this relationship that is determinative for Italian cultural property law, and not necessarily things alone. Deciding whether there is a unity between the intangible public cultural interest and a tangible, or the intangible public cultural interest and an intangibles, is what is fundamental to cultural property under Italian cultural property law. We must negotiate the two and decide which applies for each object, including a fashion design object, in order to call it cultural property under Italian cultural property law.

3. The Dilemma of Copyright within the Italian Cultural Property Law Context

Public cultural interest, time, and things, while being dilemmas of cultural property under Italian law, also give us, as we have seen, tools with which to identify when a property is cultural property. The inverse question, however, is also important- when and why does Italian law choose to *not* protect certain properties as cultural property? As we have seen, the most bright-line rule that prohibits properties from the cultural property "box" is when a public cultural interest attaches to an intangible property that is the same no matter where it is places. Petrarca's *Rime* are Giannini's example. Copyright, in Giannini's opinion, is best suited to regulate these types of properties. From doctrine and legislative history it should be the case then that Italian cultural property law does not care about the relationship between intangible public cultural interest and these intangible properties at all. This is, however, not the case. There is an overlap between copyright and cultural property law in Italy *when cultural property law does regulate the relationship between an intangible public cultural interest and tangible objects through cultural property protection.*

If we follow Giannini's view, copyright is only a private law regime that regulates the relationship between private individuals for objects that are *not cultural property*. Since its inception, however, Italian cultural property law has controlled the commercial reproduction of properties it deems cultural property *at least for cultural properties in public collections*. This control of reproduction, essentially the relationship between public cultural interest and any material is

frustrating, as many scholars who find themselves tracking down permissions to reproduce works in Italian collections know. This is especially so for American scholars, who operate in a market nation without a traditional cultural property law regime. This is in part because the regulation of the image or reproduction of a tangible object for economic purposes⁵⁶⁷ (what happens in Italy) is understood (especially in the United States) as a masquerade for the regulation of the copying of an intangible property – some intangible work that is only fixed in a tangible medium of expression- that usually happens through copyright law.⁵⁶⁸ So, why does Italian cultural property law care about reproductions, about the public cultural interest attached to an intangible or, in other words, to any tangible? Is there in reality some common ground between copyright and cultural property law, despite Giannini's separation of them into private and public law, respectively?

Copyright law, in Italy and in the United States, is understood as related to originality and, in Italian law especially, to creativity.⁵⁶⁹ Many of the works which we think of as being cultural property seventy years after their creation begin as copyrightable works. As an antecedent to works of historic or artistic interest think of the figurative arts in Italian copyright, or pictorial, graphic and sculptural works in U.S. copyright law.⁵⁷⁰ W.W. Kowalski has already suggested that we might see copyright law as

⁵⁶⁷ Here we set aside, for now, a discussion of moral rights, which are more obviously incorporated into Italian copyright law, while being regulated by a separate statute, the Visual Artists' Rights Act, which has its own limitations, in the United States. See also ANDREA SIROTTI GAUDENZI, *IL NUOVO DIRITTO D'AUTORE* 47 (2016). The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A. For a more detailed discussion of moral rights and the intricacies of it at the State level see *Moral Rights* in RALPH E. LERNER AND JUDITH BRESLER, *ART LAW* 1071- 1123 (4th ed., 2012). It is important to note that even the authors that imagine an overlap between moral rights and cultural heritage protection specifically reject the suggestion that the public interest in preserving the cultural significance of an object be completely substituted by copyright law. See Kowalski, *supra* note 79 at 1168 - 1169 (stressing that a right of integrity can protect the work of an artist in the public interest as part of a common cultural heritage but insisting that "copyright law should not strive to replace or even compete with cultural heritage law"); Gerstenblith, *Architect as Artist supra* note 78 at 463 ("while the application of moral rights to public art and architecture coincidentally helps to further the goals of protection and preservation, artists' rights are not intended primarily for that purpose.").

⁵⁶⁸ 17 USC §102.

⁵⁶⁹ *Id.* (noting "original works of authorship"). For an exemplary case noting a low bar for originality in U.S. copyright law, but holding that it is not evident in facts alone see *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340, (1991). See also GAUDENZI, *supra* note 567 at 46- 47.

⁵⁷⁰ Art. 1 Law n. 633 of 22 Aprile 1941; 17 USC §102.

*responsible for the protection of valuable works of art in the interim period- before the work of art is considered cultural heritage but when its protection is in the public interest.*⁵⁷¹

Seeing copyright as an *ex ante* cultural property regime for certain categories of subject matter might work for jurisdictions like the United States where movable objects of historic or artistic interest, or even objects that are testaments having the value of civilization, are generally not protected as individual objects, but rather through a collection of some sort. In this way copyright specifically might be seen as “[undergirded by the] recognition that our accumulated knowledge and insight should be viewed as elements of a common heritage.”⁵⁷² In this sense, U.S. copyright, although purporting to be about intangible works and the regulation of copies of those works, might effectively equate to “a right to decide the fate of an object”.⁵⁷³ In U.S. copyright law, works are defined across an intangible and tangible divide as

*material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device...includes the material object, other than a phonorecord, in which the work is first fixed.*⁵⁷⁴

In certain circumstances, even though copyright protection is understood as separate from the ownership of the object itself, this legal regime controls the fate of tangible objects. Copyright holders, while having a right to an intangible limited by someone else’s ownership of the tangible object, still act with reference to the “fixation” of their intangible in a tangible object.⁵⁷⁵

The proposal that copyright, by regulating the relationships between private persons and certain intangible works fixed in tangible properties, can act as an *ex ante* cultural property law needs further exploration in Italian cultural property law terms. This is needed since Italian cultural property law purports to, at times, act like a

⁵⁷¹ Kowalski, *supra* note 79.

⁵⁷² SAX, *supra* note 78 at 3 (although referring to this as the undergirding of intellectual property rules generally).

⁵⁷³ SAX, *supra* note 78 at 9.

⁵⁷⁴ 17 USC §101.

⁵⁷⁵ Paintings are a good example of this- a contemporary artist may own the copyright in the visual representation, the pictorial, graphic and sculptural work which he places on a canvas, but the canvas itself, with the visual representation fixed in or on it, may be owned by a collector.

copyright legal regime, Italian or otherwise.⁵⁷⁶ The actions taken by Italian cultural property law to regulate reproduction are usually justified as regulations of a cultural property's *decoro*, that intangibility quality that is measured in terms of how appropriate actions towards and within cultural properties are.⁵⁷⁷ The substance of this *decoro* is, at the very least, as Giannini mentioned years ago, vague.⁵⁷⁸ In addition, exercises of *decoro* can produce serious content-based restrictions.⁵⁷⁹

More than anything, however, Italian cultural property law's regulation of reproductions, which have been in place since the early 20th century⁵⁸⁰, and the squishy content of the term *decoro*⁵⁸¹ belie the importance of tangibility alone in Italian cultural property law, *at least for the cultural property in the State's possession which is defined by a relationship between the intangible public cultural interest and tangible property*. The regulation of reproductions might be justified by a need to preserve the physical integrity of the object. Indeed, the regulation of reproductions grew out of provisions in the 1902 and 1909 law which sought to maintain objects' physical integrity.⁵⁸² Today, however, reproductions can easily be made without even touching the object. When Italian cultural property law limits its regulation of reproduction to the commercial reproduction of objects in the State's possession it seems to, improperly, take on the clothing of copyright law. In doing so, it seeks to regulate what the notion of cultural

⁵⁷⁶ This is a reference to the harmonization which has taken place thanks to the Berne Convention, see Berne Convention for the Protection of Literary and Artistic Works, WIPO, <https://www.wipo.int/treaties/en/ip/berne/>.

⁵⁷⁷ Art. 53, L. 42/2004. See also DIRITTO DEL PATRIMONIO CULTURALE *supra* note 378 at 193 (discussing *tutela del decoro*).

⁵⁷⁸ See Massimo Severo Giannini, *Review of Mario Grisolia's La tutela delle cose d'arte, estratto da Rivista trimestrale di diritto pubblico*, III, 1953, n. 1, p. 171-172 in SCRITTI, Vol 3, 842 (2003) ("Il massimo di potere dispositivo che la legge riconosce allo Stato è il divieto, che può imporsi, di utilizzare il bene in modi incompatibili con 'il carattere' storico o artistico: divieto, peraltro, di rilievo marginale, e di contenuto piuttosto confuso e incerto.")

⁵⁷⁹ The recent debate surrounding Steve Bannon's purchase and use of a protected monastery and convent in Italy is evidence of this. Cristina Ruiz, *Battle over Bannon's nationalist bootcamp in Italian monastery*, THE ART NEWSPAPER, April 24, 2019, <https://www.theartnewspaper.com/news/battle-over-bannon-s-nationalist-bootcamp-in-italian-monastery>.

⁵⁸⁰ Lorenzo Casini, *Riprodurre il patrimonio culturale? I "pieni" e i "vuoti" normativi* [Reproducing cultural heritage? The legal filling and empty spots] 3 AEDON [ARTE E DIRITTO ONLINE] [ART AND LAW ONLINE] (2018) [hereinafter *Riprodurre il patrimonio culturale?*], <http://www.aedon.mulino.it/archivio/2018/3/casini.htm>.

⁵⁸¹ For a discussion of some cases involving the determination of *decoro* see Lorenzo Casini, *Jeux avec les frontières: le rôle de la jurisprudence administrative dans la construction du droit italien du patrimoine culturel* in DROIT PUBLIC ET PATRIMOINE LE RÔLE DU CONSEIL D'ÉTAT 199-212, 205 (2019).

⁵⁸² Casini, *Riprodurre il patrimonio culturale?*, *supra* n. 580.

property law under Italian cultural property law says it does not mean to: the relationship between a public cultural interest and an intangible property. In other words, by regulating *decoro* and the commercial reproduction of cultural properties in its possession, the State, while perhaps seeking to maintain the public's cultural interest in a specific tangible property, also seeks to control the public cultural interest itself, as it exists apart from the tangible object. This is evident in critiques of the improper use of images of Italian cultural property in certain commercial advertisements. The uproar over the use of the image of the David by an Illinois rifle company in 2014⁸⁸ seems to be as much about controlling how the public might fix its cultural interest on the David, how it might understand and find it culturally relevant, as about preserving and protecting the public's previously ascertained cultural interest in it. Indeed, the asymmetrical enforcement of this reproduction by the Ministry might support this hypothesis further. Why is the same action to regulate reproduction not taken for the sale of David underwear and David aprons in the many souvenir kiosks in Florence?

If Italian cultural property law seeks to control the reproduction of cultural property, then it seeks to control both the relationship between intangible cultural interest and tangible properties *and* the relationship between intangible cultural interest and intangible cultural properties. This is, however, contrary to the notion of cultural property *as it stands* under cultural property law. In this sense, valorization, in which regulations of *decoro* and reproduction are usually classified⁸⁹, affects the scope of *tutela* and the notion of cultural property.

The notion of cultural property under Italian cultural property law

⁸⁸ Mentioned in Casini, "Noli me tangere" I beni culturali tra materialità e immaterialità ["No one touch me" Cultural properties between tangibility and intangibility], 1 AEDON [ARTE E DIRITTO ONLINE] [ART AND LAW ONLINE] (2014), <http://www.aedon.mulino.it/archivio/2014/1/editoriale.htm>. See also Gaia Rau, *Il David Testimonial di un Fucile, il fotomontaggio scatena la polemica*, FIRENZE LA REPUBBLICA, 7 Marzo 2014, http://firenze.repubblica.it/cronaca/2014/03/07/news/il_david_testimonial_di_un_fucile_fotomontaggio_scatena_la_polemica-80475411/.

⁸⁹ Although *decoro* is technically considered to be part of the valorization of cultural property, and not its strict protection, the valorization of cultural property is allowed or not based on whether a fundamental part of it remains intact or not. This part is deemed its *decoro*. As a result, just as we might understand what is copyrightable subject matter through issues of infringement, so we might understand what is cultural property by looking not only at what is identified as such at the front end of cultural property protection, at the time of its identification and declaration or verification, but also by looking at what is not deemed in conflict with the use of the property, which must not compromise its protection.

seems to at times aspire to be the same as copyrightable subject matter, just at a different time after the expiration of the copyright term. In the United States, this might be concerning because copyright is understood as expiring at a given moment. On the other hand, an overlap between the notion of cultural property and copyrightable subject matter would perhaps help us to see how the public cultural interest in certain objects may be actuated *through copyright* in legal jurisdictions like the United States which do not have a cultural property legal regime for movable objects like Italy. Such a comparison might also help us to understand what is going on when certain authors, like fashion designers, insist on copyright protection. Fashion designers might be fighting for a future assignment of public cultural interest to their tangible work through a recognition that their intangible property might be of some intangible public cultural interest. This hypothesis is further explored in Chapter 4.

Let's return to Italy, however, and to Giannini's hypothesis that the moment might appear when it is necessary to protect certain new categories of objects as cultural property through Italian cultural property law. Giannini's presentation of cultural property as fundamentally about the relationship between an intangible public cultural interest and tangible property supposes that text, the intangible property of intangible public cultural interest that is always outside the cultural property "box", *is always the same no matter upon what material it is placed*. There are, however, texts where this is not the case- some texts are *only of public cultural interest because they are on certain materials*. Expanding Giannini's presentation of the notion of cultural property to the case where *text is materially dependent* might help us to imagine how *modern and contemporary Italian fashion design objects are cultural property under Italian cultural property law*. While Italian fashion design is usually understood as too intangible to be protected as cultural property, because in fact its public cultural interest is based on its ability to travel and to be culturally exchanged, *in certain cases we might be able to identify Italian fashion design as tangible and therefore as susceptible to an attachment of public cultural interest that would make it eligible for inclusion in the cultural property "box."*

CHAPTER 3

FASHION DESIGN OBJECTS AS CULTURAL PROPERTY UNDER ITALIAN LAW?

This chapter explores how certain texts, despite usually being identified as intangible and invisible, may be tangible and, therefore, tangible properties eligible for inclusion as cultural property under cultural property law. Comparing these new tangible texts to images and designs, it proposes a legal standard for when certain fashion designs may be tangible enough to satisfy the requirement that properties have a public cultural interest attached to their tangible qualities, allowing for their entrance into the proverbial cultural property “box.”

1. Fashion Design Objects and other Cultural Properties as Tangible *and* Intangible

As explained in the last chapter, public cultural interests attached to intangible properties are generally considered outside the definition of cultural property under Italian cultural property law. This having been said, it is difficult, if not almost impossible, to draw a bright line rule for what is in or out of the cultural property “box.” Time mechanisms, cultural interest, collective consensus, and practical concerns all work together to solve the question of how something is cultural property. Notwithstanding this complex web of requirements, however, the limit of tangibility as applied to property is, for now, what might be termed the gatekeeper to entrance into the proverbial cultural property “box.”

While the limit of tangibility of property may at first seem straightforward, it is, in a sense, deceptive and counterintuitive. A problematic separation between tangible and intangible with respect to the public’s cultural interest is especially evident in this digital age. Our intangible public cultural interest, in fact, may converge on an aspect of a tangible property that is also susceptible to intangibility. Fashion design objects are an excellent example of this, because design elements that are at once fundamental parts of a tangible object might be easily reproduced in other materials. There are also other examples. Imagine a painting- our intangible public cultural interest converges, as Cantucci would say, on the object. There are a number of reasons to find the tangible painting of cultural interest, including its author, its historical context, its provenance, what it depicts, etc. This public cultural interest, however, can focus on a part of the painting which can be intangible, reproduced in other materials, and yet *still be fundamentally tied to the tangible canvas*. Indeed, the composition of a

painting to which we might attach our cultural interest is *both tangible and intangible*. It might be easy to think that such an intangible feature of a tangible property might be protected apart from the tangible object in which it originated but, at times, it cannot be.

The exploration of how intangible features of tangible property are in some ways still tangible is important in our contemporary times. Today, certain laws that protect creativity and its contemporary iterations have progressively embraced intangible aspects and reasons for these creative works over their tangible, mechanical processes. One of the hallmarks of the progressive inclusion of “new arts” (like photography) into legal regimes protecting forms of creativity is an emphasis on intangibility in order to negate utilitarian, mechanical or functional natures and aspects.⁵⁸⁵ As certain subject matters of culture have been embraced as deserving of legal protection, certain fictions have been created to emphasize their figurative nature over their complex process of creation. Tangibility is a stake in the wheel of this cultural evolution and an almost necessary line in the sand between different legal regimes to delimit their different jurisdictions.

⁵⁸⁵ A comparison between two cases deciding how photographs are copyrightable in the 19th century points to a winning emphasis on the hand of the author and the positioning of figures over the actual capturing of an image by machinery. One is *Mayer v. Pierson* decided in 1862 by the French Court of Cassation. For a copy of the opinion see Court of Cassation on Photography (1862), PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer eds.), www.copyrighthistory.org, available at http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_f_1862 (images of a reproduction of the opinion). See also Anne McCauley, *Merely Mechanical: On the Origins of Photographic Copyright in France and Great Britain* 31(1) ART HISTORY 57, 72 (2008) (pointing to one aspect of the discourse surrounding photography, “the identification of the machine with programmatic repetition and standardization” as the one definitive reason for the legal recognition of certain photographic positives as artistic property). The other American case deciding the copyrightability of a photo of Oscar Wilde displays similar argumentation. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). Today copyright arguments still tend to justify copyrightability by emphasizing the intangible aspects of works over the tangible, mechanical functional aspects of their creation, although this is progressively becoming a fine line with photographs, where the transformative part of the fair use test and the nature of the sharing of digital images make an author’s contribution often indiscernible. See *Graham v. Prince*, 265 F. Supp. 3d 366 (S.D.N.Y. 2017) (holding on a motion to dismiss that Prince’s screenshot of an Instagram post displayed in an art gallery for sale was not fair use); *Xclusive-Lee, Inc. v. Jelena Noura “Gigi” Hadid*, 1:19-cv-00520 (E.D.N.Y., 2019) (reported on by The Fashion Law, describing the model Gigi Hadid’s argument that fair use applies to her sharing of a paparazzi photograph of herself on Instagram in part because she is a co-creator of the work since she created the “[the subject’s] pose, expression, or clothing”). See also *Supermodel Gigi Hadid Calls Instagram Photo at Center of Paparazzi Lawsuit “Fair Use”*, THE FASHION LAW, June 7, 2019, <http://www.thefashionlaw.com/home/supermodel-gigi-hadid-calls-instagram-photo-at-center-of-paparazzi-lawsuit-fair-use>.

Two recent examples illustrate the conundrum of prioritizing an intangible visual over a tangible object and the mechanical, functional processes surrounding it. In a recent article in *The Art Newspaper* Martin Bailey spotlighted the restoration of Vermeer's work *Girl Reading a Letter at an Open Window* by the Dresden gallery which holds it. The restoration revealed a hidden cupid in the upper part of the canvas. This cupid, as Bailey recounts, makes an "astonishing...difference" to Vermeer's composition.⁵⁸⁶ The letter the woman is reading may be from a love letter, or Cupid's presence may be interpreted as a type of message about love for the woman or as Vermeer's general love advice for the viewer.⁵⁸⁷ What is striking here is that a simple image of the painting would not have revealed the change of message. Indeed, even an X-ray image of the painting which revealed the Cupid prior to its restoration needed the material of the tangible canvas or painting to alter the composition. Here, this is not simply a question of valorizing Vermeer's painting by taking a picture of it and distributing it; this is an example of how one part of a painting which we might be able to think of as intangible and divorced from its material object, the image, still needs and is dependent on its tangible material- the painting. A separate recent article in *The New York Times* spotlighted the restoration of a number of paintings of sunflowers by Van Gogh in various iterations.⁵⁸⁸ The museums which held these *Sunflowers* were curious to understand if they were simple copies of each other, or if they were intended by Van Gogh to be independent artworks. Van Gogh, as the article recounts "*referred to [one] work as a 'repetition' of the [other] painting.*"⁵⁸⁹ Setting aside for now Van Gogh's intent and the process he used, restorers at the National Gallery in London and the Van Gogh Museum in Amsterdam analyzed the paintings *in their materiality* to understand "*how different [one] 'repetition' is from the first. Should it be considered a copy, an independent artwork or something in between?*"⁵⁹⁰ Their answer, that these paintings were so different in their paint colors, texturing and brushstrokes as to be different from one another, *came from an analysis of the tangible painting and affects our perception of its intangible image.* Indeed, the knowledge of the image is incomplete without the physical

⁵⁸⁶ Martin Bailey, *Comment | Cupid 'outing' in Vermeer painting is the right move*, THE ART NEWSPAPER, May 28, 2019, <https://www.theartnewspaper.com/comment/vermeer-cupid-outing-is-the-right-move>.

⁵⁸⁷ *Id.*

⁵⁸⁸ Nina Siegal, *Van Gogh Painted Many 'Sunflowers.' But How Different Are They?*, N.Y. TIMES, June 20, 2019, <https://www.nytimes.com/2019/06/20/arts/van-gogh-sunflowers-gauguin.html>.

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.*

canvas of the tangible *Sunflower* paintings. These are examples of an at first intangible image which is, however, still dictated by the tangible property of which it is a part.

By protecting tangible properties when they are of cultural interest, Italian cultural property includes protection of both the tangible property and its intangible image by controlling the physical object of which they are both a part. This is something, however, which Italian cultural property law, doctrine and case law do not aspire to do. Indeed, with the exceptions of *decoro* and commercial reproductions of cultural property in State property mentioned above, Italian cultural property law seeks to leave the protection of intangible properties of cultural interest to other legal regimes.⁵⁹¹ At the same time, however, examples like *Sunflowers* and *Girl Reading a Letter at an Open Window* beg the question: can Italian cultural property law really opt out of the preservation of intangible property? Italian cultural property law might be better off embracing a shifting definition of the tangible and intangible properties in its purview.

Embracing a spectrum of intangibility and tangibility under cultural property law as opposed to a strict division between tangible and intangible has much to do with how to assign artistic and historic interest, or testamentary value, to objects under the law. Returning to the examples above, the historic value of the Vermeer painting (composition and canvas) seems greater than the image of the Vermeer because it can give us more information than the image itself. At the same time, however, there are cases in Italian law which seem to describe the cultural interest in paintings as based solely or at least in part on their intangible composition. In one case, the private owner of an “Allegory” painting by the 15th century Flemish artist Frans Floris appealed the Ministry’s judgment that the painting was a cultural property of particularly important artistic-historical interest after his request to export it.⁵⁹² One of the first observations about the painting’s cultural interest was that it depicted an allegory of Genova in the composition. The Ministry was apparently ready to declare it a

⁵⁹¹ For the entertainment of the justifications for the regulation of the circulation of the *image*, or the intangible parts of a cultural property, and for a discussion of why cultural properties should be reproducible see Amedeo Tomicelli, *L’immagine del bene culturale [The Image of the Cultural Property]* 1 AEDON (2014), <http://www.aedon.mulino.it/archivio/2014/1/tomicelli.htm>. For further discussions of the links between intangibility and cultural properties under Italian law see the other articles published in Issue 1 of 2014 of AEDON.

⁵⁹² The following facts are taken from various stages of the case in the opinions T.A.R. Milano, (Lombardia) sez. II, 08/11/2007, (ud. 24/07/2007, dep. 08/11/2007), n.6205 and Consiglio di Stato sez. VI, 10/12/2014, (ud. 28/10/2014, dep. 10/12/2014), n.6046, DEJURE.

cultural property based on these criteria but then, given the owner's protests that it did not so depict Genova and members' of the Field Offices' agreement on the point that such a link could not be confirmed, the Ministry rejected this as a reason for the painting's classification as a cultural property.⁵⁹³ The Ministry did decide, however, to classify the painting as a cultural property for other reasons. It decided the representation was particularly significant because it represented "*l'unico dipinto attualmente noto dell'autore raffigurante un'allegoria di soggetto profano a carattere encomiastico.*"⁵⁹⁴ The private owner protested this basis for classification given that historical documentation existed of other allegories of virtue by the painter. The Court, applying and reviewing various rules to which the behavior of the Ministry had to comply, noted that the Ministry's evolving reasons for classifying the cultural property as such seemed to be preconceived and not based in fact. The Ministry had given different weight to different historical-artistic facts at various stages of the process and even vacillated between understanding the painting as a cultural property because of its ability to testify to the painter's links to Genova and other, arguably more evident, parts of the composition. This revolving door of public cultural interest assignment was too much for the court, and it annulled the painting's classification as cultural property.⁵⁹⁵

Setting aside the bad faith behavior of the administration in this case, the vacillation of the assignment of public cultural interest to the tangible painting, to intangible parts embedded in the painting, then to the tangible painting inasmuch as it testifies to a historical connection, is a cautionary tale. In other circumstances, had the facts backed their judgment up, the Ministry certainly could have classified the painting for its composition's depiction of Genova, or its tangible property's ability to testify to a specific historical moment. Such reasoning implicates the embrace of a spectrum of the intangible and tangible divide in Italian cultural property law. At the same time as Italian cultural property law protects the tangible object, its manner of assigning the public cultural interest belies an interest in tangible things alone. Classifying series or collections of objects as cultural property only highlights this issue, as in one case where a private collection of paintings was declared cultural property because of a common characteristic that was not even evident in them alone but

⁵⁹³ T.A.R. Milano, (Lombardia) sez. II, 08/11/2007, (ud. 24/07/2007, dep. 08/11/2007), n.6205. DEJURE.

⁵⁹⁴ Consiglio di Stato sez. VI, 10/12/2014, (ud. 28/10/2014, dep. 10/12/2014), n.6046, DEJURE.

⁵⁹⁵ *Id.*

was, rather, due to the fact that they had all been mentioned in a 1790 catalog.⁵⁹⁶

For modern and contemporary Italian fashion design objects, the ascertainment of this public cultural interest and the decision of where to assign it is crucially important. In a world where multiple examples and variations of Italian fashion design objects exist, historical, artistic or testamentary judgments at the basis of the public cultural interest are often finely drawn and the classification, therefore, of fashion design objects as cultural property is by nature susceptible to these fine lines. Let us take, for example, a Giorgio Armani dress from 1990, most recently included in the exhibition *Italiana: L'Italia vista dalla moda*.⁵⁹⁷ [Figure 21] The dress consists of what we might call harem pants underneath a wide short skirt that arrives almost to the wearer's knees and a close-fitting top with netting over it. Of a dark green and blue color, the fabric of each of these pieces is different: while the pants have a paisley design, the skirt has a delicate yet confident flower embroidery with a ribbon-esque waist, and the top is made of a sheer fabric. Even without an explanatory label, the visual links to the work of the celebrated early 20th century French designer Paul Poiret are evident to an eye familiar with fashion history.

In the early 20th century Poiret designed a number of cutting edge gowns made of a pants and skirt combination inspired by the Middle East.⁵⁹⁸ One of these dresses is in the collection of the Costume Institute at The Metropolitan Museum of Art, while the Museum at The Fashion Institute of Technology has another. Titled "Fancy Dress Costume" and dated to 1911, the Poiret gown in the collection of the Costume Institute is noted as being created for and worn at Poiret's famous promotional 1002nd night party.⁵⁹⁹ [Figure 21] An elaborate

⁵⁹⁶ See T.A.R. Sez. II, 8 Ottobre 2008, n. 8824.

⁵⁹⁷ *Italiana. L'Italia vista dalla moda 1971-2001*. Curated by Maria Luisa Frisa and Stefano Tonchi. February 22 to May 6, 2019 at the Palazzo Reale in Milan. The dress by Armani dates to his Giorgio Armani Spring/Summer 1990 collection. See e-mail from Cecilia Dessalles d'Epinoix, Responsabile Iniziative Corporate Giorgio Armani S.p.A., to author, April 15, 2019, 4:53 pm (on file with author).

⁵⁹⁸ As fashion history recounts it, Poiret's early 20th century embrace of orientalism was in part precipitated by the arrival of the Ballets Russes in Paris. See *Paul Poiret, THE MUSEUM AT FIT*,

[http://fashionmuseum.fitnyc.edu/view/people/asitem/items\\$0040:2935/0?t:state:flow=c746f588-1c39-4743-8495-a43d0c6e64fd](http://fashionmuseum.fitnyc.edu/view/people/asitem/items$0040:2935/0?t:state:flow=c746f588-1c39-4743-8495-a43d0c6e64fd) (last visited April 9, 2019) ("[Poiret] remains best known for his ravishing orientalist evening dresses and fancy ball costumes. These designs echoed the look of contemporaneous Ballet Russes productions, such as Cleopatre and Scherezade, and Poiret's lampshade tunics and harem pants were among the most celebrated designs of the era.")

⁵⁹⁹ *Fancy Dress costume, 1911, Paul Poiret, THE METROPOLITAN MUSEUM OF ART*, <https://www.metmuseum.org/art/collection/search/81781?&searchField=All&sortBy=>

concoction of bejeweled seafoam green fabric with numerous gems described as of metal, silk and cotton, the dress consists of a pair of harem pants tied at the ankles, a longer overlaid skirt which goes to the wearer's knees, and a v-neck sleeveless bejeweled top. By contrast, the "Evening Dress" in the collection of the Museum at The Fashion Institute of Technology, dated to 1913, is described as related to Poiret's classic Sorbet Gown, which is in turn characterized by fashion historians as being inspired by a "lampshade tunic over harem trousers" originally worn by Poiret's wife at the 1002nd night party.⁶⁰⁰ [Figure 21] Displaying a very different color scheme compared to the gown in the collection of the Metropolitan, the 1913 evening dress is in shades of purple, cream and rose, and is described as of "mauve and ivory silk satin and seed beads."⁶⁰¹ While the Museum at FIT's evening dress still has identifiable pants with a skirt over it, both the shape of the pants and the skirt, which is more like a tunic or wrap dress, are noticeably different than Poiret's fancy dress in The Metropolitan Museum of Art and Armani's 1994 dress inspired by Poiret. The different color schemes and differences in design seem to clearly differentiate one evening dress from the other.

In cultural property terms we can see that deciding where to locate the intangible cultural interest in this dress, where to identify its historical or artistic value, benefits from a discussion of tangibility and intangibility. This discussion is not one of function and art, but one which asks when a tangible property is important over and above an intangible one alone. A tangible property can still be functional and yet of public cultural interest. A tangible property can be art and yet *not* of public cultural interest. Returning to our Poiret, we can discuss tangibility and intangibility over and above function and art in the following ways. Does the historic or artistic value of Poiret's early 20th century design lie in its unique combination of a skirt and pants in an orientalist style? Or, is the historic value in Poiret's unique combination of all these elements in various specific iterations? If we decide that Poiret's pants and skirt combination is of historic

[Relevance&ft=paul+poiret&offset=0&rpp=80&pos=1](#) (last visited April 9, 2019). ("This fancy-dress ensemble was made for and worn to Poiret's 1002nd Night party in 1911, which was decorated and organized to promote his new creations in the full splendor and glamour of the orientalist trend.")

⁶⁰⁰ *Evening Dress*, THE MUSEUM AT FIT, <http://fashionmuseum.fitnyc.edu> (last visited April 9, 2019) ("[Mme Poiret's] costume inspired the famous Sorbet gown of 1913 – with its lampshade tunic decorated with pearl embroidery in sherbet colors of pistachio, pink, and mauve.") A version of a Poiret dress titled Sorbet is also visible in the collection of the Victoria & Albert Museum in London and describes this same design inspiration. See *Sorbet*, VICTORIA & ALBERT MUSEUM, <http://collections.vam.ac.uk/item/O15549/sorbet-evening-dress-paul-poiret/> (last visited April 9, 2019).

⁶⁰¹ *Evening Dress*, *supra* note 600.

significance, then we might not see this contribution as inherent to one specific tangible dress. We might see an intangible Poiret style as historically significant. As a result, Armani's Italian fashion design object inspired by Poiret in 1994 might be less historically significant, not historically significant at all, or perhaps of a different historical significance altogether. On the other hand, if we identify the historical significance of Poiret's fashion objects in their unique combination of specific colors, fabrics and material alongside the addition of a pants and skirt, then we might limit their historical significance to specific iterations of tangible dresses. In this sense, Armani's 1994 creation might be considerably historically significant for its unique riff on one or more of Poiret's specific ensembles.

Determining whether the public cultural interest attaches to a style, design or material becomes even more difficult when we encounter multiple versions and even copies of Poiret's dresses by others. Such is the case with the artist Isabelle de Borchgrave's rendering of a Poiret Evening Suit from 1912.⁶⁰² [Figure 21] When we look at Borchgrave's close copy, small differences do become apparent between it and the Museum at FIT's evening dress, which it most resembles. These differences include Borchgrave's decision to include what seems to be a skirt instead of the classic Poiret harem pants, differences in the placement of the flower motifs on the tunic's skirt and sleeves, and slight differentiations in color. Looking beyond these differences, however, perhaps by observing how the light may catch Borchgrave's rendering in person or by touching it, it becomes apparent, almost by complete surprise, that Borchgrave's dress is of paper and not of fabric. While Borchgrave's intention is to create art, the functionality of this design object as fashion by Borchgrave is by no means negated: "paper clothes" (made in the 1960s of "a nonwoven mixture of cellulose and cotton or rayon") have been made, sold and worn throughout fashion history.⁶⁰³ If we assign a public cultural interest in Poiret's design or style, as it exists in any or all tangible materials, Poiret's design would be out of the cultural property "box" and any commercial reproduction of it would be free. On the other hand, a public cultural interest might lie in a tangible dress of Poiret's that reflected this specific design, in one design object. In this case, some sort of recognition to the relationship between the public cultural interest and an intangible property through the classification of a

⁶⁰² MODA DI CARTA: ISABELLE DE BORCHGRAVE A VILLA NECCHI CAMPIGLIO 77 (Skira, 2016).

⁶⁰³ See Valerie Steele discusses MFIT paper dresses, THE MUSEUM AT THE FASHION INSTITUTE OF TECHNOLOGY, <http://www.fitnyc.edu/museum/news/archive/2011/valerie-steele-paper-dresses.php> (last visited April 9, 2019) (also noting that "some paper dresses were meant to be hand painted", a method almost identical to Borchgrave's work).

tangible property as cultural property might be extended. This seems contrary to Giannini's conceptions but is like the above example of the allegorical painting.

The notions of archetype, stereotype and prototype provide another way to think about how an extended limit of tangibility might include some relationships between intangible public cultural interest and intangible properties. These notions as applied to fashion design objects, within the context of fashion's "partak[ing] in all the existential dilemmas of design"⁶⁰⁴, come from Paola Antonelli's recent MOMA exhibition *Items: Is Fashion Modern?*⁶⁰⁵ Without emphatically attributing certain fashion objects to brands or designers⁶⁰⁶, the exhibition tried to first focus visitors on a fashion object's stereotype, or "the incarnation that made it significant in the last one hundred (or so) years...[drawing] on the collective consciousness: when you close your eyes and think of a sari, or a pair of chinos, or a pearl necklace, what do you see? That is the item's stereotype."⁶⁰⁷ Archetypes, on the other hand, were deemed historical.⁶⁰⁸ Practically, this meant that in the same exhibition some tangible, individual fashion objects were presented as representative of the stereotype: for example, a Patagonia fleece for a fleece or a Hermès Birkin for a Birkin bag. Other stereotypes had multiple tangible iterations in different fashion objects, as for the Little Black Dress or the Platform Shoe.⁶⁰⁹

While stereotypes that cannot be easily divorced from their fashion brand or designer origin, like the Birkin bag, may be thought of in terms of authorial significance in cultural property law or even through trade dress or trademark protection in trademark law, the definition of stereotype in *Items: Is Fashion Modern?* urges a move beyond source recognition alone because it incorporates history into its definition ("...the incarnation that made it significant in the last one

⁶⁰⁴ Paola Antonelli, *Who's Afraid of Fashion?* in *ITEMS: IS FASHION MODERN?* 15 (2017). The problematics between fashion and design are also sometimes characterized as ones between art and design. See Colman, *History and Principles*, *supra* n. 6 at 229.

⁶⁰⁵ For a full description of the exhibition see the catalog. *ITEMS: IS FASHION MODERN?* *supra* n. 604.

⁶⁰⁶ The exhibition did label certain objects with the name of their designer (as for example with Chanel No. 5). For others, it left out the brand name, as with Levi's 501s, described only as 501s. Of course, the labels in the exhibition belied this emphasis on design only, as did the inclusion of objects with numbers on them, such as jerseys, whose symbolic meanings could not be easily erased.

⁶⁰⁷ *Id.* at 20.

⁶⁰⁸ *Id.*

⁶⁰⁹ For images of the exhibition see *Installation Images, Items: Is Fashion Modern?*, MUSEUM OF MODERN ART, <https://www.moma.org/calendar/exhibitions/1638> (last visited April 10, 2019).

hundred (or so) years..."⁶¹⁰). Presented with stereotypes, what we imagine the definitive iteration of a specific fashion object to be, we are automatically influenced by history and historical perspective. The stereotype of Capri pants, for example, included in the exhibition, might normally be thought of by an Italian audience as incarnated by Emilio Pucci's 1950s iteration, but the exhibition included still earlier iterations designed by Sonja de Lennart in Germany in the 1940s.⁶¹¹ Where is the historical significance implied by the term stereotype in these material fashion objects? Is it in an intangible design that can be reiterated in any material, or in one specific material object? If the public cultural interest can only be assigned to an intangible design, and not even to a tangible design object which by definition has that intangible design, is an idea effectively of public cultural interest to us?

Fashion objects created by the American designer Mary Ping installed in the MOMA exhibition close to the Hermès Birkin bring these questions even further home. Created for Mary Ping's fashion label, *Slow and Steady wins the Race*, individual bags of leather reproduce the forms of *It Bags*, including the Gucci Bamboo Bag.⁶¹² In the exhibition, Ping's bags are described as "a series of purses that divorce craftsmanship from luxury branding."⁶¹³ Here, it is almost as if Ping has attempted to assign a public cultural interest to craftsmanship alone, as other Italian scholars like Grisolia have hinted at when discussing protecting the popular and traditional arts. At the same time, however, Ping's exercise does not succeed. These bags are still recognized as reproducing certain fashion designs, no matter that they are all in caramel leather and outside their usual luxury material and accoutrements. Here, the public cultural interest seems caught up not only with the intangible design, but also as inseparable from the idea of a Gucci Bamboo Bag or a Chanel bag. To protect an idea as a cultural property would be a slippery slope indeed. Ideas are not protectable in copyright for similar reasons.⁶¹⁴ The law should not

⁶¹⁰ Paola Antonelli, *Who's Afraid of Fashion?* in ITEMS: IS FASHION MODERN?, *supra* note 604 at 20.

⁶¹¹ *Capri Pants* in ITEMS: IS FASHION MODERN? *supra* note 604 at 85.

⁶¹² For an image see *Birkin Bag* in ITEMS: IS FASHION MODERN? *supra* note 604 at 62- 63. It is interesting to contemplate whether Ping reached an agreement with the houses for use of their trade dress. For a discussion of the reciprocal use of trademarks by designers and artists see Gianfranco Negri-Clementi and Silvia Stabile, *L'arte e il diritto d'autore* in IL DIRITTO DELL'ARTE: L'ARTE, IL DIRITTO E IL MERCATO, Vol 1, 113 (2012).

⁶¹³ *Id.* at 62.

⁶¹⁴ For some discussions in case law of the idea /expression dichotomy, to which the merger doctrine and the doctrine of independent creation in copyright are connected, with reference to designs of useful articles see *Mazer v. Stein*, 347 U.S. 201, 217-218 (1954) ("Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea -- not the idea itself. Thus, in *Baker v. Selden*, 101

extend a cultural monopoly or an economic monopoly to an idea. If the idea of a Birkin Bag is of such public cultural interest to the public, perhaps it needs to be outside of both the cultural property and copyright legal regimes.

In contrast to ideas, text and images are generally seen as intangible properties that are outside the purview of cultural property law but not outside the purview of copyright law. At the same time, however, there is a relationship between images and tangible properties that allows them into the cultural property “box” through a backdoor while text is said to remain outside. This difference is grounded in what Carlo Ginzburg has termed visible images and invisible texts.

2. Redrawing the Tangible and Intangible Boundaries through Text and Images

Visible images, as Carlo Ginzburg has critically elaborated, are part of an assumption that “*there is a difference between a canvas by Raphael (or by Veronese) and a copy (be it a painting, an engraving or, today, a photograph)*”

U.S. 99, the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings. The distinction is illustrated in *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 151, when the court speaks of two men, each a perfectionist, independently making maps of the same territory. Though the maps are identical, each may obtain the exclusive right to make copies of his own particular map, and yet neither will infringe the other's copyright. Likewise a copyrighted directory is not infringed by a similar directory which is the product of independent work.” (footnotes omitted)); *Oldcastle Precast v. Granite Precasting & Concrete*, 2011 U.S. Dist. LEXIS 20977 at *14- *22 (holding technical drawings of concrete precast vaults copyrightable because each drawing contained different, particular expressions and did not equal the idea of a concrete vault and distinguishing these technical drawings from useful articles, noting that “*a technical drawing...is created precisely to 'convey information,' hence it is not a useful article. §101 of the Act defines technical drawings as being a "pictorial, graphic, and sculptural work"...*”); But see *Enterprises International, Inc. et al v. International Knife & Saw, Inc*, 2014 U.S. Dist. LEXIS 48493 at *16- *18 (holding technical drawings of knife blades uncopyrightable because the drawings merged or were inseparable from the knife blade itself and equating technical drawings of the knife blades with designs for useful articles which do not convey information or portray appearance). See also *Notes and Questions to Baker v. Selden* in COHEN ET AL, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 3 – 16; 19- 21; 21- 29 (3rd ed. 2010) (noting “some courts see merger doctrine as a defense to copyright infringement liability, rather than as a bar to copyright at the outset or other courts just say the scope of the copyright is thin – so thin that infringement only occurs if an identical copy is made.”); *Idea and Expression* in Chapter 11, Copyrights in LERNER AND BRESLER, *supra* note 567 at 912- 915; see also 1 Nimmer on Copyright § 2A.06 (2019) (noting in a discussion of the idea/expression doctrine in the context of *Baker* how the refusal to protect ideas in the visual arts is more complex and usually replaced by determination of “scene-a-faire”).

and [that] it cannot be eliminated.”⁶¹⁵ Images, in other words, are supposedly always copies that refer back to an object and are, at the same time, not the same as the object to which they refer. Images in this framework of original and copy are always (counterintuitively) material: images are never the same, images are never *the tangible object*, but images are always an intangible copy that refer back to a tangible object. No matter where we see an intangible image we still identify it with another tangible object. We see images as a placeholder for the real thing. When Manet’s *Luncheon on the Grass* for example, is projected on a slide it is not understood as the *Luncheon on the Grass*. Even if the image of *Luncheon on the Grass* may enter into spaces which Manet’s original work never could have before digitization, even if the image may hang on a wall as a poster for a million years, the image of *Luncheon on the Grass* is never understood as the original *Luncheon on the Grass*. Italian cultural property law preserves these visible images, these tangible or material images, but not necessarily these images as they exist as intangible copies.

Invisible text, on the other hand, as Ginzburg has also described, is part of a separate assumption that there is “...an essential incompatibility between the idea of an abstract, invisible text and the idea of a book as a palpable and visible object...”⁶¹⁶ Text, in other words, is not materially dependent and has no original, or better still, texts are always an intangible original. This is the assumption at the heart of the distinction Giannini makes between books, manuscripts and texts. Texts are the same no matter where they are printed- on a book or on a manuscript. Books are the physical support of texts which are not cultural property, while manuscripts which still reproduce the text are cultural property because they testify to the creativity of the text’s author. Cultural property law, the argument goes, never preserves intangible text.

Design, of which fashion design is a part⁶¹⁷, is not easily assigned to the categories of invisible texts or visible images. Defined as a descriptor of “the aesthetic and functional characteristics of an object”, design

⁶¹⁵ Carlo Ginzburg, *Invisible Texts, Visible Images* in *COPING WITH THE PAST: CREATING PERSPECTIVES ON CONSERVATION AND RESTORATION* (Pasquale Gagliardi, et al, eds.) 134 (Leo S. Olschki Editore, 2010).

⁶¹⁶ *Id.* at 136.

⁶¹⁷ Paola Antonelli, *Who’s Afraid of Fashion?*, *supra* n. 604 at 17 (“...most forms of design, but especially fashion design, are too often considered ‘lesser’ disciplines in the art world (much the way film is), because no matter how extensive the scholarly literature they engender, they still manage to immediately connect and inspire- and usually delight- at levels that are accessible by the many as well as by the few.”)

frustrates the tangible and intangible divide.⁶¹⁸ Design is a unity of form and function, of aesthetic and function. Design is both intangible and tangible. Design is by nature meant to be reproducible and copied. The level of reproducibility may vary depending on the designed object (think, for example, of the practical difficulties of reproducing an entire building or the restraints on reproducibility allowed by contract or other law), but designs are meant to both create the sameness of intangible text and, at the same time, to communicate some semblance of an original quality that is related to Ginzburg's visible images.

To elucidate these differences further, take the example of an American design object, the Eames chair. We identify the design of an Eames chair as representative or indicative of the material, physical Eames chair somewhere, but we also recognize the design of an Eames chair as the design no matter whether the Eames chair is made of wood, plastic, or another material. The fact that design straddles both assumption one (images are visible and tangible) and assumption two (text is invisible and intangible) has been unknowingly expressed recently by a conversation on Twitter between two professors at the University of Notre Dame. In response to Professor Jeffrey Pojanowski's indecisiveness as to whether to purchase a real Eames chair notwithstanding its expense or to feel discomfort at the prospect of buying a "fake"⁶¹⁹, Professor Mark McKenna replied "Much depends here, of course, on what 'fake' means in this context. The fact that those chairs have the same design as the original might just be called competition to provide designs people want."⁶²⁰

Locating the importance of the Eames chair in the design, McKenna's words, while framing the chair's reproduction as good competition, seems to support premise two: it's not necessarily a "fake" when we recognize the value of or exhibit an interest in a design across media and materials. While Pojanowski's response echoed some agreement with premise two, it also envisioned a role for premise one through an

⁶¹⁸ Penny Sparke, *Design*, *supra* note 102. As Sparke notes, "By the 1980s...such phenomena as 'designer' jeans, 'designer' vacuum cleaners, and even 'designer' lemon squeezers (e.g. squeezer for Alessi designed by Philippe Starck, 1988) acknowledged that the most potent meaning of the word [design] was that of 'added value' in the form of style—an indefinable quality that made things not only useful but also more desirable, albeit in a somewhat intangible way." For a discussion of design, artisanship and art in the Italian perspective see Gianfranco Negri-Clementi and Silvia Stabile, *L'arte e il diritto d'autore* in *IL DIRITTO DELL'ARTE*, *supra* note 612 at 123- 124.

⁶¹⁹ In Professor Pojanowski's words: "Wanted to buy an Eames reading chair for my office and then saw how expensive they were"; "I saw [that there are imitations too] and am thinking about it. But I kind of feel like I'd rather wear no watch or a Seiko rather than a fake Rolex." @Pojanowski, TWITTER, April 9, 2019 tweet (on file with author)

⁶²⁰ @markpmckenna, TWITTER, April 9, 2019 tweet (on file with author)

appreciation of materials related to the intangible design, “True. If the construction (materials and composition) and functionality are comparable, the only thing one would be paying a premium for is an effable sense of snobbery and that’s not good.”⁶¹ In other words, material may still matter for the recognition of an Eames design as such. Design is fundamentally caught up in both assumptions across pre-conceived boundaries between images and text.

Fashion design, perhaps even more than industrial design, brings the tension between intangibility and tangibility, visible images and invisible texts, to the fore. While we may use a juicer, sit on a couch or live in an architectural space, fashion design is uniquely connected to materiality because we wear it on our bodies.⁶² Fashion design physically changes the ways in which we stand, sit and even communicate with the rest of the world. Fashion design is both intangible like a text (a fashion design may be repeated in many outfits or in many iterations across different media and materials) and tangible like an image (design may be uniquely manifested in specific material forms).

At the same time as the dichotomy between invisible text and visible images exists, there are some examples of text which are materially dependent, where text is tangible and not intangible. As Maria Luisa Catoni has already written

*We might [despite the implication from Ginzburg’s notion of an invisible text that texts and images entertain a profoundly different relationship not only with a specific place (whether or not it is their specific place of origin) but also with the physical support upon which they are articulated] nonetheless ask whether such a sharp distinction between text and images...is applicable to all images and all written texts, even within cultural traditions considered as belonging to Western culture.*⁶³

⁶¹ @Pojanowski, TWITTER, April 9, 2019 tweet (on file with author)

⁶² This also brings up important discussions of gender and fashion, and of identity more broadly, and the sanitization of bodies through a fetishization of fashion objects when we divorce them from the body and view them only as objects. For a discussion of class and gender from a fashion studies point of view see DIANA CRANE, *FASHION AND ITS SOCIAL AGENDAS: CLASS, GENDER, AND IDENTITY IN CLOTHING* (University of Chicago Press, 2000). See also presentations given at the colloquium *Memory, Wear, and Imperfection in Dress*, THE MUSEUM AT FIT, September 29, 2018, <http://www.fitnyc.edu/museum/events/special-projects/fashion-unraveled-colloquium.php>.

⁶³ Maria Luisa Catoni, *Symbolic Articulation in Ancient Greece: Word, Schema and Image in SYMBOLIC ARTICULATION: IMAGE, WORD, AND BODY BETWEEN ACTION AND SCHEMA* 146 (Sabine Marienberg, ed.) (De Gruyter, 2017).

Looking at these examples, and some of the history behind the evolution of invisible, intangible text helps to envision how some texts might enter the cultural property “box” under Italian cultural property law and, therefore, how modern and contemporary Italian fashion designs might also be compared. Far from existing in distinct “boxes”, examples show us that intangibility and tangibility exists on a fluid spectrum.

The dichotomy between images and text which Ginsburg seeks to trace is usually identified in the shift from oral to written poetry in Ancient Greece. A bit counterintuitively, the argument goes, the fixation of oral poems, such as Homer’s *Illiad* and *Odyssey*, into one version through writing allowed text to become an abstract entity. The fixation of text allowed it to travel, divorcing it from changes which might be made in an oral performance or for a particular audience.⁶²⁴ Tangibility allowed text to become intangible, the same wherever it appears. It is this intangibility and immediate understanding that is exemplified in silent reading. Bernard Knox gives some early examples: the riddle in Antiphanes’ *Sappho* (“What is it that is female in nature and has children under the folds of its garments, and these children, though voiceless, set up a ringing shout ... to those mortals they wish to, but others, even when present, are not permitted to hear?...a letter”)⁶²⁵; Theseus’ silent reading of a letter tied to his dead wife’s hand in Euripedes’ play *Hippolytus*; Demosthenes’ silent reading of an oracle in Aristophanes’ play *Knights*.⁶²⁶

The narrative arc of intangible text, however, is nuanced by two facts. First, notwithstanding text’s increasing intangibility, its presentation as figuratively tangible like other *technai* was a crucial part of its ability to exist as an intangible. In this sense, text was like other crafts and cultural practices that produced and continue to produce tangible images. Second, an intangibility of text did and still does not negate the continuing existence of other types of texts, namely those that are not abstract or those that still need tools other than silent reading to be understood.

Even the etymology of the word *text* itself belies the modern association of text with an intangible, invisible entity. Indeed, “text

⁶²⁴ See *The aoidos in context* in BARRY B. POWELL, *WRITING AND THE ORIGINS OF GREEK LITERATURE* (Cambridge Press, 2002).

⁶²⁵ Bernard M.W. Knox, *Silent Reading in Antiquity*, 9 *GREEK, ROMAN AND BYZANTINE STUDIES* 421, 432 (1968). Knox’s work and examples are also cited in Ginsburg, *supra* n. 614 and in JESPER SVENBRO, *PHRASIKLEIA: AN ANTHROPOLOGY ON READING IN ANCIENT GREECE* 163- 165 (Janet Lloyd, trans., Cornell, 1993).

⁶²⁶ Knox, *Silent Reading in Antiquity*, *supra* n. 624 at 433- 434.

comes from [the] Latin *textus*, which means fabric/weaving and the product of weaving and from the verb *texere* to weave."⁶²⁷ In ancient times, "putting words together [was] primarily visualized by thinking of weaving."⁶²⁸ In Greek the word *hymnos*, hymn, is linked to the word for weave, *huphainô*, which is in turn derived from the Greek word for fabric-working.⁶²⁹ Etymologically linked to textile and fabric, the raw material of clothing and fashion, the evolution of the word text itself implies the artificial construction of the assumption underlying the intangibility of text which has been constructed since the transcription of Homeric poems and the appearance of silent reading in the 5th and 4th centuries B.C.E.⁶³⁰ Gregory Nagy has pointed to the Greek word *hymnos* to show the metaphoric quality of what we might commonly think of as "a song sung in praise of gods or heroes- but also a song that functions as a connector, a continuator."⁶³¹ Nagy's overarching "point is, metaphors referring to the craft of fabric-workers pervade the usage of *hymnos* in archaic Greek poetics."⁶³²

⁶²⁷ Text/Textile, Center for Hellenic Studies, https://www.youtube.com/watch?v=HICTxDy_yv0 (with Gregory Nagy) (video). See also *Text* in MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/text>. See Scafidi, *F.I.T.*, *supra* n. 37 at 76 (although using ancient Greek examples to support the idea that textiles conveyed information like a text).

⁶²⁸ Text/Textile, *supra* n. 626. This link between word and weaving in ancient times has been taken up in fashion law literature. Susan Scafidi notes that "[f]or the ancient Greeks, the fiber arts were an extension of symbolic thought, as vital to a meaningful existence as speech." Scafidi, *F.I.T.*, *supra* n. 3 at 76.

⁶²⁹ GREGORY NAGY, *PLATO'S RHAPSODY AND HOMER'S MUSIC: THE POETICS OF THE PANATHENAIC FESTIVAL IN CLASSICAL ATHENS 70- 71* (Center for Hellenic Studies, Harvard University Press, 2002).

⁶³⁰ Ginzburg, *Invisible Texts* *supra* n. 616 at 136 (highlighting "the momentous event that took place in Athens in the 6th century B.C.E: the transcription of Homeric poems, which had until then circulated only in oral form, sung by professionals known as rhapsodes").

⁶³¹ NAGY, *supra* n. 628 at 70.

⁶³² *Id.* at 71. Other research on the relationships between fabric, textile and other ancient Greek *technai* are currently being pursued as part of The Penelope Project, hosted at the Research Institute for the History of Technology and Science in the Deutsches Museum, Munich. The project, whose "aim is to integrate ancient weaving into the history of science and technology, especially digital technology", has also resulted in work on the relationships between textile and rhythm notation in poetry and music (See GFanfani, *Rhythmical interweaving: epiploke in ancient Greek metrical theory*, *Ancient Greek Metre and Rhythm/Weaving Imagery in Greek Poetry*, February 5, 2018 THE PENELOPE PROJECT, <http://penelope.hypotheses.org/614>). Giovanni Fanfani, one of the researchers associated with the project, has written articles on the use of textile as a metaphor in Greek poetry. Giovanni Fanfani, *Weaving a Song: Convergences in Greek Poetic Imagery between Textile and Musical Terminology. An Overview on Archaic and Classical Literature* in *TEXTILE TERMINOLOGIES FROM THE ORIENT TO THE MEDITERRANEAN AND EUROPE, 1000 BC to 1000 AD 421- 436* (Salvatore Gaspa et al, eds., Zea Books, 2017) and Ellen Harlizius-Klück and Giovanni Fanfani, *(B)orders in ancient weaving and archaic Greek poetry* in *SPINNING FATES AND THE SONG OF THE LOOM. THE USE OF TEXTILES, CLOTH AND CLOTH PRODUCTION AS METAPHOR, SYMBOL AND NARRATIVE DEVICE IN GREEK AND LATIN LITERATURE* 61-99

Some examples show how text, recited by rhapsodes from a set text, was like tangible images. In these *rhapsodes'* texts we find metaphors in which the *rhapsodes* compare the lasting quality of their recitation to stitched products and to sculptures. As Svenbro recounts, Pindare in Néméene commands his lyre to weave his song (" 'O douce lyre, tisse (exúphaine) sans plus tarder, sur le mode lydien, ce chant (mélos) aimé...'"⁶³³) and says he himself weaves a decorated tiara (" 'Je tisse (huphaínō) pour les Amythaonides un diadème ornementé (poikílon húmnon)'"⁶³⁴). Of interest for the relevance of these nuances for fashion are Svenbro's comments that go so far as to say that these comparisons are not only about *tissage* and *tressage*, but also about *couture*.⁶³⁵ Elsewhere Svenbro points out how Simonides uses marble as metaphor for what his own poetry must do (" 'Il est difficile de devenir un homme exemplaire dans le Mémoire des hommes, carré pour ses bras, pour ses jambes et pour sa pensée...'"⁶³⁶), explaining the use of the term *carré* by a *rhapsode* as a way to equate a *rhapsode's* own poetry with the famed *kouroi* to suggest the permanence of his work.⁶³⁷ According to Svenbro one of the chief reasons for the emphasis and the equation of recitation of poetry with other *technai* was the *rhapsodes'* desire to be paid by the heterogeneous audience members they now served.⁶³⁸ In effect, *rhapsodes* sought a legal equality between themselves and the authors of other monumental works.⁶³⁹

The work of *rhapsodes* in Ancient Greece reveals a continuing affinity between newly intangible text and other categories of tangible works

(Oxbow Books, forthcoming) (available at <https://zenodo.org/record/840005#.WpLhSGaZO8U>).

⁶³³ JESPER SVENBRO, LA PAROLE ET LE MARBRE: AUX ORIGINES DE LA POÉTIQUE GRECQUE 192 (1976) [hereinafter SVENBRO, LA PAROLE].

⁶³⁴ *Id.*

⁶³⁵ *Id.* at 191-192.

⁶³⁶ *Id.* at 220. ("En autre mots, Simonide emploie une métaphore empruntée à la sculpture pour suggérer l'intemporalité à laquelle l'*anēr agathós* atteint dans la poésie...C'est à travers une réflexion sur la peinture et la sculpture qu'il arrive à une compréhension de sa propre activité : « La parole est l'image des actions... » Simonide considère donc la poésie non seulement comme analogue à la peinture, mais encore à la sculpture. ») *Id.* at 156. Svenbro also cites to Pindar for the same idea that poetry is superior to marble. See *Id.* at 157 (« Comme Pindare, Simonide considère que la parole poétique est supérieure au marbre. »)

⁶³⁷ *Id.* at 156- 157. See also the Italian version: JESPER SVENBRO, LA PAROLA E IL MARMO: ALLE ORIGINI DELLA POETICA GRECA 14 (Boringhieri, 1984).

⁶³⁸ SVENBRO, LA PAROLE *supra* n. 632 at 180.

⁶³⁹ *Id.* (« ...si les poètes ont insisté sur l'analogie entre monument et poème, leur insistance relève donc vraisemblablement d'une volonté de faire reconnaître la « monumentalité » de la poésie commémorative et, du même coup, l'équivalence 'juridique' entre sculpteur e poète. »)

of art, like sculpture and painting and textiles. We might say, like the diverse categories of things protected under Italian cultural property law and U.S. copyright law, that newly intangible text in Ancient Greece included itself alongside other objects to emphasize its value no matter the emerging qualities of tangibility and intangibility which we may identify in hindsight.

Other types of texts alongside what we might frame as increasingly intangible textual recitations of *rhapsodes* in the 5th century B.C.E. further narrow the gap between intangible text and tangible images and, therefore, between cultural property and non-cultural property. Mnesitheos' inscription dating to the early 5th century B.C.E. is a text which, written on a stone, is implicitly connected to and made meaningful by the addition of a reader's voice to it.⁶⁴⁰ As Svenbro analyzes the text, the phrase "someone will tell the passerby", spoken aloud by the reader/speaker of the inscription, allows the fame of the person who is dead to be distributed.⁶⁴¹ In this case the text on the stele requires a voice to be truly permanent. Not only is the text not the same no matter where or how it is reproduced, but a material monument is crucial to the communication of the text's meaning. This funerary monument and inscription work together to shape the way in which the message is expressed. The text on the stele requires a voice and its place on a funerary monument to be truly permanent. In addition, neither the sculpture nor the text is the same no matter where or how they are reproduced: both need a voice and each other to communicate their message. Here, this text may be protected and preserved as a cultural property. Our public cultural interest in the text's message is tied to the text as it exists on the tangible monument; we cannot understand one without the other. This text seems tangible.

In our contemporary times we have texts which today are similar to Mnesitheos' inscription. Svenbro himself gives a modern example in French, "doukipudonktan", from Raymond Queneau's novel *Zazie dans le Métro*. The text must be read aloud in order to be fully understood as "From where [is it] that they stink so much then?"⁶⁴² Duchamp's phrase and work of the same name L.H.O.O.Q. [Figure 23] and the Britney Spears' song "If You Seek Amy" are other examples. In these examples, text is not intangible, it is not the same wherever it is printed. Rather, text is tangible because it is dependent on its placement on a specific type of material or because it exists between tangibility and intangibility thanks to a necessary oral and aural

⁶⁴⁰ For this example see SVENBRO, PHRASIKLEIA, *supra* note 624 at 48.

⁶⁴¹ *Id.* 51- 55.

⁶⁴² *Id.* at 166.

dimension.⁶⁴³

These examples show how an obvious meaning of the text can necessitate negotiations between text and tangible materials that then indicate text's tangibility. Context, however, can also inform the tangible text inquiry. The example of Nestor's Cup brings home the modern conundrums of conceiving text as historically tangible, then as intangible, only to return to text as tangible in certain cases. As Catoni details, Nestor's Cup dating to the 8th century B.C.E. displays an inscription, "*I [am] Nestor's cup, good to drink from. But he who drinks from this cup, him straightaway the desire of beautiful-crowned Aphrodite will seize.*"⁶⁴⁴ The placement of this text on a cup and the self-referencing of its placement conveys the importance of the cup's materiality for the text's meaning. The text is a tangible text. At the same time, however, the context of the symposium is also crucial to the tangible text's meaning and existence as such. Catoni describes the inscription as a "literal meaning of ownership [which] is partially corrected and linked in a substantial way to its support as well as its context of use."⁶⁴⁵ In certain circumstances, context may need to be incorporated into a negotiation of the relationship between public cultural interest and property to determine what might be sufficiently tangible to satisfy the cultural property legal standard.

For modern and contemporary Italian fashion design objects context is an important consideration. Most fashion designs are not as immediately clear in their cultural message, and therefore not as clear in their public cultural interest, as tangible text. At the same time, however, context considerations might also need a limit. Italian fashion designs exist in many different spaces at many different times; fashion design objects are not confined to one place, as the text on Nestor's Cup is confined to the symposium. Fashion designs instead exist in many different places, from the design studio, to the closet, to the street, to the cultural institution.

⁶⁴³ Which might also be compared to the trademark legal regime and its rules preventing "sound alike" marks. See *Virgin Enters. v. Nawab*, 335 F.3d 141, 149 (2nd Cir, 2003) (discussing the Polaroid factors of trademark infringement and noting, as part of its analysis of whether two marks both of the word "virgin" were similar that "the reputation of a mark also spreads by word of mouth among consumers. One consumer who hears from others about their experience with Virgin stores and then encounters defendants' Virgin store will have no way knowing of [sic] the differences in typeface.") See also Lanham Act 15 U.S.C. §1051 et seq. (while first passed in 1947, trademarks were also included as part of the 1870 Patent Act; see Patent Act of 1870, 41 H.R. 1714).

⁶⁴⁴ Catoni, *Symbolic Articulation*, *supra* note 623 at 149.

⁶⁴⁵ *Id.* at 150.

3. Fashion Design Objects on a Tangible/Intangible Spectrum

The possibility that some text, like the Ancient Greek examples of Mnesitheos' inscription or the one on Nestor's Cup, might be considered tangible text eligible for inclusion in the cultural property "box" opens a door for the consideration of fashion design objects as cultural property. Certain fashion designs include text. Examples of fashion designs' embrace of text can serve as a starting point for how the public cultural interest in certain Italian fashion designs may be tied to the materiality of a fashion design object. When so tied to a dress, accessory or other tangible object itself, a fashion design may be considered a cultural property and protected as such; an entire Italian fashion design object may then be classified as cultural property.

A first example of such a fashion design object is a full length sleeveless evening gown made of gold sequins from Moschino's Pre-Fall 2015 collection designed by Jeremy Scott. On the front of the dress, from the bust to below the knees, is written in large block letters "I HAD NOTHING TO WEAR SO I PUT ON THIS EXPENSIVE MOSCHINO EVENING DRESS."⁶⁴⁶ Read out loud by the viewer, the dress' wearer or owner is given a voice and deliberately interacts with the viewer like the funerary monument's inscription mentioned above. On another material the meaning of the message would not be the same, the dress' wearer or owner would be making a different type of statement, one that was perhaps mocking instead of tongue in cheek. This text, at first glance and first reading, seems tangible enough for this Italian fashion design object to enter the cultural property "box" in circa sixty-six years and after Jeremy Scott's death.⁶⁴⁷ By extension, the fashion design itself would be cultural property.

Another contemporary Italian example is a 2016 GucciGhost bag designed by Alessandro Michele, the current Creative Director of Gucci, in conjunction with the artist Trouble Andrew.⁶⁴⁸ 17.5 inches high and 17 inches wide, this black bag is 6 inches deep and its handle is a round hole in the leather at approximately 1.5 inches from the top

⁶⁴⁶ Look 25, Pre-Fall 2015 Moschino, VOGUE, <https://www.vogue.com/fashion-shows/pre-fall-2015/moschino/slideshow/collection#25>.

⁶⁴⁷ The time and non-living author *unicum* mentioned above. See Art. 10(5), CODICE, D.L. n. 42/2004.

⁶⁴⁸ See *Behind the Collection*, Gucci Ghost, GUCCI, <https://www.gucci.com/us/en/st/capsule/women-gucci-ghost-collection> (" 'Artist Trouble Andrew is as much as Gucci as the brand is, the way he uses the logo of the company is by taking it to the streets, it is interesting how our language, started by a family in Florence nearly 100 years ago can be something very contemporary.' Alessandro Michele, Gucci Creative Director).

of the bag.⁶⁴⁹ The bag displays the graffitied word “REAL” in the middle on the front of the square bag where the word “GUCCI” is also embossed at the bottom of it. The back of the bag has the Gucci trademark GG displayed in the same graffitied type as “REAL” on the front. Made in a variety of colors, including red with blue writing and black with pink writing, this bag is black with yellow writing. Like the Moschino example above and the funerary monument inscription, the commentary of the design on the front of the bag, which refers to the bag’s realness seems easily understandable at first reading *but only inasmuch as it is on a “real” Gucci bag, on Gucci material*. Placed on any other material, a non-Gucci bag, the message of the text would not be the same. Here we seem to have an example of tangible text that is part of an Italian fashion design and, therefore, an Italian fashion design object which might be such an *unicum* of intangible public cultural interest in an intangible element and tangible material that the bag can enter the cultural property “box” after Alessandro Michele and Trouble Andrew’s death and in circa sixty-eight years.

At the same time, however, both these examples are also related to context. The way in which both texts on the dress and the bag, and therefore the way in which both Italian fashion designs, convey their messages is inextricably caught up, like in the example of Nestor’s Cup, with both the material and the context. Separated from the discussion of counterfeits and fakes, the message of authenticity and tongue-in-cheek quality of these Italian fashion designs may have less cultural relevance and be of less public cultural interest by extension. In this sense, the test of whether certain modern and contemporary Italian fashion designs are sufficiently Italian fashion design objects that enter the cultural property “box” is dependent on their specific place, support and messages. Context here could be an added consideration in a legal standard applied under Italian cultural property law. A consideration of context for the Moschino dress and the Gucci bag above might *only further* support a preservation of these Italian fashion design objects. The fashion design alone, separate from the dress or bag, is not enough to convey the full message here. In the face of other objects which might undermine or blur this fashion design’s message *because the text and design are on other materials*, preservation of the entire Gucci bag or Moschino dress, even if it exists

⁶⁴⁹ These measurements are courtesy of The Real Real website, on which the bag is for sale. See GUCCI 2016 GUCCIGHOST LARGE TOTE, THE REALREAL, https://www.therealreal.com/products/men/bags/totes/gucci-2016-guccighost-large-tote?sid=pxogmz&utm_source=Google&utm_medium=shopping&cvosrc=cse.google.google&cv0_crid=151251594673&gclid=EA1aIQobChMI7_6WvLpM3A1VigOGCh212w5jEAOYCBABegIVv_D_BwE.

in multiple versions, seems necessary.

Another example not related to a context of authenticity or counterfeiting is a 2015 dress designed by Valentino embroidered with a line of text from Dante's *Inferno*.⁶⁵⁰ The text, from Canto V and likely citing Dante's references to Paolo and Francesca⁶⁵¹, is placed in a concentric circular form on the skirt of the dress at the apex of the wearer's legs. Such a placement is likely tied to the meaning of the text, which takes place in the circle of Hell where sinners are punished for subjecting their reason to their sensual or corporeal desires.⁶⁵² Here, the text's concentric circle form makes clear that there is a connection between the text from *Inferno* and the Italian design, but its tangibility might only be ascertained through a contextual analysis. Placed on this specific part of the skirt, the text conveys a specific message which might be of public cultural interest to us. Placed on a bag or shoe or even other object, even if in this concentric circle form, the message might not be the same and, therefore, no longer of public cultural interest to us. In this sense, this Valentino fashion design object might be sufficiently tangible to be classified as a cultural property under Italian law.

A standard for when objects such as these Italian fashion design objects may be cultural property might, therefore be the following. First, look to the relationship between the Italian fashion design and the material. If the message of the Italian fashion design is sufficiently materially dependent at this stage, then there may be no need to consider the context in which the object exists. If there is a question as to whether the message of the Italian fashion design is sufficiently materially dependent, context may be taken into account as part of a second step.

In short, Italian fashion design objects that include text might be evaluated according to their particular circumstance, in light of their specific place, support, message, and *at times* context, to determine whether the public cultural interest is sufficiently tied to a design that is materially dependent. If it is determined that a design is sufficiently

⁶⁵⁰ Look 41/48, Spring 2015 Couture Valentino VOGUE, available at <https://www.vogue.com/fashion-shows/spring-2015-couture/valentino>.

⁶⁵¹ See e-mail to author from Blair Trader, Head of PR for Valentino, June 7, 2019 (on file with author). The attribution of the text to that describing Paolo and Francesca has been made at the suggestion of Guido Guerra, M.A. Italian Studies, University of Notre Dame, who identified the word "non m'abbandona" in line 105 of Canto V as part of the Valentino design.

⁶⁵² Such a description observed by Guido Guerra, M.A. Italian Studies, University of Notre Dame (on file with author).

materially dependent and that the public cultural interest attaches to that design, then an Italian fashion design object may be classified as cultural property. In this sense, fashion design objects offer nuance to Giannini's differentiation between intangible text that is not cultural property and the objects of aesthetic, historic interest or testamentary value that can be classified as cultural property. *Some previously conceived intangible text is not only of public cultural interest but also sufficiently materially dependent to be classified as a tangible cultural property.* In this sense, there are some tangible texts which do not need to be indirectly protected through the preservation of manuscripts as testaments having the value of civilization.

This proposed legal standard may also help to weed out Italian fashion designs which are not sufficiently materially dependent. This material dependency does not, however, necessarily mean that these Italian fashion designs, and the objects to which they apply, are not cultural property. Some Italian fashion design objects may also, apart from this legal standard, be considered testaments having the value of civilization. Other Italian fashions may be like a separate category of cultural property: the visible images associated with paintings.

To explore how some Italian fashions may be like visible images, take two non-Italian fashion designs by the Japanese fashion designer Matsuda⁶⁵³ in his collections from 1988 and 1989.⁶⁵⁴ In the 1980s, after officially entering the U.S. market and creating labels underneath his Nicole Ltd. brand⁶⁵⁵, Matsuda designed a number of objects with text on them that are still part of The Museum at the Fashion Institute of Technology's collection. One, a necktie dated to 1991,⁶⁵⁶ measures 51.5 inches long to the tip of the tie's corner and varies in width from 1.15 inches at the skinniest point of the tie to 3.25 inches at its widest. In flock printed text, in which fibers are placed on the shirt's fabric to form the letters through adhesive or electrostatic⁶⁵⁷, letters that spell out

⁶⁵³ For a short biography of Matsuda see Elizabeth Glendinning, *Mitsuhiro Matsuda*, Fashion Photography Archive. London: Bloomsbury, 2015. Bloomsbury Fashion Central. Web. 16 Apr. 2019. <<http://dx.doi.org/10.5040/9781474260428-FPA086>>.

⁶⁵⁴ Richard Martin, *Wordrobe: The Messages of Word and Image in Textile and Apparel Design of the 1980s* in *TEXTILE AND TEXT* (formerly THE TEXTILE BOOKLIST) (Fashion Institute of Technology, 1989) at 11. Fashion Institute of Technology Special Collections.

⁶⁵⁵ Elizabeth Glendinning, *Mitsuhiro Matsuda*, *supra* n. 652.

⁶⁵⁶ This date is available in The Museum at The Fashion Institute of Technology's TMS database. The full entry and description read "91.240.11, Matsuda, man's necktie, 1991, Japan, Gift of Richard Martin, Clothing and Accessories, Yellow-green cross rib silk man's tie with flock printed design of words." The objects were viewed on August 16, 2019 at The Museum at The Fashion Institute of Technology.

⁶⁵⁷ *What is flock printed, definition and explanation*, <http://www.textileglossary.com/terms/flock-printed.html>.

“Monsieur Nicole Matsuda” are spaced close together in a line which curls and winds itself into knots on the front of the tie [Figure 26]. At the tie’s corner, individual letters separate from the word “Matsuda” and fall, one by one, into a pile at the corners. Another Matsuda shirt dated to the same year displays similar text with similar placement at strategic points on it. Looping text, the same phrase “Monsieur Nicole Matsuda”, curls around the collar, down the front of the shirt, and finally falls, letter by letter, into the front shirt pocket. Like on the tie, individual letters spelling out “Monsieur Nicole Matsuda” fall into the corners of the sleeve cuffs.

For the shirt, with button holes made over the flock-printed letters, the text is indelibly tied to the material. The tie seems the same, with its flock-printed letters floating into a V-like shaped container made by the corner of the tie. A visual impression of objects falling into a pocket or another receptacle is depicted here. This text, if placed on any other object or material, while it would convey the same name and therefore implying a source identification, would not convey the same visual message which the placement and the progressive separation of its letters convey on the shirt or tie now as they interact with the specific shape and materiality of this shirt and this tie. Divorce this text from the material of the fashion object, place the text on a shirt without a pocket, and the visual message of the image which the text makes is no longer properly understood.

Here, more than simply indicating the source of this shirt, i.e. naming Matsuda as the designer, the text which is part of a fashion design plays with material and becomes a type of visualized quotation, an image.⁶⁵⁸ In this sense, the fashion design is much like Ancient Greek examples of images which include text on pottery. One example is an amphora dating to the 5th century B.C.E.⁶⁵⁹ (Figure 27) showing text coming out of the mouth of a rhapsode. Greek letters standing for the beginning of a poem, “As once in Tiryns...”⁶⁶⁰, are placed in a downward arc which melds with the stance of the poet to convey a leaning forward motion, as if the text depicted on the vase is literally falling out of the *rhapsode*’s mouth towards an imaginary audience. On the one hand this text seems distinctly tangible – placed any other way in the image it would not convey the same meaning, the same message.

⁶⁵⁸ Catoni, *Symbolic Articulation supra* n. 623 at 132.

⁶⁵⁹ *Neck-amphora*, THE BRITISH MUSEUM, http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?assetId=221978001&objectId=399287&partId=1 (last visited July 17, 2019) (describing as “Amphora Made in Attica, Attributed to the Kleopadres Painter, 490- 480 BC, Collection of the British Museum, Roman and Greek Antiquities”).

⁶⁶⁰ For this information see the catalogue entry from the British Museum. *Id.*

Straight text or vertical text placed beside the *rhapsode* would not help to convey the *rhapsode's* self-representation in the concrete sense. At the same time as a part of an image, as a visualized quotation, the text functions as a crucial part of a representation. Connected to the material and yet also able to be divorced from it, while informed by its particularities of design, this image of the rhapsode and the cultural message it conveys might be protected through classifying one entire vase with the image as cultural property, certain iterations where the vase has added historic significance as cultural property, or every vase having this image as a piece of cultural property. In this sense, we might also consider protecting the first iteration of Matsuda's shirt, other exemplary versions of Matsuda's shirt or tie in their materiality, or all their material iterations, as cultural property. This is much the same decision as that which Italian cultural property law would take to protect the multiple versions of Van Gogh's *Sunflowers* on the Italian territory.

A standard for when objects such as the Matsuda fashion design objects may be cultural property might, therefore be the following. Again, first, look to the relationship between the Italian fashion design and the material. If the message of the Italian fashion design is sufficiently materially dependent at this first stage, but can also be repeated in other materials without, however, maintaining the original relationship between the fashion design and the object, then the fashion design may be sufficiently like a visible image, like the composition of a painting, that the fashion design object in its first tangible iteration(s), at the very least, may be cultural property.

Some Italian fashion designs might fulfill this test that we have thus far applied to the Matsuda examples. Take, for example, a dress by Cesare Fabbri for the "Zuccoli" Spring/Summer 1990 Collection currently in the collection of Palazzo Pitti's *Museo della Moda e del Costume*. On the dress, a beaded representation of the triangular topped façade of the Santa Maria Novella church in Florence, Italy is matched by a triangular piece of material which makes up the halter of the dress' bodice. The material support and this decorative element are closely related. Depending on how we understand the relationship between the design, a reproduction of the Santa Maria Novella façade, and the importance of the halter top of the dress, which imitates the top of the Santa Maria Novella façade on the church, we may decide that this Italian fashion design is like a visible image which is always informed, despite its ability to be reproduced, by the material upon which it is first placed. Would this triangular fashion design convey the same cultural message if it were placed on a turtleneck, and not a halter

dress? At the same time, the issue of what is of public cultural interest muddies the analysis. Do we see this Italian fashion design as of public interest because it is a uniquely tangible fashion design object or because it is a reproduction of another tangible object that is cultural property, the Santa Maria Novella façade? Depending on how we characterize the cultural significance of the fashion design, we might be more prone to envision the fashion design as an invisible image unable to be tangible enough as related to any material, which only refers back to the Santa Maria Novella façade itself.

Of course, a fashion design could also be understood as a text as image; an image which is not tied to a specific material at all but is only meant to convey a proper *schema*⁶⁶¹, in Ancient Greek terms, the abstract reality of how a *rhapsode* should perform. We might identify this abstract reality as the same no matter where it is placed, as in Ancient Greece where certain gestures and postures, in sculpture, dance and across other *technai*, communicated the same messages.⁶⁶² In this sense, fashion designs would not be tangible text or visible images but *intangible images- always copies that were originals no matter where they were placed*. Italian fashion design as text here essentially becomes an icon.⁶⁶³ Some modern and contemporary Italian fashion design objects like logos or silhouettes of dresses raise this issue for us. In such examples, taking the context of the text into account, an Italian fashion design could also be characterized as an intangible text, reproducible across material design objects to convey similar or even nuanced messages which are not related necessarily to the material support upon which they are placed. The concentric Dante text example in the Valentino dress noted above, despite its ability to be tangible based on its placement on the dress, might also be interpreted thusly. Here, an Italian fashion design object would not be eligible for protection as

⁶⁶¹ For a discussion of *schema* as “aiming at the continuous reproducibility of the same figures in different media”, see Catoni, *Symbolic Articulation supra* note 623 at 147. *Schema* may also be defined as “figure, general outline, silhouette, posture, or gesture.” See *Id.* at 141. *Schema* here refers to figures communicated in the compositions of artworks, or invisible abstract realities, as Maria Luisa Catoni has indicated. See generally MARIA LUISA CATONI, LA COMUNICAZIONE NON VERBALE NELLA GRECIA ANTICA (2008). See also Catoni, *Symbolic Articulation in Ancient Greece: Word, Schema and Image, supra* n. 623 at 139- 140 (referring to a discussion in Plato’s *Cratylus*, “...just as painting imitates through *schema* and *chroma* (meaning drawing and color) the *schema* and the *chroma* (meaning the figure and the color) of the imitated object...”). “Pictograms” are not the same as *schema*. For support of this point see *Writing: semasiography and logosyllabography* in POWELL, *supra* n. 624 at 62- 71.

⁶⁶² See generally CATONI, *supra* note 661.

⁶⁶³ As Catoni observes as applied to Alcimadas’ equation of written text with other imitative *technai* like sculpture “a text...is an *eikon* (image).” Catoni, *Symbolic Articulation, supra* note 623 at 132.

cultural property under Italian cultural property law because, like Giannini's example of Petrarca's text, it would be understood as an original, no matter where it is placed.

A Jeremy Scott designed pair of shoes from Moschino's Fall 2014 Ready to Wear line may be one example of a fashion design that exists as an intangible text. Such a fashion design cannot be classified as cultural property because its cultural message is not materially dependent enough to necessitate the preservation of the entire fashion object of which it is a part. In the collection of the Museum at the Fashion Institute of Technology and measuring 3.5 inches high, 9 inches long and 3.25 inches wide at its widest point, the Moschino shoes in question are white, yellow and red. Slingbacks, the yellow is on the majority of the outside part of the shoe, while the tip is red with a yellow curved M on it over black curved lines which seem to form a shadow under the yellow M. The inside of the shoe is covered by yellow and white stripes, and has a label "Moschino Milano" at its heel. Underneath, the shoe is scuffed. Carved or stamped into the sole is written "VERO CUOIO" "37" and there is also a label glued on to the sole noting "2014.46.1C/D MOSCHINO ITALY Fall 2014 Gift of Moschino MFIT." Focusing on the M and looking only at the shoe, there is a correlation between the name "MOSCHINO MILANO" and the M as the first initial of that name. Moreover, "VERO CUOIO" tells us about the material of the shoe, although, without a knowledge of Italian shoe sizes, the information the "37" might convey may not be identified. The choices of the colors are equally unclear looking only at the shoe itself, including its material. Looking at other objects from the same collection, such as a sweater from the Moschino Fall 2015 Ready to Wear Collection, the choice of colors (red, yellow, black and white) may perhaps be identified as the common *schema* of the fashion object. Here, the common design element of color seems intangible and reproduced across individual fashion objects in one collection.

In addition, looking more closely at the "M" and applying the standard above, discerning if there is a connection between this "M" and the material of the shoe, and applying a contextual analysis, looking at other objects in the cultural vicinity of the shoes, the white and yellow stripes, red and yellow, and the curved "M" are all the same colors and practically in the same positions as a McDonald's French Fry container. Here the white and yellow lines are applied to the inside of the shoe and might also be placed on another material, but within the greater context of the yellow M on the red surface and the outside knowledge that there exists a similar looking object in a fast food restaurant, the message of the "M" becomes clear and, *as applied on multiple Moschino*

objects and other tangible objects does not seem sufficiently tangible to be classified as cultural property. The public cultural interest converges on the *schema* of the M as it is applied and understood on multiple materials in multiple places. The “M” and colors, while on Moschino materials, could also potentially communicate the ironic commentary on McDonald’s logo if they were placed on other materials of different provenance or of different raw material.

Of course, the main issue and challenge with identifying the public cultural interest in fashion designs divorced from materiality is that a purely symbolic cultural message of the design might be the definitive factor for our cultural interest. Cultural interest may not relate at all to the connection between the design and its material. Such symbolic meaning alone, apart from an object, seems definitively outside the cultural property “box” under Italian law. Indeed, even when Italian cultural property law presumes to protect tangible objects like manuscripts, it grounds this preservation not in a manuscripts’ symbolic function but, as Giannini says, in the manuscript’s physical connection to the author and his creativity, or, in the case of audiovisual materials, to an ability to incorporate cultural expressions and diffuse them. Designs which are symbolic alone do not seem to do this. Rather, they are about standing in for a certain message, not communicating one or diffusing cultural expression in an absolute sense. Such symbolism seems better suited to the realm of trademark law, and not to that of cultural property law. The “as applied to”⁶⁶⁴ requirement is not only different from “fixed”⁶⁶⁵ in copyright, but it is

⁶⁶⁴ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 10 (2nd Cir. 1976) (noting in its application of the categories of generic, descriptive, suggestive and fanciful in trademark law that the type of product to which the mark is applied and its use are used to determine the category); see also *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 211 (2000) (discussing *Abercrombie* to note when a mark is considered distinctive in terms of the mark’s “primary significance...to identify the source of the product rather than the product itself.”)

⁶⁶⁵ 17 U.S.C. §102. *Williams Electronics, Inc. v. Artic International, Inc.*, 685 F.2d 870 (3d Cir. 1982) (“the fixation requirement is met whenever the work is “sufficiently permanent or stable to permit it to be...reproduced or otherwise communicated “for more than a transitory period”); *Kelley v. Chicago Park District*, 635 F.3d 290, 304-305 (7th Cir. 2011) (although applying the Visual Artists’ Rights Act, the Court explored if the work qualified for “basic copyright” noting “*Wildflower Works* is neither “authored” nor “fixed” in the senses required for copyright... If a garden can qualify as a “work of authorship” sufficiently “embodied in a copy,” at what point has fixation occurred? When the garden is newly planted? When its first blossoms appear? When it is in full bloom? How—and at what point in time—is a court to determine whether infringing copying has occurred? In contrast, when a landscape designer conceives of a plan for a garden and puts it in writing—records it in text, diagrams, or drawings on paper or on a digital-storage device—we can say that his intangible intellectual property has been embodied in a fixed and tangible ‘copy.’”); see also Megan Carpenter and Steven Hechter, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82(5) *FORDHAM L. REV.* 2221 (2014),

also different from “caught up” or “related to”⁶⁶⁶ in cultural property law.

It is here that the limits of a proposed legal standard to decide how modern and contemporary Italian fashion designs, and therefore design objects, are cultural property under Italian cultural property law may be found. Designs which are so unmoored, so unfixed or unrelated to material supports may not be understood as cultural property. Such designs are best conceived of in terms of *style* and *schema*. When *style* and *schema* are so indicative of an Italian fashion design, not only does cultural property law seem unable to apply, but the legal standard becomes marred by questions of authenticity better suited to trademark law, as Giannini would say, a private law regime.

4. The Possible Legal Limits Imposed by Intangible *Schema* and *Style* for Tangibility

Style, the conceptual partner of *schema* identified above, seems to hang like a grey haze over a proposed legal standard for how modern and contemporary Italian fashion design objects may be sufficiently tangible to be classified as cultural property under Italian cultural property law. Not only, as we have seen above, do certain designs seem best characterized as intangible texts or even intangible images, as *schema* or *abstract entities* that are the same no matter where they are placed, but they seem to communicate symbolic messages that Italian cultural property law is hard pressed to see as within its purview. In addition to these legal concerns, references to an “Italian style” in Italian fashion history highlight the importance of deciding what weight to assign to such a term in an analysis of how Italian fashion is part of cultural heritage and how, more specifically, Italian fashion design objects are cultural property.

The identification of style has been extensively discussed by material culture scholars and art historians and its understanding in those quarters is indicative of something that is common across material iterations of objects and yet also culled from certain objects. Cultural property is, after all, a liminal notion⁶⁶⁷: other disciplines inform it, the

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4984&context=flr>. See also *Garcia v. Google, Inc.*, 786 F.3d 733, 743- 744 (9th Cir., 2015) (holding an actress’ performance in a film uncopyrightable because the director and crew fixed her performance and noting the nature of film or audiovisual works, which privilege joint authorship and not collective authorship).

⁶⁶⁶ See Giannini, *supra* note 465.

⁶⁶⁷ CASINI, *EREDITARE IL FUTURO*, *supra* note 63 at 47- 50 (discussing the expansion of cultural property into the myth of *benculturalismo*); Cassese, *da Bottai a Spadolini*, *supra* note

legal weight of the term is not given by the law itself. As a result, the way material culture scholars and fashion studies scholars see style might provide a clue as to whether some fashion designs are like intangible text, reproducible across media; like tangible text, related to certain materials; or even like visible images. Such analyses potentially help to identify what parts of Italian fashion designs might not be considered sufficiently related to their material support, and therefore not eligible to be cultural property.

The use of the term *style* both in Italian cultural property law and in U.S. copyright law is at times ambiguous. In U.S. copyright law, style can both identify a specific expression which is copyrightable and a potential indicator of a commonality which cannot be copyrightable subject matter. In this sense, *style* as a term with legal weight in U.S. copyright law reveals itself as on the intangible and tangible spectrum identified above, but also as a tool for determining what is an unprotectable idea or protectable expression and for the application of the merger doctrine.⁶⁵⁸ In Italian cultural property law *style*, as in the

330 at 136; TARASCO, *supra* note 91 at 46 (“*Il bene culturale è categoria paerta all’evoluzione socio-culturale, di cui deve farsi espressione.*”).

⁶⁵⁸ Cassese, *da Bottai a Spadolini*, *supra* note 330 at 135- 136 (noting the difficulty of understanding cultural property as including all material culture under the law, although from both a liminal and intangible perspective).

⁶⁵⁹ In *Franklin Mint Corp v. National Wildlife Art Exchange, Inc.* for example, the Third Circuit identified a style particular to an artist as part of a copyrightable expression and not as an uncopyrightable or freely able to be copied style of a period. LERNER AND BRESLER *supra* note 567 at 915 (citing and summarizing *Franklin Mint Corp v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62 (3rd Cir., 1978)). The court noted how hard it is to draw a common boundary between idea/expression across the different categories of copyrightable subject matter: “*Precision in marking the boundary between the unprotected idea and the protected expression, however, is rarely possible, see Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902, 75 L. Ed. 795, 51 S. Ct. 216 (1931), and the line between copying and appropriation is often blurred. Troublesome, too, is the fact that the same general principles are applied in claims involving plays, novels, sculpture, maps, directories of information, musical compositions, as well as artistic paintings. Isolating the idea from the expression and determining the extent of copying required for unlawful appropriation necessarily depend to some degree on whether the subject matter is words or symbols written on paper, or paint brushed onto canvases.” *Franklin Mint Corp v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62, 65 (3rd Cir., 1978). In a later case, *Steinberg v. Columbia Pictures*, in which the creator of a cover for the New Yorker sued the movie studio for copying his cover as part of a movie poster, the Southern District of New York noted the “whimsical, sketchy style” as part of Steinberg’s copyrightable, and here inappropriately copied, expression, notwithstanding what we might term the common unprotectable style or idea of a “New Yorker’s myopic view of the centrality of his city to the world” common to both the cover and the poster. *Steinberg v. Columbia Pictures*, 663 F. Supp. 706, 710 – 712 (S.D.N.Y., 1987). See also *Ward v. Andrews McMeel Publ’g, LLC*, 963 F. Supp. 2d 222, 232-233 (S.D.N.Y., 2013) (describing how typography, scratch off letters, colors and shapes are not copyrightable in a hangman book.) There are also other cases dealing with other subject matter that reveal the contradictory role style can play in copyright suits. See *Dr. Seuss Enters, L.P. v. Penguin*

case of the Allegory painting above, might be just as much a justification for considering a work to be a cultural property as not.

Jules Prown defines style as “*a distinctive manner or mode which, whether consciously intended or not, bears a relationship with other objects marked in their form by similar qualities...*”⁶⁶⁹ He continues, “[t]he way in which something is done, produced, or expressed is its style. Style is manifested in the form of things rather than in content.”⁶⁷⁰

According to Prown style is “inescapably culturally expressive...[and] the formal data embodied in objects are therefore of value as cultural evidence...[making] the analysis of style...useful for [studies] other than purely art historical studies.”⁶⁷¹ In elaborating on how style is manifested in form, Prown takes account both of style’s relationship to function and its relationship to content through form:

*[s]tyle is manifested in the form of things rather than in content...[t]o say that form and content are discrete is not to say that they are unrelated. They affect and modify each other.*⁶⁷²

Function is the constant against which stylistic variables play... Functional intention obscures style. The configuration of a functional object, such as a tool or machine, is almost completely determined by its

Books, U.S.A., Inc. 109 F.3d 1394 (9th Cir., 1997) (noting a parody has to target the original, including the style of it that affects its substance, and not just general style), T-Peg Inc. v. Vt. Timber Works, Inc., 459 F.3d 97 (1st Cir., 2006) (allowing analysis of style by jurors to determine infringement); Mattel, Inc. v. MGA Entm’t, Inc., 616 F.3d 904 (9th Cir., 2010) (while the District court noted the “particularized, synergistic compilation and expression of the human form and anatomy that expresses a unique style and conveys a distinct look or attitude” as allowing designs features of the doll to be copyrightable, the 9th Circuit characterized style as part of the uncopyrightable nature of the dolls, “Mattel can’t claim a monopoly over fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing- these are all unprotectable ideas”); Williams v. Gaye, 895 F.3d 1106 (9th Cir., 2017) (observing, although holding that Robin Thicke did infringe Marvin Gaye’s copyright in his song that “our decision does not grant license to copyright a musical style or “groove””). It must be noted that this identification of style, much like the utility or function of a design in the separability test, is usually made at the infringement stage of a copyright infringement suit, but also affects the scope of the copyright seeking to be protected. When a plaintiff brings an infringement suit, they need to prove ownership of a valid copyright before proving that the infringer copied and that the infringing work is substantially similar to the copyrighted one. As a result, courts often address questions of validity within the context of an infringement suit. See TRADE DRESS, *supra* note 16 at 465 (Aspen Publishers 2010). See also *Kieselstein- Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (1980).

⁶⁶⁹ Jules David Prown, *Style as Evidence*, 15(3) WINTERTHUR PORTFOLIO 197, 197 (1980).

⁶⁷⁰ *Id.* at 198.

⁶⁷¹ *Id.*

⁶⁷² *Id.*

*purpose, and style is a peripheral consideration. Form in such a case clearly follows function. The configuration of an object or activity purposefully concerned with a message, such as a story or play, is strongly conditioned by that message.*⁶⁷³

Here, we see initial similarities with the *schema* we spoke of above. Silhouettes, figures, gestures, or general outlines relate to the form of a thing, the figure of the object that is being imitated. As we have seen, a certain communicative function is also related to *schema*: *schema* is meant to communicate specific values, at times it must function in a certain way. At the same time, the values *schema* communicates are also their content. To see the relationship between *schema*, form, function and content we can return to the example of our *rhapsode* on the ancient Greek vase, which we identified as like a visible image, but which we might also think of as an intangible image, a visualized quotation which is the same no matter where it is produced. The form here, of a *rhapsode* standing upright with a stick, with text spilling out of his mouth, informs the *schema*, the figure of the *rhapsode* which is the abstract invisible reality which we identify as of a *rhapsode*. This abstract invisible reality, however, is also informed by the content of the message – if we are to communicate the proper way that a *rhapsode* should stand and deliver his song, how can we but portray him standing like this, with his stick and the text flowing? In this sense, the function of this visual quotation of a *rhapsode* is highly determinative of both its form and, therefore, its *schema* and *style*. If we look at other instances of representation similar to the *rhapsode* across different media in Ancient Greece we see that similarities in form exist, and therefore that similarities in content and function of the image, exist.⁶⁷⁴ Studies such as Aby Warburg's which trace gestures across examples of the visual arts also testify to common *schema* throughout different media.⁶⁷⁵

For the purposes of classifying fashion design objects as cultural property this overlap between *style*, *schema* and visible images or intangible images, like intangible text, complicates how we identify what is of sufficient public cultural interest to us in an object to qualify it as cultural property. The union of content and form, form and function, and then form, function, content and style with reference to

⁶⁷³ *Id.*

⁶⁷⁴ Maria Luisa Catoni has done this for other representations. See generally CATONI, *supra* note 661.

⁶⁷⁵ A. Warburg, *Einleitung. Bilderatlas Mnemosyne 1929*, in A. Warburg, MNEMOSYNE. L'ATLANTE DELLE IMMAGINI (M. Ghelardi and Nino Aragno, eds. 2002) http://www.engramma.it/eOS/index.php?id_articolo=2991.

culture make it hard to justify a protection of a *style* or *schema* that is not specific to a particular object *because that style or schema needs to proverbially and practically travel in order to be of cultural significance to us. While preserving certain relationships between the public cultural interest and tangible properties would support and help our understanding of cultural messages and therefore actuate our public cultural interest in them, preserving certain relationships between the public cultural interest and intangible properties would frustrate our understanding of cultural messages and therefore deny our public cultural interest in them.* As a result, if we follow Prown's analysis matched with Catoni's, what we would identify as the style of an Italian fashion design object, a design aspect that is reproducible across materials that communicates the same message, should be outside the cultural property "box" under Italian cultural property law.

This of course does not mean that material supports are not important to an analysis and identification of style. Prown, for example, goes about showing what style is through an analysis of multiple types of the same object. Looking at chairs and teapots over different periods of time, Prown identifies different ways in which these objects are done, produced, or expressed⁶⁷⁶ to identify a difference, across two groups of objects, between a style that is curving, twisted and inspired by organic forms and a style that is clean cut, geometric and abstract (in other words *rococo* and *neoclassical*).⁶⁷⁷ Throughout his analysis Prown engages with the distinct expression in individual objects in order to arrive at extracting a general style which applies to groups of objects. Materiality of the objects plays a part in Prown's identification of the general style. Prown contrasts "carved mahogany"⁶⁷⁸ with "sliced veneers"⁶⁷⁹ noting how each material affects the different and distinct ways in which certain tables express their specific style (the way in which they are tables) and, therefore, the cultural traditions, beliefs and expressions of the society which created them. While one has "twisted ropes, leaf forms, and claw and ball feet...replicating organic natural objects"⁶⁸⁰ the other is "simpler and more direct...precise and clean cut."⁶⁸¹ While the function of a table may be to allow things to be placed on top of it, leading to the necessity of a flat surface, and a table may need to stand at a certain height, and therefore have legs, here Prown identifies variations against these functions which are not

⁶⁷⁶ Prown, *Style as Evidence*, *supra* note 669 at 201- 205.

⁶⁷⁷ *Id.* at 202.

⁶⁷⁸ *Id.*

⁶⁷⁹ *Id.*

⁶⁸⁰ *Id.*

⁶⁸¹ *Id.*

dictated by it and which are instead manifested in the object's form, which he defines as "the configuration of a single object including [its] shape (in particular) [which] can also include material, color, size, texture, weight."⁶⁸² The "general or widespread use of [such] a particular form" is then understood as a style.

Prown's identification of style seems to begin with the identification of certain forms, which includes taking the material into account. From this identification of form and its relationship with function, Prown arrives at style and then general cultural expressions. In order to arrive at identifying that style and general expression, however, Prown must begin with one individual object and that individual object's contribution to a more general style. Each individual object seems to contribute, through its form, to an understanding of what general style is and therefore what the cultural expressions of its society are. Each object, through its own particular form, even seems to contribute to the reflection, formation and later understanding of the cultural expressions, beliefs and traditions of a society. In certain circumstances individual cultural expressions identified in this test might be tangible enough, so related to one particular material, to protect as cultural property. Given, however, that style is understood, by definition, as a cultural expression *across forms*, it does not seem to fit into the definition of cultural property under Italian cultural property law.

The difference between certain forms that are protectable as cultural property and generally unprotectable and intangible *styles*, or *schema*, does become complicated when we apply this division to fashion design objects.

Valerie Steele has applied Prown's analysis to fashion objects. In her article *A Museum of Fashion is more than a Clothes Bag*, Steele applies Prown's stylistic analysis to a yellow-silk late 19th- early 20th century dress in the collection of the Wadsworth Athenaeum in Connecticut.⁶⁸³ Noting the role of function in her stylistic analysis in comparison to Prown's, Steele observes that "...clothing is not simply (or even primarily) 'functional', at least not in the concrete sense of the word. Clothing may, of course, function by telling us something about the wearer."⁶⁸⁴ Here, the function of an individual fashion design object can be communicative, which follows from our analysis of how certain Italian fashion designs

⁶⁸² This definition was given in an e-mail from Jules Prown to the author, dated August 13, 2018, 5:06 pm (on file with author).

⁶⁸³ Valerie Steele, *A Museum of Fashion is more than a Clothes-Bag* 2(4) FASHION THEORY 327, 330 (1998).

⁶⁸⁴ *Id.* at 332.

are like tangible text, above. This communication may be understood from an internal analysis which Steele terms *stylistic analysis*, “concerned mainly with internal evidence...”⁶⁵ This internal evidence and the stylistic analysis it engenders is much like the legal standard proposed above- it looks to place, support, messages and perhaps context to identify whether an Italian fashion design is tangible enough, so indicative of a communicative message, to be protected under Italian cultural property law. Here, style seems to be another word for the expression of a particular object. In Steele’s test, description, deduction, and speculation⁶⁶, are all steps which are closely tied to the materiality of a dress and the individual message it can convey, notwithstanding her referral to it as *stylistic*. Here, the *stylistic analysis* of a dress seems about identifying how the dress, in its materiality, can tell us something about the wearer, specific to that dress. In some cases then, stylistic analysis as applied to fashion design objects may not necessarily frustrate an understanding of how individual fashion design objects might be cultural property. Indeed, such a stylistic analysis might help us to understand how certain fashion design objects are testaments having the value of civilization.

A semiotic analysis, on the other hand, of certain aspects of Italian fashion design objects, one in which, as Steele says,

*we must go out of the object to understand what each sign means. The sign (icon) may resemble the object it represents, as an artificial flower sewn on a dress stands for a real flower. The sign (symbol) is assigned an arbitrary meaning. The object that an icon represents may itself be a symbol for something else; a flower, for example, may symbolize spring and, by extension, youth*⁶⁷

might identify parts of fashion design objects which are not necessarily tied to the tangible object, like the “M” and colors on the Moschino shoe example above. Here, the symbolic quality of these individual fashion design objects kicks them out of the proverbial cultural property “box.” Recalling Catoni’s mention of text as an *eikon* above, certain parts of a fashion object may act, as Steele notes, as an *icon*, an image. These same *icons* might so intangible, like some text, that they cannot enter the cultural property “box” under Italian cultural property law.

Such a symbolic exercise as applied to fashion design objects which

⁶⁵ *Id.*

⁶⁶ *Id.* at 329.

⁶⁷ *Id.*

incorporate text seems best exemplified in Richard Martin's examination in his essay *Wardrobe: Messages of Word and Image in Textile and Apparel Design of the 1980s*.⁶⁸⁵ Characterizing his examples of text on clothing as "phenomena of pronounced speech"⁶⁸⁶, Martin also wades into the fashion as art debate, showing how other examples of visual art also meld word and image in the same way that these items of fashion do.⁶⁸⁷ "Reading" is, for Martin in his essay, an exercise that flows from both art and fashion alongside an "iconography."⁶⁸⁸ Using the tools of context and even metaphor Martin sees text in fashion as symbolic; he deploys semiotics, in the tradition of Roland Barthes⁶⁸⁹, to translate and understand the meaning of fashion that has text both on it and as part of its design.⁶⁹⁰ While Martin addresses 1980s Moschino fashion objects with text on them, he places these fashion objects alongside others which reproduce text outside of their intelligibility in a section of his essay titled *Globalism and Glosolalia*.⁶⁹¹ Melding Barthes and Walter Benjamin, Martin notes that language used outside of its realm of intelligibility is a new sign or system but also "an aura, an inarticulate sympathy"⁶⁹², which in turn makes these clothes a "true universal language."⁶⁹³ For Martin, while it matters that text is printed on clothing, it only matters as much as that text conveys something no matter the fact that it is on a particular type of fashion or fabric, like other categories of works (conceptual art, books) that incorporate text. Indeed, when classifying other incorporations of text in fashion as simply decorative, such as those by Matsuda with their "floating letters"⁶⁹⁴, Martin compares these to "supposedly free forms of proto-concrete poetry, Mallarme, and the collaboration of Blaise Cendrars and Sonia Delauney in their 1913 synaesthesia of word and image."⁶⁹⁵

⁶⁸⁵ Richard Martin, *Wardrobe: The Messages of Word and Image in Textile and Apparel Design of the 1980s* in *TEXTILE AND TEXT*, *supra* 654. The title of the essay, *Wardrobe*, published in 1989, would also be the name of an exhibit Martin later created and curated at the Costume Institute of The Metropolitan Museum of Art from September 9, 1997-November 23, 1997. For these dates see the notes surrounding the archival inventory of the documents of the exhibition. *Subseries III.OOOO. Wardrobe (September 9, 1997-November 23, 1997)*, Costume Institute Records, 1937-2008, 206- 207.

⁶⁸⁶ *Id.*

⁶⁸⁷ *Id.* at 4-5.

⁶⁸⁸ *Id.* at 5.

⁶⁸⁹ To whom Martin cites towards the end of his essay. See *Id.* at 13.

⁶⁹⁰ *Id.* at 7 (discussing Stephen Sprouse as "anticipat[ing] in the artistic thrust of our time top [sic] examine sign, symbol, and language as both metaphor and expression of ourselves" in pieces in his 1980s collections which Martin presents as part of the punk movement).

⁶⁹¹ *Id.* at 8-9.

⁶⁹² *Id.* at 9.

⁶⁹³ *Id.* at 9.

⁶⁹⁴ *Id.* at 11.

⁶⁹⁵ *Id.*

In other words, Martin sees these fashion designs as intangible images or intangible text. Such communicative meanings divorced from materiality are beyond the scope of cultural property under Italian cultural property law. When the public cultural interest is assigned to *schema* and, at times *style*, it should be a signal of the exclusion of Italian fashion design objects from the cultural property “box” under Italian cultural property law.

CHAPTER 4 TOWARDS A CULTURAL PROPERTY THEORY OF COPYRIGHT?

Having proposed a legal standard for when the public cultural interest in Italian fashion designs might be so connected to a tangible iteration as to qualify certain Italian fashion design objects as cultural property under Italian cultural property law, this chapter asks how protecting this narrow new category of Italian fashion design objects as cultural property is related to copyright law, both in the U.S. and in Italy. It identifies commonalities and differences between the two regimes by spotlighting their relationships to one specific category, Italian fashion design objects.

1. Fashion Design Objects between Copies and Originals

A standard for when certain Italian fashion design objects are cultural property under Italian cultural property law might look something like the following. First look to the relationship between the Italian fashion design and the material of which it is made or upon which it is placed. If the cultural message of the Italian fashion design is sufficiently materially dependent at this first stage, and of sufficient public cultural interest, then we should classify the Italian fashion design object as cultural property under Italian cultural property law. In addition, if the message of the Italian fashion design is sufficiently materially dependent at this first stage, but can also be repeated in other materials without, however, recreating the same original message conveyed when the fashion design was on its first material support, then the fashion design may be sufficiently like a visible image, like the composition of a painting, that the first iteration of it as a fashion design object may be cultural property. In some cases, there may be no need to consider the context in which the Italian fashion design exists as a second part of the test. On the other hand, context might also be taken into account to decide whether a tangible Italian fashion design object is needed in order to preserve our public interest in the Italian fashion design as it exists in a material iteration.

Italian fashion design objects that include text are the design objects that seem to most easily fulfill this standard. Italian fashion design objects that include text, like the REAL GUCCI bag, the Moschino dress or even perhaps the Valentino dress, might be evaluated according to their particular circumstance, in light of their specific place, support, message, and *at times* context, to determine whether our public cultural interest is sufficiently tied to a design in them that

is materially dependent. At the same time, this proposed standard also seems to indicate when Italian fashion designs are like visible images, like the composition of a painting, such that they too should be cultural property. Some fashion designs and therefore fashion design objects still fall outside this test; they are those that are like intangible text or intangible images, which are so intangible and unconnected to material objects as to never be cultural property under Italian cultural property law. Italian fashion design objects could also, of course, be testaments having the value of civilization. Notwithstanding their incorporation of an intangible Italian fashion design, and that intangible Italian fashion design's existence across multiple fashion design objects, certain individual objects might testify to a designer's creativity or be so indicative of a certain historical moment that the public cultural interest in them could be actuated by protecting these design objects as cultural property.

These different applications of the standard exist on a spectrum of intangibility and tangibility and can, moreover, work with other characteristics of Italian cultural property, like time thresholds and even different levels of public cultural interest (which include simple, particularly important, or exceptional⁶⁹) to decide when Italian fashion design objects are cultural property. For purposes of clarity, summarizing these different categories which exist on a spectrum is useful to understand how they uniquely manage the relationship between the public cultural interest and tangible properties, or the public cultural interest and intangible properties. In addition, summarizing these different categories also reveals how they exist not only on a spectrum of tangibility and intangibility, but also on a spectrum of originals and copies.

Tangible Text represents a union of the public cultural interest in certain intangible texts whose meanings are, however, tied to the material upon which they are placed. These tangible texts are cultural

⁶⁹ Art 10, CODICE, D.L. n. 42/2004 (mandating that properties display different levels of cultural interest depending on whose property they are in; State properties are presumed to be of a simple cultural interest, while those in private hands need to be of particularly important cultural interest to be declared as such and series and collections of objects, among others, need to be of exceptional cultural interest). While these levels of interest are seen as procedural mechanisms, they are not understood as definitive of the public cultural interest in a property. The historical definition of cultural interest testifies to this. Rosadi, for example, in explaining the 1909 law which did away with the catalog requirement, noted that the procedures of *notice* presumed that properties in private properties would be of a greater cultural interest. EMILIANI, *supra* note 381 at 213. A particularly important cultural interest is not definitive of a cultural property in private hands, rather it is a quality which justifies actions on a private property in order for it to be administratively declared cultural property.

property. The original, so to speak, is the text and the object. In a sense, tangible texts cannot be copied because their meaning is so materially dependent. The placement of the same text on a different object no longer means the same thing and is not of the same public cultural interest. *Some fashion designs that incorporate text can be identified as like tangible text and therefore their fashion design objects are cultural property.*

Visible Images represent a union of the public cultural interest in tangible properties which have, however, conceptually separable intangible elements. Paintings and compositions are, here, the main example. These visible images are cultural property. The *unicum* of the tangible property with its intangible elements, such as a painting with its composition, is considered the original, while the composition alone is considered a copy. *Some fashion designs that incorporate text or images might be identified as like visible images and therefore their fashion design objects as cultural property.*

Intangible Text or Intangible Images, which we may in some circumstances term *schema* or *style*, represent a union of the public cultural interest with intangible properties. These intangible texts or intangible images are not cultural property. The text or the image is understood as always an original and never a copy, or as always a copy which means the same thing no matter where it appears. *Most fashion designs are like intangible text or intangible images and are therefore not cultural property; neither, then, are the fashion design objects of which they are a part.*

Testaments Having the Value of Civilization may be tangible iterations of intangible text or intangible images. These testaments having the value of civilization are cultural property, but they do not preserve the intangible text or intangible image directly. *Some, and perhaps many, fashion design objects might be testaments having the value of civilization and, therefore, cultural property.*

As detailed in the previous chapter, this proposed spectrum of cultural property subject matter tweaks Giannini's presentation of intangible text as beyond the scope of Italian cultural property law. In that presentation, Giannini notes that, where Italian cultural property law does not protect intangible text, other legal regimes, like copyright, protect intangible text by regulating private actors' interaction with it.⁷⁰⁰ In addition, Giannini notes that in jurisdictions where there is no cultural property law, cultural properties are part of a public domain.

⁷⁰⁰ Giannini, *supra* note 465.

Two main questions arise from Giannini's presentation. These questions are of particular interest to a U.S. jurisdiction in which the fashion industry is desirous of copyright protection and where a legal framework that treats movable, non-indigenous objects of cultural interest outside of museum collections as cultural property is not particularly evident. First, can copyright law at times function as a cultural property law for certain subject matter that is not protected under cultural property law? In other words, is there a commonality between copyrightable subject matter and cultural property under their respective laws? Second, and relatedly, in jurisdictions that do not have cultural property law for certain objects, like the United States, are items which might be protected as cultural property, in other jurisdictions, part of a public domain?

Fashion designs and, especially, modern and contemporary Italian fashion designs objects, seem to provide an appropriate case study through which to explore the interactions between cultural property law and copyright law. This is especially the case when we think of the relationships between copyright law and cultural property law in terms of originals and copies. There are some categories that theoretically *should be* or even that *might already be* in U.S. copyright's purview. As Amy Adler's work explores, U.S. copyright seems best suited to protecting works that are always the same- that are perfect substitutes for one another. Fashion design is theoretically one such category and copyright should theoretically apply to it. Cultural property law may provide the answer to why U.S. copyright does not adequately protect fashion design as a whole in the way that it supposedly must by promoting progress. Cultural property law might explain why only certain categories of fashion design are deemed copyrightable subject matter in the U.S. Cultural property law might provide a different justification than other theories, such as Sprigman's and Raustala's. Such a justification for U.S. copyright's treatment of fashion design based on Italian cultural property law, however, might be narrow in scope. That is, in other jurisdictions with cultural property laws like Italy, copyright law may be related to cultural property law while perhaps not fully acting as a cultural property legal regime. Italian copyright law, for example, explicitly recognizes as copyrightable subject matter fashion designs exhibiting creative character or artistic value by using historic, cultural metrics.⁷⁰¹

⁷⁰¹ Art 2(1), L. n. 633/1941. Another difference in protection between the U.S. and Italy is the difference in design right protection, which has been shaped extensively in Italy by supranational law. For an overview of the European law of unregistered and registered design rights at the European Union level see TRADE DRESS, *supra* note 16 at 527- 560 (Aspen Publishers 2010) (explaining "Directive 98/71/EC of the European Parliament and

Examining U.S. copyright law from an original and copy perspective, Amy Adler has noted that certain examples of art, especially modern conceptual ones, do not need copyright because the norm of authenticity, understood here as the source or origin of a work of art, eliminates the need to prevent copying.⁷⁰² Using the production of contemporary art work as her main example, Adler points to works by Richard Prince, which essentially copy Instagram posts, and other modern conceptual artworks like Sherrie Levine's *After Walker Evans*.⁷⁰³ One of the things that becomes apparent from Adler's argument is that, for the norm of authenticity to replace or negate the need of copyright for certain works of contemporary art, the objects of contemporary art at issue must be conceptualized as originals with copies, i.e. as visible images in our spectrum. Adler seems to admit as much when she says that, for visual art,

*...the art market prizes scarcity rather than volume, and originals rather than copies. Although individual songs or books or movies are perfect substitutes for one another [with the exception of rare books and vintage photographs, mentioned in a footnote], the distinction between originals and copies forms the very foundation of the art market.*⁷⁰⁴

of the Council of 13 October 1998 on The Legal Protection of Design, O.J. L 289 (Oct. 28, 1998)" and "Council Regulation 6/2002/EC of 12 December 2001, O.J. L. 3 (Jan. 5, 2002)."

The cultural property standard proposed in this dissertation does not foreclose that, in the United States, the way in which to identify whether a design has sufficient ornamental aspects in design patent law may also exhibit some similarities to cultural property law's identification of the cultural interest in objects, even with patent's standard of novelty. Such an exploration is, however, for future work and is beyond the scope of the present dissertation. See TRADE DRESS, *supra* note 14 at 297 – 373 (Aspen Publishers 2010) for an overview of the scope of design patent and relevant cases. It is important to note that there are more overlaps between this standard for cultural property protection and other legal regimes, even outside of fashion design. Such an overlap is already contemplated by works such as The Statue of Liberty, which was both given a design patent in the 19th century, registered at the U.S. Copyright Office, and later registered as historic property at the federal and state levels. See *Id.* at 310 (reproducing design patent image); "Statue of Liberty is Registered", August 31, 1876, *Timeline, The 19th Century*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_19th_century.html; New York: Statue of Liberty National Monument, NATIONAL PARK SERVICE, <https://www.nps.gov/articles/liberty.htm>; Governor Cuomo Announces Columbus Monument Listed on State Register of Historic Places and Recommended to National Register, PRESS RELEASE, NEW YORK STATE, October 8, 2018, <https://www.governor.ny.gov/news/governor-cuomo-announces-columbus-monument-listed-state-register-historic-places-and> (noting "Other statues and buildings on the State Register of Historic Places include the Statue of Liberty...").

⁷⁰² Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 349 (2018).

⁷⁰³ *Id.* at 349.

⁷⁰⁴ Adler, *supra* note 702 at 331.

In Adler's interpretation, it seems U.S. copyright only really works for intangible texts or intangible images- things which are perfect substitutes for each other. Indeed, Adler's article contemplates how copyright, whether in its economic justifications or for other reasons proposed by other scholars⁷⁰⁵, may appropriately serve other categories of authors whose objects *are* valued for their copies. These objects include illustrations, graphic designs, and other commercial art

*whose markets may depend on multiple copies rather than sales of authentic originals, or whose markets lack the protection the art market provides by valuing authenticity.*⁷⁰⁶

Adler identifies rare books and vintage photographs as other categories which do not require copyright protection because "we put great value on the first edition."⁷⁰⁷ Here Adler's works seems to identify another category of works on our spectrum which do not need or should be out of copyright- *testaments having the value of civilization*.

Adler's article offers a first glance at the doubt that U.S. copyright is properly able to protect two categories of work which are firmly inside the cultural property "box"- *visible images* and *testaments having the value of civilization*. Can U.S. copyright be understood as continuing to protect these works, visible images and testaments having the value of civilization, notwithstanding its proposed inefficacy?

There is also doubt that copyright is meant to apply to all the intangible texts and intangible images that it *should* protect. Certain authors like Sprigman and Raustala correctly note that copyright, for some subject matter, chooses not to apply. Indeed, Sprigman and Raustala, relying on the principle of innovation as the driving force of copyright, note, perhaps rightly so, that

*copying fails to deter innovation in the fashion industry because, counter-intuitively, copying is not very harmful to originators. Indeed, copying may actually promote innovation and benefit originators. We call this the 'piracy paradox.'*⁷⁰⁸

⁷⁰⁵ See Adler's section *Attacks on the Utilitarian Model* in *Id.* at 327- 328.

⁷⁰⁶ *Id.* at 370 (Adler describes these categories of objects in terms of their author or creator: "One major problem with my theory is that it applies only to "visual art," and so requires us to separate out "artists" from other visual creators, such as illustrators, graphic designers, or "commercial" artists...").

⁷⁰⁷ *Id.* at 331, n. 77.

⁷⁰⁸ Sprigman and Raustala, *The Piracy Paradox*, *supra* note 9 at 1691 (2006). See also LOSCHEK, *supra* note 103 at 135 (noting similarly that "Fashion does not create mimicry; it is through mimicry that clothes become fashion.")

Here fashion designs seem to be like intangible text for Sprigman and Raustala. Identifying obsolescence and anchor trends⁷⁰⁶ as the main drivers of the fashion industry along with the production of new fashion designs, fashion, the story line goes, is about accepting specific trends for a short period of time and operating within a common framework. Copying is paradoxically good because being fashionable means looking like others for a specific period of time. For Sprigman and Raustala, the *work* or property at issue for copyright protection in fashion is line-by-line copies, or exact copies of fashion designs. These fashion designs are as appropriate to copy or create as derivative fashion designs, which are fashion designs inspired more loosely by another.⁷⁰⁷ Fashion design for Sprigman and Raustala seems to be the essence of a trend, whether that trend is defined as a dress in all its details or as simple as the color red. Copying this trend essence, in any shape or form, is appropriate and allowed under copyright because, for Sprigman and Raustala, the copying serves copyright law's purpose: it promotes the progress of the arts and sciences. In other words, fashion designs are like intangible text or intangible images, like most conceptions of *style* or *schema*: they are originals no matter where they are reproduced and never, essentially, really have a copy.

Adler's article, however, and, for that matter Giannini's, both imply that such intangible texts, fashion designs characterized thusly, are appropriately copyrightable and indeed *most likely should be*. In contrast, the argument by Sprigman and Raustala seems to suggest, again, that copyright law does not protect fashion because protecting fashion is at cross purposes with the subject matter copyright law is meant to protect, *notwithstanding the fact that copyright works best when it protects things that are perfect substitutes for one another, like intangible text*. Why? Is there a way to reconcile these two seemingly conflicting statements? How can fashion design be like an intangible text, identifiable no matter in what material or by whom it is created, identified as itself in its very copies, and yet be too inappropriate of a category of work to be protected under copyright law? Why are Italian cultural property law and U.S. copyright law here both inapplicable?

Here we propose that the reason both legal regimes are inapplicable might be because U.S. copyright law seeks to act like the Italian cultural property regime for the category of pictorial, graphic and

⁷⁰⁶ Sprigman and Raustala, *Paradox Revisited*, *supra* note 11 at 1203.

⁷⁰⁷ *Id.* at 1210 (2009) ("Whereas Hemphill and Suk wish to ban line-by-line copies, we find no reason to treat them differently from the copying done to create derivative fashion designs.")

sculptural works. Like Italian cultural property law which, now, protects visible images and testaments having the value of civilization, U.S. copyright law, when protecting pictorial, graphic and sculptural works, seeks to identify if a public cultural interest *may exist* in a tangible property, which may also have intangible elements. In this sense, for the category of pictorial, graphic and sculptural works, U.S. copyright law seeks to *at the very least* identify future visible images and testaments having the value of civilization in the interests of the American public.⁷¹¹

U.S. copyright law's concern with the existence of a possible public cultural interest in a pictorial, graphic or sculptural work is most evident when U.S. copyright law decides how a category of works *normally excluded from the pictorial, graphic and sculptural category, designs of useful articles, may enter the pictorial, graphic and sculptural category and therefore be copyrightable subject matter*. When considering whether designs of useful articles are pictorial, graphic and sculptural works in U.S. copyright law at the infringement stage, judicial decisions *seems to seek to identify the intangible part of the tangible property to which the public cultural interest may attach*. It is this intangible part of possible future public cultural interest in a useful article that is deemed copyrightable subject matter.

Now, there are certain boundaries to this theory. First, U.S. copyright law acts at an earlier stage than Italian cultural property law. As detailed in Chapter 2, Italian cultural property law usually applies to individual objects that are classified as of historic or artistic interest after their author is no longer living and seventy years after their creation. U.S. copyright law, on the other hand, applies to pictorial, graphic and sculptural works from the moment of their creation and then for seventy years after the author's death.⁷¹² In this sense, there is already some overlap between U.S. copyright law and Italian cultural property law. An author may be no longer living and his copyright

⁷¹¹ One wrinkle in this theory may be derivative works, defined as "work[s] based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work." 17 U.S.C. §101. If U.S. Copyright law seeks to identify, as part of the category of pictorial, graphic and sculptural works, future visible images and testaments having the value of civilization administratively decreed to be cultural property, what does that mean for future iterations of the copyrightable subject matter in other copyrightable subject matter? Is that too presumed to have the same future public cultural interest?

⁷¹² In some cases the term may be longer (as in work for hire) or shorter. See 17 U.S.C. §302- 305.

still valid when Italian cultural property law chooses to verify or declare that that object is of a simple or particular important cultural interest. Ferragamo's *Rainbow Sandals* made in 1938 are a perfect hypothetical here. U.S. copyright law, however, even if it may have, for pictorial, graphic and sculptural works, elements similar to the Italian cultural property law regime, acts unlike cultural property law because U.S. copyright law operates *before the complete cultural consensus needed under Italian cultural property law for the ascertainment of the public cultural interest exists*. In this sense, U.S. copyright law may identify an *ex ante* public cultural interest, a possible public cultural interest, *without, therefore, engaging in the value judgments of Italian cultural property law or, for that matter, Italian copyright law*. Such a content-neutral decision on copyrightability makes sense- it is only for the public, after a certain period of time, to decide whether a work is of public cultural interest.

Now, some may counter that searching for a possible future cultural interest in the designs of useful articles to include them in the category of pictorial, graphic and sculptural works is the rendering of an aesthetic judgment.⁷³ The inability of judges to render aesthetic judgments in copyright is most often cited as a strong precedential rule.⁷⁴ However, identifying a possible future public cultural interest is not the same as rendering an aesthetic judgment. Taking a cue from the explanation of what the boundless cultural interest means from Chapter 2 above, it is easy to see how an evaluation of public cultural interest does not necessitate aesthetic judgment. Historical interest, ethnoanthropological interest and others do not always require aesthetic judgment. As a result, implicitly identifying a possible public cultural interest may not be as contrary to the principles of *Bleistein*, nor as content-based, as we might at first think. Identifying a possible public cultural interest with reference to Italian cultural property law may also address the issue of panaestheticism which Barton Beebe sees as the main problem in a post-*Star Athletica* world. In Italian cultural

⁷³ There is literature exploring how judges already render aesthetic judgments beyond copyright law and how aesthetic reasoning is in many ways part and parcel of certain U.S. legal regimes. See, for example, Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381 (2017) (identifying appropriate places for aesthetic judgment in law and proposing a standard for when it should be limited based on the First Amendment).

⁷⁴ Cases and secondary literature usually cite to for this precedent. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (while holding a circus poster worthy of copyright protection noting “[i]t [is] a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations...it would be bold to say that [pictures with a commercial value] have not an aesthetic value.”). Some authors suggest that the majority opinion of the Court here looked to the market to substitute for aesthetic judgment. See Barton Beebe, *Star Athletica and the Problem of Panaestheticism*, 9 UC IRVINE L. REV. 275, 286 (2019).

property law not everything is cultural property and thus not everything or anything “can serve as an object of aesthetic experience.”⁷¹⁵

The second boundary to the theory that U.S. copyright law is concerned with the existence of a possible public cultural interest when considering whether designs of useful articles are pictorial, graphic or sculptural works is that U.S. copyright is understood and explained as economically driven.⁷¹⁶ At the same time, however, there are scholars who already consider the aesthetic implications of some copyright decisions⁷¹⁷, and who explicitly situate copyright within the social and communicative nexus of cultural progress and cultural dialogue.⁷¹⁸ And, even in its economic justifications, U.S. copyright law,

⁷¹⁵ Beebe, *supra* note 714 at 278.

⁷¹⁶ This is a generally accepted principle. *Star Athletica v. Varsity Brands*, No. 15-866, 580 U.S. ____ (dissenting opinion) at 7. For one premiere example of a book that treats the subject thusly see WILLIAM B. LANDES AND ERIC POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2009). See also Geoffrey R. Scott, *A Comparative View of Copyright as Cultural Property in Japan and the United States*, 20 TEMP. INT'L & COMP. L.J. 283, 358 (2006) (“While attempts have been made to characterize that which is protected by copyright as cultural treasures and so distinguish these products from advances in science that might be protected by the patent laws, this position has not been generally accepted in the United States.” [citing to petitioner’s arguments in *Mazer v. Stein*, 347 U.S. 201 (1954)] Rather, two assumptions are deemed to be at the foundation of the Copyright Act: 1) that it is to the advantage of an enlightened society to encourage creative additions to the resource of the public domain, and 2) that unrestrained and unimpeded replication of intangible intellectual and creative products is not in the best interests of the community.”) Scott’s article is a comparison of copyright in Japan, which is classified as part of the Japanese cultural property regime, and copyright in the United States, which is not part of any cultural property regime and indeed deemed separated from any cultural property-like concerns. The organization of Scott’s article highlights the arguments in the petitioner’s brief in *Mazer v. Stein* and partially inspires the idea that the copyright legal regime in the United States and the cultural property regime in Italy could be compared to each other, notwithstanding the fact that they are the products of two very different historical contexts.

⁷¹⁷ Yen, *Copyright Opinions and Aesthetic Theory*, *supra* note 469 (noting how certain decisions in different spheres of copyright doctrine reflect certain aesthetic doctrines). See also Beebe, *Bleistein, The Power of Aesthetic Progress*, *supra* note 27. See also Glen Cheng, *The Aesthetics of Copyright Adjudication*, *supra* note 469.

⁷¹⁸ See Adler, *supra* note 702 at 327-328 (2018) (citing in part to Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007)). See also Beebe, *Bleistein, The Power of Aesthetic Progress*, *supra* note 27 at 346 (Beebe points to pragmatist aesthetics as the aesthetic progress metric by which to measure progress in copyright and defines aesthetic progress as measuring “the quality of ephemeral aesthetic experience in the present”); DRASSINOWER, *supra* note 52 (although not concentrating solely on U.S. copyright law, arguing that promoting incentives for creativity is insufficient as the purpose of copyright law and that copyright law is instead meant to protect acts of speech between persons); and CRAIG, *supra* note 52 at 2 (noting “The copyright system should be regarded as one element of a larger cultural and social policy aimed at encouraging the process of cultural exchange that new technologies facilitate.

is seen as justified by some public interest or public purpose⁷⁰ and has a hybrid private-administrative law nature. The economic justification for copyright sees itself in public terms and not necessarily in private ones: progress is good for society as a whole and not just for individual authors.⁷¹ Somewhat similarly, in Italian cultural property law the differences between economic justifications and safeguarding or preservation are not so black and white. In Italian doctrine and jurisprudence we find discussions of economics in relation to both the safeguarding of heritage and the promotion of the development of culture. Certain Italian art historians have cited to older Italian cases and doctrine to argue that economic development should have a cultural value according to Article 9 of the Italian Constitution and that cultural and aesthetic values should profoundly influence the Italian economic order.⁷² Other Italian cultural property norms more

The economic and other incentives that copyright offers to creators of original expression are meant to encourage a participatory and interactive society, and to further the social goods that flow through public dialogue.”). See also Julie Cohen, *Copyright, Creativity and Cultural Progress* in JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF* (2012), available at <http://www.juliecohen.com/page5.php>. The question of how we justify U.S. copyright law a part from authorial incentives also seems to be a hot topic in current intellectual property scholarship, as evidenced by Eva Subotnik’s paper *The Fine Art of Rummaging* at the 2019 Intellectual Property Scholars Conference at DePaul in Chicago in August of 2019 (asking in part “What is the purpose of copyright if we subtract authorial incentive?” and “What is copyright meant to protect post-mortum?” through the case study of Vivan Maier and her copyright successors.)

⁷⁰ See for example, Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOYOLA L.A. L. REV. 123, 157 (2002) (noting as part of a discussion of the Copyright Term Extension Act: “But if an easement over land is gone once it is dedicated to the public, then why not a future interest in a copyright? It is dedicated to the public at the time of its creation.”). See also observations from the history of the Copyright Act in the United States *infra* and Hearings on the Preservation of certain Copyrighted Works *infra*. Early debates in Congress note alternatively “the belief of the framers that great public benefit would accrue from the partial recognition of these two kinds of property [referring to copyright and patent]” (Report No. 1188, Senate, May 21, 1886, to accompany Bill S. 2496 at 1).

⁷¹ For this argument and an exploration of it at the “edge” of intellectual property in an edited volume see INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP (Rochelle Cooper Dreyfuss and Jane C. Ginsburg, eds.) (2014) (especially Carol M. Rose, *Introduction* mentioning the traditional rationales at 2).

⁷² SALVATORE SETTIS, ITALIA, S.p.A. 126 - 127 (2002) (“Abbiamo ricordato che uno dei principi fondamentali della nostra Costituzione (art. 9) stabilisce che ‘la Repubblica tutela il paesaggio e il patrimonio storico e artistico della Nazione.’ Nel più autorevole commentario [citing to G. Branca (a cura di), *Commentario della Costituzione*, Bologna 1975], Fabio Merusi ha mostrato che tale norma non è solo ‘sublimazione’ della legislazione preesistente alla Costituzione (leggi 1089 e 1497 del 1939), ma anzi vale soprattutto come progetto dei Costituenti per il futuro; e che essa è intesa ‘ad imporre una valenza culturale all’intero sviluppo economico-sociale’, tanto che lo sviluppo economico ‘dovrebbe manifestarsi attraverso opere ispirate non soltanto a criteri economicistici, ma anche a valori culturali.’ Questa lettura è stata precisata e consacrata al massimo livello da un’importante sentenza della Corte Costituzionale (151/1986), secondo cui l’art. 9 della Costituzione sancisce ‘la primarietà del valore estetico-culturale’, che non può essere

readily indicate the close connection between economics and safeguarding. The decision of Italian cultural property law to limit the circulation both of cultural property belonging to the State and of certain private property declared of particular importance⁷²² necessarily limits the economic value which the State and a private owner may potentially gain from their item of cultural property. We need only cite to the many examples of private owners contesting the designation of their property as cultural property⁷²³, or public protests by antiquarians about the red tape surrounding export license applications for items not necessarily designated as cultural property⁷²⁴, to drive home the point that a great quantity of economic resources are tied up in the Italian cultural property regime. In an inverse way, this is similar to decisions under U.S. copyright law to limit the exercise of a copyright holder's right to enforce their copyright in the face of fair use defenses. Just as the Italian state says a private owner may not export a tangible cultural property because it needs to stay in Italy to be available to a wider public, so U.S. copyright law says that a copyright holder may not prevent specific viewings or even uses of their intangible property when it serves specific public purposes. We can cite to numerous examples of copyright holders' attempts to

'subordinato ad altri valori, ivi compresi quelli economici', e pertanto dev'essere esso stesso 'capace di influire profondamente sull'ordine economico-sociale.'") For a more recent discussion than 151/1986 of the competences of regions and the State for the preservation and valorization of cultural property see, Const. Ct., n. 9/2004 available at <http://www.cortecostituzionale.it/actionPronuncia.do#> (holding it is the exclusive competence of the State to regulate the education and formation of cultural property restorers given that restorers' work is closely related to the object itself; therefore such regulation falls under the exclusive right of the State to maintain and restore cultural property).

⁷²² "Definitive exportation" is generally prohibited for objects that are considered cultural property in Italy, whether private or public. In some cases, the Ministry of Cultural Heritage may also prohibit non-definitive circulation (loans, etc) of certain private property of particularly important interest, post their declaration as cultural property, for a definitive period of time, when certain concerns are evident. See Dario Jucker, *La circolazione dei beni culturali tra Italia e Svizzera: Le azioni di restituzione* in in IL DIRITTO DELL'ARTE, *supra* note 612 in VOL 3 at 203-204. Moreover, it is important to note that even objects that are considered to be freely definitively exportable from the Italian territory must, if displaying certain characteristics, still be presented to the Italian Exportation Office and receive authorization to be exported. *Id.* Recent reforms have incorporated a monetary limit. See Art. 65, CODICE DEI BENI CULTURALI E DEL PAESAGGIO, D. L. n. 42/2004, <https://www.altalex.com/documents/news/2014/09/15/codice-dei-beni-culturali-e-dell-ambiente-parte-ii-beni-culturali#titolo2>.

⁷²³ See, again, T.A.R. Milano sez. II n. 6205/2007.

⁷²⁴ Such protests were made by the antique dealer and Segretario Generale della Biennale Internazionale dell'Antiquariato di Firenze, Fabrizio Moretti, at the symposium *Esportazione dei Beni Culturali: Italia, Regno Unito, Stati Uniti, Olanda, Germania a Confronto* on March 28, 2017 in the Salone dei Cinquecento in Palazzo Vecchio organized by Moretti to coincide with and as part of activities surrounding the first G7 Meeting on Culture, but prior to the reform.

influence the free and legal use of their works⁷²⁵ as a complement to antiquarians' call for freer exportation. Both can be characterized as economic restraints on specific properties justified by a wider public, and perhaps even cultural, interest. Some have even seemed to characterize fair uses in the United States under U.S. copyright law as "cultural heritage type uses" to which some rightsholders would be amenable.⁷²⁶ While not characterizing fair use as a preservation regime, congressional hearings in 2014, while exploring the efficacy of Section 108 of the Copyright Act extending exceptions to copyright infringement to libraries and archives engaged in preservation efforts under certain circumstances, did note that "preservation activities could be covered by the fair use provisions of Section 107."⁷²⁷ In such fair use cases it almost seems as though copyright law splits control of the development and very existence of public cultural interest between owners, cultural institutions and the public, leading possibly to a potential public cultural interest vacuum for a period of time.

In addition, scholars such as Jerome Reichman have explained the circular and cyclical nature of copyright protection for certain types of design in Italy and the United States as driven by a dueling tension between vacillating feelings towards industrial design as fulfilling a historical definition of art and being more freely producible in the competitive market for industrial property.⁷²⁸ Such a presentation of copyright for design as related to both historical interest and economic concerns across jurisdictions supports a comparison of the notions of cultural property and copyright and their legal regimes as applied to fashion design and fashion design objects in Italy and the United States today.

Just as decisions related to cultural property do not negate economic choices in Italy, neither might decisions related to even an economically-driven copyright negate some consideration in the

⁷²⁵ Correspondence between copyright holders and permission seekers reveal nuanced negotiations for rights, often dependent on the cultivation of personal relationships between authors, curators and rights holders.

⁷²⁶ Preservation and Re-Use of Copyrighted Works, Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representatives, 113rd Congress, April 2, 2014 at 116 (testimony of Sedlik).

⁷²⁷ *Id.* at 6.

⁷²⁸ J.H. Reichman, *Past and Current Trends in the Evolution of Design Protection Law--A Comment*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 387, 388-389 (1993) [hereinafter Reichman, *Past and Current*] (citing in part to J. H. Reichman, *Design Protection after the Copyright Act of 1976: A Comparative View of the Emerging Interim Models*, 31 J. COPYRIGHT SOC'Y U.S.A. 267 (1984) [hereinafter Reichman, *Design Protection*]).

United States of that which is broadly considered to be of cultural interest. In other words, much like cultural property law, U.S. copyright law may be just as concerned with certain property's cultural use as with its economic one. This seems evident when U.S. courts are called upon to determine whether certain features of designs of useful articles are copyrightable subject matter as pictorial, graphic, and sculptural works.

2. Conceptual Separability and Cultural Interest: Fashion Designs as Pictorial, Graphic and Sculptural Works under U.S. Copyright Law?

Grounded in Article 1, Section 8, clause 8 of the U.S. Constitution, the U.S. government's ability to legislate for copyright is rooted in the founding fathers' exhortation that Congress "*promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right for their respective Writings and Discoveries.*"⁷²⁹ This is unlike Article 9 of the Italian Constitution, written centuries later, which provides, "*The Republic promotes the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the Nation.*"⁷³⁰ While the debate recorded surrounding the passage of the Constitutional clause in the Constitutional Convention has been characterized as short (and a full analysis of it is beyond the scope of this dissertation)⁷³¹, suffice it to say that there seems to thus far be no evidence that the Framers of the U.S. Constitution considered the Intellectual Property Clause to be a clause enabling cultural property-like protection. The idea might be

⁷²⁹ U. S. CONST., art. I, §8, cl. 8.

⁷³⁰ Art. 9, Costituzione [Const.] (It.) available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (in English). It is important to note that members of the Italian Constitutional Assembly noted the support the United States gave to the progress of the Arts and Sciences when debating the addition of the clause "La Repubblica promuove la ricerca scientifica e la sperimentazione tecnica e ne incoraggio lo sviluppo." See *Assemblea Costituente, Seduta di Mercoledì 30 Aprile 1947* at 3425, available at <http://www.camera.it/dati/Costituente/Lavori/Assemblea/sed106/sed106.pdf>. The safeguarding clause, on the other hand, was deliberately inspired by the German Weimar Constitution and the Spanish Constitution. See Salvatore Settis, *Italy's cultural heritage: definition, protection, political issues*, February 20, 2017, Lecture, Università Commerciale Luigi Bocconi, Milano. See also Andrea Ragusa, *Costituzione e cultura: Il dibattito in tema di Beni Culturali nei lavori dell'Assemblea costituente*, STORIA E FUTURO, available at <http://storiaefuturo.eu/costituzione-cultura-dibattito-in-tema-beni-culturali-lavori-dellassemblea-costituente/> (describing debate in the Constitutional Assembly and separate publications of studies of the United States Constitution and others prior to the debate over constitutional inclusion of cultural heritage).

⁷³¹ For analysis of Madison's diaries which he kept of debate in the Constitutional Convention and other background on the Clause see Dotan Oliar, *The Origins and Meaning of the Intellectual Property Clause*, Working Draft September 15, 2004, available at https://cyber.harvard.edu/ip/liar_ipclause.pdf.

entertained, however, that at least supporting the arts and sciences of potential public cultural interest in some way was part of the idea behind the clause.⁷³²

Copyright in the United States is extended to

*original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*⁷³³

A non-exhaustive survey reveals that, over time, much like Italian cultural property law, the subject matter and the term limits of copyright have expanded, although, as other authors have noted, copyright protection has never been extended to fashion designs.⁷³⁴ Patents and copyrights were separated into different bills as early as 1790, although with some overlaps throughout legislative history⁷³⁵, which also presents historical arguments about what belonged in the patent regime and what belongs in copyright, still a live conversation to this day among practitioners and legal scholars.

The subject matter of the first 1790 Copyright Act included “any map, chart, book, or other writing...”⁷³⁶ Extending the subject matter of copyright has allowed copyright protection for items as diverse as books and maps, then works of art, photographs, sound recordings, and now even software. The advent of new forms of arts (and sciences) led to legislative proposals, debates and litigation over time. An 1890 bill in

⁷³² Oliar has observed four peculiarities to the U.S. Intellectual Property Clause, its use of the word “progress”, its institution of an examination system for patents and a non-territorial definition of the word novelty, and its influence by Jefferson’s support of the free exchange of ideas. *Id.* at 52- 53. This free exchange of ideas and Jefferson’s metaphor of the light is used by Sprigman and Raustala in their discussion of why certain subject matter, like fashion designs, is unprotectable under intellectual property law. See THE KNOCKOFF ECONOMY, *supra* note 12 at 6.

⁷³³ 17 U.S.C. §102.

⁷³⁴ THE KNOCKOFF ECONOMY, *supra* note 12 at 30; Hemphill and Suk, *supra* note 69 at 159-160; Susan Scafidi, *Intellectual Property and Fashion Design*, *supra* note 6 at 118-119. Of course, the subject matter of design patent has also expanded over time, also without protecting fashion designs *per se* but potentially protecting new, original and ornamental designs for articles of manufacture. See Jason J. DuMont and Mark Janis, *The Origins of American Design Patent Protection* 88 INDIANA L. J. 837 (2013). Some authors characterize the recent emphasis on design patent protection as a change after decades of design patent irrelevance. See Colman, *History and Principles*, *supra* note 6 at 229- 230 (citing to Burstein).

⁷³⁵ See the 1870 Patent Act which included revisions for Copyrights. Chapter V, Patent Act of 1870, 41 H.R. 1714.

⁷³⁶ An Act for the Encouragement of Learning (1790), <https://www.copyright.gov/about/1790-copyright-act.html>.

the House of Representatives, for example, proposed to harmonize copyrightable subject matter to include “any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts...”⁷³⁷ This harmonization extended protection to works of visual art⁷³⁸ but also cemented previous inclusions of historical prints and photographs.⁷³⁹ All this diverse subject matter was deemed properly derived from the U.S. Constitution’s reference to “writings.”⁷⁴⁰ In the midst of these changes the U.S. Congress also allowed for international copyrights and extended rights to non-U.S. citizens in the shadow of the Berne Convention.⁷⁴¹ Of course, differences in terminology are also historical.⁷⁴² A great extension of subject matter occurred in 1909 when musical compositions were included alongside, of most interest for our purposes, “works of art models or designs for works of art, reproductions of a work of art, drawings or plastic works of a scientific or technical character, photographs, and prints and pictorial illustrations” were included.⁷⁴³ This extension actually went beyond international law at the time by not derogating as much as it could from the Berne Convention. Under the Berne Convention nations could, at the time, provide greater exceptions to the “granting to authors of musical works...the exclusive right to control the reproductions of their compositions by mechanical means.”⁷⁴⁴ Instead of reading this exception broadly, the United States chose to extend a right to compensation to authors of musical works even when their musical compositions were allowed to be copied under the law.⁷⁴⁵ Celluloid motion pictures were later included in extensions of copyrightable

⁷³⁷ H.R. 10881, 51st Congress, 1st Session (1890).

⁷³⁸ For a timeline of such changes from the point of the view of the Copyright Office see The 19th Century, COPYRIGHT.GOV, https://www.copyright.gov/timeline/timeline_19th_century.html.

⁷³⁹ *Id.* See also *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). See also *Copyright* in *ENCYCLOPEDIA OF 19th CENTURY PHOTOGRAPHY* (John Hannavy, ed., 2008).

⁷⁴⁰ Colman, *History and Principles*, *supra* note 6 at 225, 236, n 31 (citing to 1907 Senate Report).

⁷⁴¹ For one example of the discussions in the Senate see Report No. 1188, Senate, May 21, 1886, to accompany Bill S. 2496 at 3 (noting intent to extend international comity but concerned with protecting “American publishers and the American artisans who make the books in this country”). See also February 1909 Currier Report, House of Representatives at 6.

⁷⁴² Colman, *History and Principles*, *supra* note 6 at 236 (noting different definitions of science in colonial times as “an organized system of knowledge that was the product of authorship and was to be protected by copyright laws” (citing to Ng)).

⁷⁴³ H.R. 28192, Copyright Act of 1909, Public Law 60-349, 60th Congress (1909).

⁷⁴⁴ February 1909 Currier Report, House of Representatives at 6. The Report also cites the copyright laws of Italy in effect at the time. *Id.* at 7-8.

⁷⁴⁵ Here the report refers to what we would today categorize as mechanical licenses. See *Id.* at 6.

subject matter included in 1912.⁷⁴⁶

As the subject matter of copyright expanded, U.S. courts found themselves adjudicating cases of copyright infringement and deciding the scope of the copyrightable subject matter enumerated in the statute. Such was the case in the 1954 case *Mazer v. Stein*. In the case the copyright holder of a statuette as a work of art, and a partner in a manufacturing firm who sold the copyrighted works both as independent statues and as part of lamps as lamp bases, sued another manufacturer who copied these statuettes works and also incorporated them into lamp bases and sold them.⁷⁴⁷ The case reached the Supreme Court where, in their briefs, the parties argued over the copyrightability of the statuettes at issue. The issue was of fundamental importance because the Copyright Act in force at the time arguably did not extend copyright to objects that were not considered as belonging to the arts. The parties in the case used the Cellini salt cellar in their briefs as an example of their arguments. Both parties characterized the salt cellar as copyrightable for different reasons – the party accused of copying its competitor’s lamp bases argued that the Cellini salt cellar was copyrightable because the piece only had a “theoretical utility” and because it could not be reproduced.⁷⁴⁸ The statuettes as lamp bases, in contrast, had a practical utility and could not be copyrighted. The party who owned the copyright, on the other hand, argued against a narrow theoretical utility which would deny copyrightability, and argued that a salt cellar such as Cellini’s was like other “[a]rtistic incense burners, mugs, cups, plates, candle holders, and the like”⁷⁴⁹ which should be copyrighted because “[a]rt objects having direct usefulness form a great class of artistic expression.”⁷⁵⁰ The statuettes here would be copyrightable whether they were useful or not because they were, in any event, artistic. The Court in *Mazer* held that the statuettes were copyrightable.

In today’s discussions surrounding what is copyrightable about designs of useful articles, the *Mazer* case is usually discussed as one bend in the longer road of factoring out functionality. Functionality is a bar to copyrightability under U.S. copyright law and most discussions of whether features of a design of a useful article are or are not copyrightable as a pictorial, graphic or sculptural work have centered on whether a feature is functional or not. It is usually deemed important

⁷⁴⁶ Preservation and Re-Use of Copyrighted Works, Hearing, *supra* note 835 at 12.

⁷⁴⁷ *Mazer v. Stein*, 347 U.S. 201, 202 (1954).

⁷⁴⁸ Brief for Petitioners at 16, *Mazer v. Stein*, 347 U.S. 201 (1954).

⁷⁴⁹ Brief for Respondents at 14, *Mazer v. Stein*, 347 U.S. 201 (1954).

⁷⁵⁰ *Id.*

that the Court in *Mazer* found the statuettes copyrightable by applying the U.S. Copyright Office's regulations which defined copyrightable works of art as

*[including] works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture.*⁷⁵¹

The line in these regulations is understood as distinguishing between useful articles, which are firmly outside of U.S. copyright law, and how to conceptualize the broad understanding of what is the "art", or what are the non-functional elements of useful articles or the form, which is indeed copyrightable. How to determine what is functional and what is not about the design of a useful article, an almost impossible task given the union of form and function in design⁷⁵², is understood as the *sine qua non* of determining copyrightable subject matter. In certain *amici briefs* to the latest separability case at the U.S. Supreme Court this task has evolved to include discussions of the differences between applied art and industrial design with reference to U.S. copyright's legislative history.⁷⁵³ It has also led to proposed differences between original expressive content or aesthetic/informational utility and "'useful processes, machines, articles of manufacture, and compositions of matter'."⁷⁵⁴

In light of our discussion of Italian cultural property law, however, the importance of the *Mazer* opinion seems to lie in the separation the Court seemed to be making, not between functional and non-functional, but between visible images, intangible text/intangible images and tangible text. That is, *Mazer* suggests that the bright line rule for copyrightability is between properties culturally valued for their ability to be caught up in tangible property and yet also reproduced in others and properties which are culturally valued *only* for a unique relationship between that value and a tangible property. The former is copyrightable subject matter, the latter are not. This is what function may really be about: the cultural value of a tangible property lies in its specific use; its cultural value does not lie in its intangible elements or in its existence across specific tangible properties. It is for this reason that it is not

⁷⁵¹ *Mazer v. Stein*, 347 U.S. at 212 - 213.

⁷⁵² See *supra*.

⁷⁵³ Brief amicus curiae on behalf of Intellectual Property Professors in support of Petitioner at 5-6, *Star Athletica L.L.C. v. Varsity Brands, Inc., et al*, *Star*, No. 15-866, 580 U.S. ____ (2017).

⁷⁵⁴ Brief of Fashion Law Institute et al as Amici Curiae in Support of Respondents at 24- 27, *Star Athletica L.L.C. v. Varsity Brands, Inc., et al*, No. 15-866, 580 U.S. ____ (2017).

copyrightable subject matter. Giannini's discussion of the identification of the cultural value of, and our cultural interest in, certain cultural properties is relevant here. Giannini essentially said that there is an ambiguous correspondence between cultural value and commercial value of a thing.⁷⁵⁵ Cellini's salt cellar discussed in the *Mazer* case is a great example of this. Cultural interest can exist alongside of, and in the same object as, useful objects which might also have value on the market as such. This is another way of characterizing the functionality versus non-functionality debate: useful objects (functional, economic) can have cultural (non-functional, non-economic) parts. Indeed, there are even more boundaries that can be crossed here- cultural can be functional and even economic if functionality is defined as conveying information or portraying appearance.⁷⁵⁶ Intrinsic functionality may even be considered cultural for some objects.⁷⁵⁷ We can think of useful objects as non-economic if they are placed in a cultural context. It is easy to see how debating functionality in terms of use and economic value leads us to a never-ending circle. Rather than debating functionality or non-functionality, economic or not economic, let us consider the differences between tangibility and intangibility in Giannini's terms as applied to U.S. copyright. Let us imagine what parts of *any article*, useful or not, can be pictorial, graphic and sculptural works because these parts are of some potential cultural interest. If the part is of possible cultural interest because it is *tangible- its cultural meaning is tied to the tangible object, it will not be a pictorial, graphic or sculptural work*. If the part is of possible cultural interest because of its *intangibility- its ability to exist in multiple tangible iterations (whether or not it refers back to its first tangible iteration) and still be of cultural interest- then it will be a pictorial, graphic or sculptural work*.

To emphasize that a reading of cultural property into this precedent is not too unexpected, let us note how the *Mazer* Court made a passing observation in its opinion about cultural treasures. The Court noted how the party accused of copying the statuettes in the case had suggested that

⁷⁵⁵ Giannini, *Beni Culturali*, *supra* note 466 at 26 [translation own].

⁷⁵⁶ A definition of function which was in fact proposed in one of the *Amici Curiae* briefs in the *Star Athletica v. Varsity* case, when Chris Buccafusco and Jeanne Fromer proposed that lines as part of dress designs that make the wearer thinner should be functional, despite the fact that these lines could also be characterized as portraying appearance. Brief of Professors Buccafusco and Jeanne Fromer as *Amici Curiae* in support of Petitioner at 29, *Star Athletica, L.L.C. v. Varsity Brands, Inc.* et al, No. 15-866 *Star*, 580 U.S. ____ (2017).

⁷⁵⁷ Which seems to be implied in a recent article in which Robert Denicola has argued for emphasis on an intrinsic utilitarian functionality of separated pictorial, graphic, and sculptural features to understand the Court's test in *Star Athletica*. Robert C. Denicola, *Imagining Things: Copyright for Useful Articles after Star Athletica v. Varsity Brands*, 79 UNIV. OF PITTSBURGH L. REV. 635 (2018).

*'Fundamentally and historically, the Copyright Office is the repository of what each claimant considers to be a cultural treasure, whereas the Patent Office is the repository of what each applicant considers to be evidence of the advance in industrial and technological fields.'*⁷⁵⁸

Declining to pass judgment on the accuracy of that statement, but characterizing it as desiring a ruling that what is patentable is not copyrightable, the Court held only that patentability does not exclude copyrightability and vice versa.⁷⁵⁹ In other words, there is something common and yet also uncommon to the patent and copyright regimes.

While the Court here refers to the commonality that exists across intellectual property law regimes, its mention of cultural treasures suggests that what may also be common across copyright law and cultural property law is the intangible public cultural interest that attaches either to intangible objects, tangible objects with intangible elements, or tangible objects. In this dissertation's view, U.S. copyright law essentially extends protection to a potential (because of its term limits) public cultural interest in intangible elements of tangible property, like the compositions of a painting, and to most intangible text or intangible images which are the same no matter where they are placed. It should not, however, in the specific category of pictorial, graphic, or sculptural works, allow copyright to exist when a potential public cultural interest attaches to a tangible, useful object alone. At the very least, the scope of that copyright should be infinitesimally small.

Imagining how cultural interest attaches to tangible and intangible elements of property is what the separability test in the United States, even prior to the *Star Athletica* case, seemed to be about. After the *Mazer* decision, the U.S. Copyright Office instituted a new standard by which to determine the scope of copyrightability for such objects, in light of the Courts' note in *Mazer* that certain objects could be both patented and copyrighted. The standard read

'If the sole intrinsic function of an article is its utility, the fact that it is unique and attractively shaped will not qualify it as a [copyrightable] work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work

⁷⁵⁸ *Mazer v. Stein*, 347 U.S. at 215.

⁷⁵⁹ *Id.* at 217.

*of art, such features will be eligible for [copyright].*⁷⁶⁰

This standard was then incorporated into the 1976 Copyright Act as part of the re-definition of ‘works of art’ in the 1909 Act as pictorial, graphic and sculptural works.⁷⁶¹

The definition applied today reads

*two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.*⁷⁶²

A useful (non-copyrightable) article, outside the pictorial, graphic and sculpture works category is defined as an

*...article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a ‘useful article’.*⁷⁶³

This “be identified separately from, and are capable of existing independently of” evolved over time into the separability test, which was characterized as being of two types - physical or conceptual. In the physical separability test, courts, often deciding at the infringement stage⁷⁶⁴, would ask if the decorative parts of an object could be actually, physically separated from the useful object: as one court put it, using Nimmer’s example, the jaguar on top of the aptly-named Jaguar car is still a decorative jaguar sculpture whether it is on the car or not.⁷⁶⁵ The

⁷⁶⁰ 37 C.F.R. § 202.10(c) (1959) as cited to in Brief amicus curiae on behalf of Intellectual property professors in support of petitioner at 5, *Star Athletica L.L.C. v. Varsity Brands, Inc.*, et al, Docket No. 15-866 (2018).

⁷⁶¹ *Id.*

⁷⁶² 17 USC §101.

⁷⁶³ 17 U.S.C. §101.

⁷⁶⁴ This is because ownership of a valid copyright need to be proved before proving that the infringer copied and that the infringing work is substantially similar to the copyrighted one. *TRADE DRESS*, *supra* note 16 at 465. See *infra*.

⁷⁶⁵ “What must be carefully considered is the meaning and application of the principle of ‘conceptual separability.’ Initially, it may be helpful to make the obvious point that this principle must mean something other than ‘physical separability.’ That latter principle is

conceptual separability test was not as straight forward. It had numerous different iterations in different jurisdictions. Some of these different conceptual separability tests were applied to fashion design objects, others were applied to mannequins, fish models, and bicycle racks.

Here are some examples. The U.S. Copyright Office usually asked if “the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works”⁷⁶⁶. The Second Circuit crafted various tests. In *Kieselstein-Cord*, it held belt buckles copyrightable by reasoning that the buckles’ “primary ornamental aspect” was “conceptually separable from their subsidiary utilitarian function.”⁷⁶⁷ The court also mentioned the buckle’s inclusion in the collection of The Metropolitan Museum of Art, the designer’s inspiration from art nouveau, and the fact that some consumers wore the buckle as jewelry.⁷⁶⁸ In *Carol Barnhart*, the Second Circuit emphasized necessity, holding mannequins with hollowed out rears made to display clothes were not copyrightable because such a shape was necessary for the performance of their utilitarian function, unlike the belt buckles in *Kieselstein* whose “unique artistic design” was unnecessary for performance of the utilitarian function of a belt buckle.⁷⁶⁹ In the same case, Judge Newman’s dissent argued for an application of a test that would ask whether “[the useful] article...stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function”; that is, a design of a useful article would be conceptually separable and therefore copyrightable subject matter “whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously.”⁷⁷⁰ To concretize his test Judge Newman gave the example of an “artistically designed chair displayed in a museum.”⁷⁷¹ In a third case, *Brandir*, where the design of a RIBBON Rack bicycle was found uncopyrightable since its designer, although adapting the rack from a minimalist sculpture, had adapted “the

illustrated by the numerous familiar examples of useful objects ornamented by a drawing, a carving, a sculpted figure, or any other decorative embellishment that could physically appear apart from the useful article. Professor Nimmer offers the example of the sculptured jaguar that adorns the hood of and provides the name for the well-known British automobile...With all of the utilitarian elements of the automobile physically removed, the concept, indeed the embodiment, of the artistic creation of the jaguar would remain.” *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 420-21 (2d Cir. 1985).

⁷⁶⁶ Cited in *Varsity*, slip op., at 17-19.

⁷⁶⁷ *Kieselstein-Cord v. Accessories by Pearl*, 632 F.2d at 994.

⁷⁶⁸ *Id.* at 990.

⁷⁶⁹ *Carol Barnhart*, 773 F. 2d at 419.

⁷⁷⁰ *Carol Barnhart*, 773 F. 2d at 422-423.

⁷⁷¹ *Id.*

original aesthetic elements to further a utilitarian purpose”⁷⁷², the Second Circuit embraced Professor Denicola’s test requiring an examination of the process of the designer. This same test was also embraced by a majority of the Seventh Circuit in the *Pivot* case when it found a mannequin head that displayed a “hungry look” copyrightable since the mannequin “was the product of a creative process unfettered by functional concerns.”⁷⁷³ In the same *Pivot* case, however, Judge Kanne in his dissent called for the same mannequin to not be considered copyrightable because its aesthetic functions could not be separated from its utilitarian function as a teaching aid to beauty students, characterizing the “hungry look” not as a separable feature, but as an aspect of the mannequin’s utility.⁷⁷⁴ The Fifth Circuit in *Galiano*, a case also involving uniforms, using a likelihood-of-marketability test, held designs of casino uniforms were not copyrightable because they could not be marketed only for their aesthetic qualities, but were, rather, only marketable because of their function as casino uniforms.⁷⁷⁵ The court seemed to suggest that certain designs in costume museums might potentially meet their test and be copyrightable.⁷⁷⁶ The Patry test would have found pictorial, graphic and sculptural features of a useful article copyrightable if these features were separable from the utilitarian aspects of the useful article and if “aesthetics dictates the way that the pictorial, graphic, or sculptural features appear”, not form or function.⁷⁷⁷ Another approach considered both the extent to which a designer’s process was dictated by aesthetics and the extent to which the design of the item itself was dictated by function.⁷⁷⁸

⁷⁷² *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147 (2d Cir. 1987).

⁷⁷³ *Pivot Point Int’l, Inc. v. Charlene Products, Inc.*, 372 F.3d 913, 932 (7th Cir. 2004).

⁷⁷⁴ *Pivot Point*, 372 F.3d 913 at 934. (“To be copyrightable, the statute requires that the useful article’s functionality remain intact once the copyrightable material is separated. In other words, *Pivot Point* needs to show that Mara’s face is not a utilitarian “aspect” of the product “Mara,” but rather a separate non-utilitarian “feature.” The majority, by looking only to whether the features could also “be conceptualized as existing independently of their utilitarian function” and ignoring the more important question of whether the features themselves are utilitarian aspects of the useful article, mistakenly presupposes that utilitarian aspects of a useful article can be copyrighted. If we took away Mara’s facial features, her functionality would be greatly diminished or eliminated, thus proving that her features cannot be copyrighted.”)

⁷⁷⁵ *Galiano v. Harrah’s Operating Company*, 416 F.3d 411, 421- 422 (5th Cir., 2005).

⁷⁷⁶ *Galiano*, 416 F.3d at 422. (“Gianna correctly notes that there are costume museums and that they are replete with extravagant designs that might also have utilitarian qualities, but Gianna does not demonstrate that its designs describe such material. We therefore affirm the denial of summary judgment.”)

⁷⁷⁷ *Varsity Brands et al v. Star Athletica*, No. 14-527, slip. op at 19 (6th Cir., August 19, 2015).

⁷⁷⁸ *Id.*

In these examples, it seems as though courts, when looking at designs of many different types of useful objects, were already trying to understand where the cultural interest might lie in these designs. Sometimes the cultural interest seems to be wedded to properties' tangibility and, in some cases to the useful elements of that very tangibility: as in the hollowed out rears of mannequins. At other times the cultural interest seems to exist in properties' intangible elements that are just embedded in a tangible object- a "hungry look" embedded in a mannequin, like the image of a Van Gogh sunflower is embedded in the Sunflower canvas; the design elements of a chair that can be characterized as artistic no matter what chair they are in, or the artistic design of belt buckles that can exist across belt buckles. Without crafting their reasoning in these intangible/ tangible terms, the courts' different opinions and different tests seemed to result in counter-intuitive results.

2.1 Fashion Designs as Copyrightable Subject Matter when like Visible Images

Thanks to the counter-intuitive results of the previous separability tests, the United States Supreme Court accepted *certiorari* in the case *Star Athletica L.L.C. v. Varsity Brands, Inc* in 2016. In the case *Varsity Brands, Inc. (Varsity)*, a corporation which "designs, manufactures, and sells apparel and accessories for use in cheerleading"⁷⁷⁹ registered a number of its cheerleading designs with the U.S. Copyright Office in 2007 and 2008.⁷⁸⁰ [Figure 30] The designs, consisting of chevrons, zig-zags and color blocks on the uniforms, were alternatively classified as "two-dimensional artwork" and as "fabric design (artwork)."⁷⁸¹ The

⁷⁷⁹ *Varsity Brands, Inc. v. Star Athletica, L.L.C.*, No. 10-2508, 2014 WL 819422 at *1 (W.D. Tenn. 2014).

⁷⁸⁰ For a full list of the designs registered by Varsity see Copyright Office Search Results, COPYRIGHT OFFICE, <http://cocatalog.loc.gov> (Search "Varsity"). For images of the specific designs at issue in the case see *Varsity*, slip op., at 4-5. On a substantive note, copyright exists in works as soon as the work is created but registration gives a copyright owner certain rights, including the right to sue. The U.S. Supreme Court has recently ruled that final registration by, and not only application to, the Copyright Office is dispositive for a copyright owner's enforcement of his copyright. See *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, et al., No. 17-571, 586 U.S. ____ (2019).

⁷⁸¹ Compare *Varsity*, 2014 WL 819422, at *2 ("Varsity registered five cheerleading uniform designs with the Copyright Office for the following Varsity design numbers: 074, 078, 0815, 299A, and 299B. (Pg. ID # 2230-31.) For three of these designs (074, 078, and 0815), Varsity submitted a sketch of the uniform as deposit material and the nature of the work and authorship is listed as "2-dimensional artwork." For the remaining two uniforms (299A and 299B), Varsity submitted a photograph of a completed uniform incorporating the design as deposit material, the nature of the work is listed as "fabric design (artwork)" and the nature of authorship is listed as "2-dimensional artwork." (Pg. ID # 2231-36.)" with *Varsity*, slip op., at 3 ("Varsity sought and received copyright registration for "two-

copyrightable nature of these uniform designs is directly relevant for a consideration of how certain modern and contemporary Italian fashion designs may be copyrightable subject matter under U.S. law. The artistic features of the designs of cheerleading uniforms at issue in the case display many similarities to Italian fashion design objects which have also used the uniform as an inspiration for the designs of their fashionable clothing. We need only think of Giorgio Armani's uniforms for the Italian Olympic team, Alberta Ferretti's recent uniforms for Alitalia stewardesses, or Gucci's hot pink ski jackets.⁷⁶² In 2010 Star Athletica, another company that "markets and sells uniforms and accessories for football, baseball, basketball, lacrosse, and cheerleading"⁷⁶³, presented cheerleading uniforms for sale in its catalog which Varsity thought were substantially similar to Varsity's copyrighted designs, and therefore infringing.⁷⁶⁴ Varsity sued Star Athletica for copyright infringement.

Concentrating on separating the stripes, chevrons and zig-zags from the cheerleading uniform, the useful article, while keeping the cheerleading uniform or useful article intact, the District Court asked "*Can a cheerleading uniform be conceived without any ornamentation or design, yet retain its utilitarian function as a cheerleading uniform?*"⁷⁶⁵ No, it answered, it cannot: "*a cheerleading uniform loses its utilitarian function as a cheerleading uniform when it lacks all design and is merely a blank canvas.*"⁷⁶⁶ On appeal to the Sixth Circuit the decision was reversed: the chevrons, stripes and color blocks were held to be copyrightable. Defining the function of a cheerleading uniform more narrowly, and asking then whether the stripes, chevrons and color blocks were copyrightable pictorial, graphic and sculptural works, the Sixth Circuit noted that defining a useful article based on its decorative ability would rule out the copyrightable nature of nearly all artwork and still other subject matter protected as pictorial, graphic and sculptural works under U.S. copyright law.⁷⁶⁷ The Sixth Circuit reasoned that the

dimensional artwork" for many of its designs, including the following designs, which are the subject of this lawsuit").

⁷⁶² The latter, described as "Gucci (Tom Ford) Jacket (right) Pink polyester, nylon, spandex blend, circa 1995, Italy, 2008.25.4, gift of Dorothy Schefer Faux" was on display in the Museum at the Fashion Institute of Technology's 2016 exhibition, *Uniformity*. See <http://exhibitions.fitnyc.edu/uniformity/?url=athletics/uniformity-athletics-spyder-gucci-1>.

⁷⁶³ *Varsity*, slip op., at 5. The District Court opinion described Star as "a marketer and designer of various sports apparel." *Varsity*, 2014 WL 819422, at *1.

⁷⁶⁴ For a description of a suit of infringement see *Varsity*, 2014 WL 819422, at *1.

⁷⁶⁵ *Id.* at *8.

⁷⁶⁶ *Id.* at *8.

⁷⁶⁷ *Varsity*, slip op., at 26 ("To the extent that Star contends that pictorial, graphic, or sculptural features are inextricably intertwined with the utilitarian aspects of a

chevrons, stripes and color blocks were indeed transferable, and that they were interchangeable between uniforms themselves, and therefore not tied to the uniform's function of covering the body.⁷⁸⁸ The Sixth Circuit expressly compared the chevrons, stripes and color blocks to art, noting that "'nothing (save perhaps good taste) prevents' Varsity from printing or painting its [graphic] designs, framing them, and hanging the resulting prints on the wall as art."⁷⁸⁹ The only thing the Sixth Circuit explicitly left out of its decision was what it characterized as dress design: "[that] which 'graphically sets forth the shape, *style*, cut, and dimensions for converting fabric into a finished dress or other clothing garment...'"⁷⁹⁰

The Sixth Circuit's decision was appealed to the U.S. Supreme Court, where the Court affirmed the decision, holding the chevrons, stripes and color blocks copyrightable subject matter. Prior to the Court's decision, at oral argument, some comments made by the Justices revealed an awareness and concern for a cultural interest in fashion design objects. As part of a discussion about the potential ramifications of infringement, Justice Breyer, who later dissented in the case⁷⁹¹, asked "*What about the woman or the man who wishes – and indeed, this is a normal reason for wearing clothes – they are making a statement about themselves? They're saying who they are? The clothes on the hangar do nothing, the clothes on the woman do everything. And that is, I think, what fashion is about.*"⁷⁹² Justice Breyer also pondered "*Why do we [referring to the Justices] wear robes?*"⁷⁹³

The Supreme Court's decision abolished the distinction between physical and conceptual separability. Interpreting the separability phrase in the definition of pictorial, graphic and sculptural works

cheerleading uniform because they serve a decorative function, see Appellee Br. at 51–52, we reject that argument. Such a holding would render nearly all artwork unprotectable. Under this theory of functionality, Mondrian's painting would be unprotectable because the painting decorates the room in which it hangs. But paintings are copyrightable. It would also render the designs on laminate flooring unprotectable because the flooring would be otherwise unattractive. But the Copyright Act protects flooring designs that "hid[e] wear or other imperfections in the product." [inner citations omitted].

⁷⁸⁸ *Id.* at 29.

⁷⁸⁹ *Id.* at 28 (citing to Home Legend, 784 F.3d at 1413).

⁷⁹⁰ *Id.* at 28–30. Emphasis my own.

⁷⁹¹ See generally *Star*, No. 15-866, 580 U.S. ____ (dissenting opinion).

⁷⁹² Transcript of Oral Argument at 47, *Star Athletica LLC v. Varsity Brands, Inc.*, et al, Docket No. 15-866, 580 U.S. ____ (2017). Justice Breyer's comments have been noted as glossing over the importance of physical bodies in fashion and fashion design. See Ann Bartow, *Barbie in Bondage: What Orly Lobel's Book You Don't Owe Me: How Mattel v. MGA Entertainment Exposed Barbie's Dark Side Tells Us about the Commoditization of the Female Body*, 29 *Fordham Intell. Prop. Media & Ent. L.J.* 435, 469 (2019).

⁷⁹³ *Id.*

mentioned above, the Court created the following standard:

*a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.*⁷⁹⁴

Much of the Court’s decision-making process occurred in the second part of the test. For the Court, the simple identification and perception of features of a useful article that have pictorial, graphic and sculptural elements and may be considered a work of art is “not onerous.”⁷⁹⁵ The second part of the standard, however, involves separating out those features and making sure they themselves are not useful articles. It is in this part of the test that similarities to Italian cultural property law’s protection of the relationship between the public cultural interest and tangible properties which display intangible elements, in other words *visible images*, appear. In its reasoning, the Court seems to be attempting to conceptually identify whether there is a part of the design of the cheerleading uniform that, like a composition in a painting, can be of cultural interest and, therefore, copyrightable.

The Court noted

*respondents have applied the designs in this case to other media of expression—different types of clothing—without replicating the uniform... The decorations are therefore separable from the uniforms and eligible for copyright protection [although not necessarily copyrightable].*⁷⁹⁶

This identification of the intangibility of some features of the design was central for the Court because it indicated a difference between “correspond to the shape of” and “replicate”⁷⁹⁷. Replication would imply that these elements were necessarily always the same as the useful article of a uniform. If the designs replicated the useful article, the intangible elements of the designs would always need the tangible property, more so that pictorial, graphic and sculptural works’

⁷⁹⁴ *Star*, No. 15-866, 580 U.S. ____ (majority opinion) at 1.

⁷⁹⁵ *Id.* at 7 (“The first requirement—separate identification—is not onerous. The decisionmaker need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities.”)

⁷⁹⁶ *Id.* at 11.

⁷⁹⁷ *Id.* at 11.

characterization as being “fixed” in a material form.⁷⁹⁸ Indeed, the U.S. copyright statute specifically indicates that copyright is only an intangible right that is separate from the tangible object in which it is “fixed.”⁷⁹⁹ If the chevrons, stripes, and color blocks replicated the useful article- if, in our interpretation, they always needed the material support of a specific dress to convey the cultural message of a cheerleading uniform- then they would essentially replicate not only the useful article but *the tangible useful article at that*. This is not fixation, but impermissible replication.

Corresponding to the shape of, in contrast, would imply that, at times, these stripes, color blocks and chevrons, even if they did *happen* to correspond to the outline of a uniform⁸⁰⁰ in their configuration, or even if they corresponded to the uniform’s *style* or to its *schema*, could still communicate a message that had absolutely nothing to do with any useful function associated with the tangible uniform (wicking moisture away, but which also, according to the Court, included identifying a cheerleader as such, etc.). This corresponding to the shape of is like the intangible composition of a tangible painting. U.S. copyright, at least when deciding how designs of useful articles are pictorial, graphic and sculptural works, does not seek to protect the *tangible painting with the visible image*, but the *visible image* itself. Identifying designs of useful articles that qualify as pictorial, graphic and sculptural works is about identifying features of the design which embody the possible relationship between the public’s cultural interest and an intangible aspect of the design which is only related to a tangible property and does not replicate it.

The Court gave two examples of a guitar and a fresco as instances where pictorial, graphic and sculptural works might correspond to the shape of, but not necessarily replicate a useful article, like the designs at issue. These examples allow us to bring the argument that separability is about identifying a public cultural interest in intangible elements of tangible objects home. When discussing a fresco, the Court

⁷⁹⁸ Fixed is defined as “when [a work of authorship is] embodi[ed] in a ‘material objec[t] . . . from which the work can be perceived, reproduced, or otherwise communicated.’” *Star*, No. 15-866, 580 U.S. ____ (majority opinion) at 3 (citing to 17 USC §101).

⁷⁹⁹ 17 USC §202. (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object...”)

⁸⁰⁰ *Star*, No. 15-866, 580 U.S. ____ (majority opinion) at 11 (“Petitioner similarly argues that the decorations cannot be copyrighted because, even when extracted from the useful article, they retain the outline of a cheerleading uniform... This is not a bar to copyright.”)

noted that a fresco's "*track[ing of] the dimensions of the surface on which it was painted*"⁸⁰¹ did not mean it could lose protection as a pictorial, graphic, or sculptural work.

*Just as two-dimensional fine art corresponds to the shape of the canvas on which it is painted, two-dimensional applied art correlates to the contours of the article on which it is applied. A fresco painted on a wall, ceiling panel, or dome would not lose copyright protection, for example, simply because it was designed to track the dimensions of the surface on which it was painted.*⁸⁰²

Likewise, just because a drawing on a guitar follows the shape of a guitar, does not mean that it always performs the function of a guitar no matter where that drawing is placed. The drawing on a guitar may correspond to the shape of the useful object, but it does not replicate the tangible object and its uses when it is placed on another tangible object. The design of a guitar does not always allow you to play the guitar. A cultural interest may exist in the design of the guitar apart from whether the guitar can be played or not:

*consider, for example, a design etched or painted on the surface of a guitar. If that entire design is imaginatively removed from the guitar's surface and placed on an album cover, it would still resemble the shape of a guitar. But the image on the cover does not "replicate" the guitar as a useful article. Rather, the design is a two-dimensional work of art that corresponds to the shape of the useful article to which it was applied.*⁸⁰³

Here, for these specific chevrons, stripes and color blocks, the Court seems concerned with identifying *visible images, and not intangible text or intangible images, as part of the pictorial, graphic and sculptural work category of U.S. copyright.* For both frescos and designs of useful articles like guitars or cheerleading uniforms, the issue is whether the Court can identify an intangible part of a tangible property that is susceptible of being reproduced elsewhere but still might refer to its original place of fixation, while *not replicating the entire object in which this intangible element is fixed.* Eventually, this is the type of intangible element to which the public may attach their cultural interest in the future.

As part of its reasoning the majority of the Court also noted

To be clear, the only feature of the cheerleading uniform eligible for a

⁸⁰¹ *Id.*

⁸⁰² *Id.*

⁸⁰³ *Id.*

*copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric. Even if respondents ultimately succeed in establishing a valid copyright in the surface decorations at issue here, respondents have no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut, and dimensions to the ones on which the decorations in this case appear. They may prohibit only the reproduction of the surface designs in any tangible medium of expression — a uniform or otherwise.*⁸⁰⁴

This seems to touch on the, albeit fine, difference between the cheerleading uniform as uncopyrightable because it is a tangible union of intangible design and tangible property and the features of the design as copyrightable because these features only refer back to the tangible object while being present on other materials, like a *visible image* of a Van Gogh or Gustav Klimt painting.⁸⁰⁵ The designs here are eligible for a thin copyright. They are like a *visible image* and *not like an intangible text or even an intangible image*. A potential copyright only extends to the potential relationship between the public's cultural interest and the visible image, the features of the designs; the copyrightable subject matter is only defined by a cultural interest in an intangible feature of the tangible, and not by a public cultural interest in the entire tangible property itself. In this case, the Court decides whether this fine line exists by examining the relationship between the intangible elements and the tangible object. At a later date, it might also reference the design of the useful object in question's function, content and even material.

The dissent in *Star Athletica* criticized the majority opinion because it said that the holding effectively allowed for pictures of cheerleading uniforms, what we might deem *intangible images*, to be copyrightable. As pictures, *intangible images*, the photographs of the cheerleading uniforms were *always the cheerleading uniform, always the same no matter what material they were placed upon and therefore the Court, in the dissent's opinion, was effectively giving a monopoly to the designer of these chevrons, stripes and color blocks*. In response, the majority seems to have emphasized their characterization of the features of the designs of cheerleading uniforms as *visible images* and not as *intangible text or these intangible images, which are the same no matter where they are placed*. For the majority even if we wanted to call these chevrons, zig zags and color blocks pictures of cheerleading uniforms when imaginatively

⁸⁰⁴ *Star*, No. 15-866, 580 U.S. ___ at 12.

⁸⁰⁵ Mentioned in the Government's amicus curiae brief, Brief for the United States as Amicus Curiae supporting respondents at 18-21, *Star Athletica L.L.C. v. Varsity Brands, Inc.*, et al, Docket No. 15-866, 580 U.S. ___ (2017).

separated from the cheerleading uniform, these pictures are still not *intangible images* or the same as the useful article, as the dissent would have us believe. The chevrons, stripes and color blocks are rather, *visible images* which might be informed by their tangible property, but to which a separate cultural interest might attach, apart from that tangibility. This separate cultural interest attached to intangible parts of a tangible property that do not replicate the tangible property is what is determinative for the separability test. Moreover, in the court's opinion, such *visible images* might even exist in a conceptual work of art, like Marcel Duchamp's shovel, that consists almost completely of a useful article. The Court was adamant that, notwithstanding the fact that "a shovel as a shovel cannot" be copyrighted⁸⁰⁶ even if displayed in an art gallery⁸⁰⁷,

*...if the shovel included any artistic features that could be perceived as art apart from the shovel, and which would qualify as protectable pictorial, graphic, or sculptural works on their own or in another medium, they too could be copyrighted.*⁸⁰⁸

If we read this application of the separability test to Marcel Duchamp's *In Advance of a Broken Arm* in light of Giannini's scholarship, the requirement of tangibility in Italian cultural property law, and copyright's similar subject matter, it seems as though the Court is applying a sort of inverse tangibility test for the designs of useful articles. Broadening its test from two-dimensional works to three, the Court points to what really matters for separability: a public perception and cultural existence apart from the uses associated with the useful article itself. The limit the Court sets in its opinion for the scope of such potential copyright also seems to support this interpretation. Again

*the only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric... They may prohibit only the reproduction of the surface designs in any tangible medium of expression—a uniform or otherwise.*⁸⁰⁹

If the copyright holders can prohibit the reproduction of the surface designs in a cheerleading uniform, but not the whole union of uniform

⁸⁰⁶ , *Star Athletica L.L.C. v. Varsity Brands, Inc., et al*, Docket No. 15-866, 580 U.S. ____ (2017) at 12.

⁸⁰⁷ *Id.* at 12, footnote 2 ("...a shovel, like a cheerleading uniform, even if displayed in an art gallery is 'an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.' It therefore cannot be copyrighted.")

⁸⁰⁸ *Id.*

⁸⁰⁹ *Star*, No. 15-866, 580 U.S. ____ at 12.

and surface designs, then what is copyrightable subject matter in the Court's eyes? It must *only* be the relationship between the public perception and the surface designs, no matter where they are fixed. Like a *visible image*, like the composition of a painting, the surface designs, no matter where they are fixed, are copyrightable in so far as they *refer back to or correspond to the shape of the uniform*, but *not* in so far as they replicate the uniform or, in other words, are the tangible union of uniform and surface designs. Here, even if there is a cultural interest in that tangible union of uniform and surface designs, the Court seems to hold that cultural interest is not determinative of copyrightability under the separability test.

Recently lower courts have grappled with how to apply this new separability test from *Star Athletica*. To be fair, their opinions are divergent and do not explicitly couch the separability test in terms of cultural interest. They do, however, indicate that some awareness and consideration of cultural interest is part of the test for the design of a useful article's separability. They also might be better understood if presented in public cultural interest terms.

The case which most acknowledges public cultural interest in intangible parts of features of the designs of tangible, useful articles is *Inhale v. Starbuzz* in which a District Court in California held that features of the design of a hookah bottle were not copyrightable subject matter under the separability test.⁸¹⁰ The court explained

there is nothing distinctive or artistic about the individual features-- despite Inhale's flowery language describing the features, they are essentially geometric shapes of the most common type. Inhale itself recognizes that 'each individual geometric figure is not likely protectable.'... Combining two or three of these common geometric shapes together does little to improve the situation--the components of the water container at issue are simply not works of art in even the broadest, most liberal sense. See Compendium of Copyright Office Practices II § 503.02(b) ("[t]he [minimal] creative expression . . . [necessary for sculptural works] must consist of something more than the mere bringing together of two or three standard forms or shapes with minor or spatial variations.") This is not to say that there are not some, if not many, useful articles composed of unique geometric shapes variations or unique combinations of geometric shapes that might pass muster under the Star Athletica test. It is only to say that the water container at issue here is no Noguchi Table. ["The Noguchi Table was designed by Isamo Noguchi in 1939 for the then

⁸¹⁰ *Inhale v. Starbuzz*, 2017 U.S. Dist. LEXIS 201498 (C.D. CAL., May 8, 2017) at *8 - *9.

*president of the Museum of Modern Art in New York City, the original remains in the museum's permanent collection.”]*⁸¹¹

Here, this lower court considers the cultural interest in the Noguchi Table as something that would qualify its unique combinations of geometrical shapes as copyrightable subject matter. At least at the first stage of the separability test, the “spotting” part, the court imagines that they are looking for features that may be of cultural relevance.

In *Diamond Collection v. Underwraps Costume Corporation*, a District Court in New York was tasked with deciding whether designs of Halloween costumes for the Day of the Dead exhibited features that were copyrightable subject matter. Looking at the designs, the court recognized as separable the “ruffles and bowties on the Dia de los Muertos costumes”, the “graphic skeleton patterns on the lace poncho”, “a pattern of nefarious looking jesters interposed with diamonds” on the Evil Harlequin costume, and “the graphic of a skeleton rising out of burning flames”.⁸¹² The court did not elaborate on exactly why these features of the designs were separable, except to say that “all of these features could be removed from the costumes. Their ‘primary purpose . . . is artistic; once [the features] are removed, the remainder is a functioning but unadorned [article of clothing]’.”⁸¹³ Are these features not, however, like the intangible compositions of a painting to which we might assign our public cultural interest? How is a pattern of nefarious looking jesters on this costume different from a pattern of nefarious looking jesters on another object dating to medieval times? Are both not by nature worthy of our cultural interest? It is this that seems to be of importance for separability—deciding whether these features of the designs of useful articles exist in the wide sea of the intangible parts of other objects which may be of cultural interest to us.

The most extensive treatment of the separability test has recently been given by the 3rd Circuit as part of its decision that features of the design of a banana costume are copyrightable subject matter. The 3rd Circuit characterized *Star Athletica's* separability test as “effectively turn[ing] on whether the separately imagined features are still intrinsically

⁸¹¹ *Id.* at *8 - *9.

⁸¹² *Diamond Collection, LLC v. Underwraps Costume Corp.*, 2019 U.S. Dist. LEXIS 11737 at *11-*12.

⁸¹³ *Id.* at *12 (citing to *Jetmax Ltd. v. Big Lots, Inc.*, No. 15-CV-9597, 2017 U.S. Dist. LEXIS 138041, 2017 WL 3726756, at *6 (S.D.N.Y. Aug. 28, 2017) (holding features of the designs of decorative light strings to be copyrightable subject matter)).

useful.”⁸¹⁴ While this seems to needlessly add the word “intrinsically” to the test, the 3rd Circuit went on to explain how *Star Athletica*’s standard for two-dimensional objects could apply to three-dimensional objects, effectively broadening the test’s applicability from pictorial works to sculptural works. Observing that it was the arrangement and combination of features which mattered, the 3rd Circuit repeated the majority’s dicta about Marcel Duchamp’s shovel and linked it to its own precedent.

*We too have observed that ‘just because a sculpture is incorporated into an article that functions as other than a pure sculpture does not mean that the sculptural part of the article is not copyrightable.’*⁸¹⁵

In other words, with reference to the *Mazer* opinion and the Cellini salt cellar example, what matters for copyrightability is a function other than a physical or economic function. A cultural function, if you will, is what matters, and that cultural function may be found to exist in any useful object through features of its design, if those features do not replicate the tangible object itself.

Looking at the banana costume, the 3rd Circuit found “the banana’s combination of colors, lines, shape and length” to be copyrightable.⁸¹⁶ The key for these features of the design of the banana costume were their ability to exist as copyrightable subject matter for the 3rd Circuit because they could be, as a whole, a sculpture in another material. The 3rd Circuit also found that these features were sufficiently original, noting the originality of renderings of natural objects like bananas was decided on a case-by-case basis based on relative powers of perception.⁸¹⁷ For the 3rd Circuit, merger did not foreclose the

⁸¹⁴ *Silvertop Associates, Inc. v. Kangaroo Manufacturing, Inc.*, No. 18-2266 (3rd Cir., 2019) at 7.

⁸¹⁵ *Id.* at 9.

⁸¹⁶ *Id.* at 9- 10, n. 5 (this overruled parts of the previous District Court opinion, which had held “the location of the head and arm cutouts which dictate how the costume drapes on and protrudes from a wearer (as opposed to the mere existence of the cutout holes) among the copyrightable features... We disagree with that portion of the District Court’s analysis because we must imagine the banana apart from the useful article.... The cutout holes’ dimensions and locations on the costume are intrinsically useful (perhaps even necessary) to make the costume wearable like the “shape, cut, and dimensions” of the cheerleader uniforms in *Star Athletica*, so they cannot be copyrighted.” In our interpretation, this is a correct application because, even if there were some unique public cultural interest in this draping and protrusion, head and arm cutouts, *as features of the design of a useful article*, they are like intangible text, or style or schema, which are the same no matter where they are placed or, at least, are meant to be the same no matter where or in which material they are placed and, therefore, should be freely used by everyone, like the design of a Birkin Bag, because they are indeed of such public cultural interest.)

⁸¹⁷ *Id.* at 10-11. Relative because the 3rd circuit noted it could not make aesthetic judgments.

copyrightability of these features of the design. In other words, these features of the banana costume were not like our example of the Birkin Bag, or the Gucci Bamboo Handle for that matter. In the words of the court,

*...there are many other ways to make a costume resemble a banana.... one can easily distinguish those examples from Rasta's costume based on the shape, curvature, tips, tips' color, overall color, length, width, lining, texture, and material.*⁸¹⁸

Now, on the spectrum of tangibility and intangibility, it seems that the 3rd Circuit is insisting here that a banana costume is not an intangible text or an intangible image. At the same time, the example of the features of the design of a banana costume are not completely analogous to the chevrons, stripes and zigzags of the cheerleading uniform in *Star Athletica* and visible images. But the sculptures do exhibit similar tangible and intangible relationships: they can be reproduced in marble, bronze, wood and still other materials, just as the composition on a canvas can be placed on paper, a wood panel or even on a wall. Here, U.S. copyright law might be identifying features of possible cultural interest in an inverse or even complementary way to Italian cultural property law. While in Italian cultural property law the requirement that the intangible public cultural interest be caught up in one tangible material is what matters, the same sculptures in different materials can also exhibit inherent artistic or historic interest. As we saw when discussing the tyranny of “things”, there are multiple ways to deem similar three-dimensional objects of cultural interest in their tangibility. Likewise, the existence of three-dimensional features of designs of useful articles across materials may be deemed sufficiently indicative of separability, and potential public cultural interest, to be copyrightable subject matter. There is of course a limit: copyrightable subject matter is not cultural property. Pictorial, graphic and sculptural works are not tangible objects, they are not the underlying thing. Copyrighting features of the designs of useful articles does not give you a right to the useful article itself. Rather, the commonality between the two is the intangible public cultural interest. In U.S. copyright law, the features of the banana costume design are copyrightable because of their ability to travel and be of different

⁸¹⁸ *Id.* at 13 (also noting, while rejecting the application of the scenes à faire doctrine, that “Although a banana costume is likely to be yellow, it could be any shade of yellow—or green or brown for that matter. Although a banana costume is likely to be curved, it need not be—let alone in any particular manner. And although a banana costume is likely to have ends that resemble a natural banana’s, those tips need not look like Rasta’s black tips (in color, shape, or size).” *Id.* at 14.)

cultural interests, like a visible image or sculptural form. In Italian cultural property law, the banana costume design as an object may be cultural property because, after traveling for some time, the public cultural interest has become indelibly caught up with a specific feature of the design in that particular costume.

There are other cases that do not so clearly involve cultural interest, but do lend themselves to the entertainment of cultural interest by comparison. In *Day to Day Imps. v. F.H. Group Int'l* a manufacturer of car seat covers, described as two-dimensional art designs, sued another company who sold car seat covers that were allegedly too similar.⁸¹⁹ In holding the car seat covers as copyrightable, the District Court of New Jersey, after emphasizing the *Star Athletica* Court's example of frescos, reasoned that

*If the arrangement of colored geometrical shapes on the surface of the car seat were separated from the car seat medium and placed on a canvas, they would qualify as two-dimensional works of art. It does not matter that such images on the canvas may resemble a car seat or a picture of a car seat- the image still would not replicate a car seat as a useful article. The usefulness of the car seat is the contour of the fabric so that it fits snug over the seat, this is separable from the colored graphical shapes placed on this fabric for decoration. These designs add nothing to the utilitarian function of the car seat cover.*⁸²⁰

Here, the court identifies what is copyrightable in the colored graphical shapes inasmuch as they are not connected to the tangibility of the material as a seat cover. Might we not distinguish here between the cultural interest the public may have in how the fabric covers the seat and the cultural interest the public may have in the colored graphical shapes alone, even if they may still correspond to the shape of a car seat? Although not fashion design *per se*, we might analogize this example to other tangible objects with intangible facets.

Similarly, in *Jetmax v. Big Lots*, a District court in New York held the wire frames over the “molded, decorative, tear shaped cover[s]” of lights to be eligible for copyright as pictorial, graphic and sculptural works.⁸²¹ Although perhaps impermissibly focusing on what was left behind by noting that “the primary purpose of the cover is artistic, once the covers are removed the remainder is a functioning light

⁸¹⁹ *Day to Day Imps. v. F.H. Group Int'l*, 2019 U.S. Distr. LEXIS 110081 at *1-*2.

⁸²⁰ *Id.* at *16.

⁸²¹ *Jetmax Ltd. v. Big Lots, Inc.*, No. 15-CV-9597, 2017 U.S. Dist. LEXIS 138041, 2017 WL 3726756, at *6 (S.D.N.Y. Aug. 28, 2017).

string”⁸²², the court’s decision might also be analogized to the composition of a painting or the features of a sculpture, as in *Diamond Collection v. Underwraps Costume Corporation*.⁸²³

2.2 Some anomalies for Copyrightability when Fashion Designs are like Tangible Text or like Intangible Texts

The proffered interpretation is that U.S. copyright law, *at least as applied to how fashion designs are pictorial, graphic and sculptural works*, acts like an *ex ante* Italian cultural property legal regime by protecting *visible images*, the part of tangible properties which Italian cultural property law protects through a tangible property because it is the part to which a public cultural interest may attach. For fashion designs, U.S. copyright law does not protect an entire tangible object, nor does it protect fashion designs that are like intangible text, of the same possible cultural interest no matter on what material they are placed. Rather, U.S. copyright only recognizes as its subject matter fashion designs that are like *visible images*, connected in some way to the material upon which they are placed but possibly reproducible elsewhere as well, without necessarily needing their original material support to convey their message but always referring back to it.

There are anomalies, however, and some questions that arise from the hypothesis that the separability test is essentially about identifying whether a possible public interest exists in intangible parts of tangible objects. First, this hypothesis does not explain why U.S. copyright law does not protect the things that it should in certain circumstances. While the separability test might recognize that fashion designs corresponding to the shape of a dress are copyrightable subject matter, the test also limits this copyrightability to these fashion designs as they exist across different media, as they exhibit cultural interest on different materials, like *visible images*, and not as they *are the same no matter where they are placed*. In Giannini’s terms, the separability test only deems fashion design that *is not* like Petrarch’s *Rime* to be copyrightable. A style of a dress, a trend, the notion of a black dress, or even a white uniform, are not copyrightable subject matter. Why does the separability test not recognize as copyrightable subject matter what

⁸²² *Id.* at 16.

⁸²³ Another cases that has applied the separability test since *Star Athletica* is *Design Ideas Ltd. v. Meijer, Inc.* 2017 U.S. Dist. LEXIS 94489 (holding a bird silhouette on a clothespin separable but noting it could have been originally fixed in some other tangible medium other than the clothespin, although discussing arguments that the use of a sculpture does not make it a useful article more than other nuances of the Court’s majority opinion in *Star Athletica*).

U.S. copyright law deems copyrightable in its other categories?⁸²⁴ Why does U.S. copyright protect intangible texts and intangible images through the category of literary works and photographs in the category of pictorial, graphic and sculptural works, but *not* fashion designs that are like these intangible texts or intangible images when deploying separability?

Second, the U.S. Copyright Office *does* register as pictorial, graphic and sculptural works fashion designs which do have a different meaning depending on the material upon which they are placed. That is, the U.S. Copyright Office registers and recognizes as copyrightable subject matter designs that *can be like tangible texts*. The Office has, for example, registered “REAL GG” for Gucci as a two-dimensional artwork.⁸²⁵ Depending upon what material the “REAL GG” is placed, however, its separability- its ability to be perceived by the public as of cultural interest apart from the material in which it is first fixed- may vary. How do we reconcile this anomaly? How should the U.S. Copyright Office understand this “REAL GG”, registered in 2016, as copyrightable subject matter in light of the 2017 *Star Athletica* opinion? Rather than answer this anomaly at the separability stage, the existence of fashion designs that *can be like tangible texts* might be better addressed at the infringement stage.⁸²⁶ Of course, to reach this infringement stage, fashion designs that are features of the designs of useful articles that do pass the separability test need to be sufficiently original.⁸²⁷ Given, however, that the U.S. Copyright has already registered fashion designs that incorporate text and the low bar for

⁸²⁴ This also sets up a conflict with other categories of copyrightable works and subject matter, like music, and therefore, a conflict between what U.S. copyright law should protect, according to Giannini, and what it actually protects when considering fashion design. For categories other than fashion, the extension of U.S. copyright to other categories of works in which the relationship between tangibility and intangibility is described seems to completely mirror Giannini’s assignment of intangible texts to copyright. Take music, for example: “The distinction between the intangible intellectual property (the work of authorship) and its fixation in a tangible medium of expression (the copy) is an old and fundamental and important one. The distinction may be understood by examples of multiple fixations of the same work: A musical composition may be embodied in sheet music, on an audiotape, on a compact disc, on a computer hard drive or server, or as part of a motion picture soundtrack. In each of the fixations, the intangible property remains a musical composition.” 2 Patry § 3:22 as cited in *Kelley v. Chicago Park District*, 635 F.3d at 304. Here music, like Petrarch’s *Rime*, is the same intangible property no matter where it is fixed or to what material it is inherent, like an intangible text, and is protected as copyrightable subject matter and as a copyrightable work.

⁸²⁵ Registration Number VA 2-002-720, February 24, 2016, U.S. Copyright Office.

⁸²⁶ Which will be addressed *infra* in the Conclusion, Section 2.

⁸²⁷ Which the Court declined to do in *Star Athletica*. See *Star Athletica*, No. 15-866, 580 U.S. ___ at 11, n. 1.

originality in U.S. copyright law⁸²⁸, this may be an easily satisfied requirement.

The answer to the first anomaly may have to do with the idea/expression doctrine in U.S. copyright law. Despite the fact that U.S. copyright is, ideally, the proper place to regulate our public cultural interest in intangible fashion designs whose cultural message we understand no matter upon what material they are placed, that relationship between our public cultural interest and the intangible fashion design may be *the idea of that fashion design which we need to communicate to each other*. Such a cultural communication does not need a tangible property like a dress, nor does it only refer back or correspond to a tangible object like a *visible image* does. Such a cultural communication, such a potential cultural interest, only needs the intangible fashion design, like the drawing of an accounting frame may convey the accounting process.⁸²⁹ Whereas with intangible text and intangible images we can make narrow decisions about thin copyrightability, with most fashion designs we cannot because the cultural communication is always the same. Think of the example of Mary Ping's art installation. To communicate our cultural interest in a Bamboo Bag, Mary Ping only needs the intangible design of the Bamboo Bag, not the tangible bamboo or even wood, and there need be no relationship between the two. The immateriality of the material to the Bamboo Bag may also go beyond Mary Ping's art installation. Gucci itself, in numerous design patents filed in the 1950s and 1960s, received legal protection for the *look* of handles which seemed to be of bamboo, but which were not.⁸³⁰ This is important factual information

⁸²⁸ The case usually cited to support the low standard of originality is *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

⁸²⁹ *Baker v. Selden*, 101 U.S. 99, 102 (1880) (usually cited as an example of the merger doctrine). For a similar reason, facts are also uncopyrightable. See *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

⁸³⁰ See, for example, Brevetto n. 73795, *Modello Industriale Ornamentale* (1958), Archivio Centrale dello Stato, Rome (describing handle with bamboo-like knots in accompanying photograph as "*Il manico rigido a forma circolare è realizzato in legno nella parte inferiore (8), che è infissa sul modello a mezzo di basette anch'esse in legno (9) con perno per dare movimento a snodo al manico stesso...*"); Brevetto n. 73796, *Modello Industriale Ornamentale* (1958), Archivio Centrale dello Stato, Rome (describing perhaps what looks like most like a Bamboo Handle in today's Gucci Bamboo bags as "*Il manico (8), è semicircolare rigido realizzato in legno, parzialmente ricoperto di cuoio nella parte superiore (9) montato su supporti in metallo (10) a duplice forchetta con perno laterale per consentire lo snodo.*"); Brevetto n. 85481, *Modello Industriale Ornamentale* (1960), Archivio Centrale dello Stato, Rome (showing bamboo-like knots in the handle but describing the handle as "*Il manico è realizzato in legno pregiato o metallo in forma rigida, liscio nella parte superiore (8) e a nodi nella parte terminale che va ad inserirsi sul modello mediante due basi snodate (10).*"); Brevetto n. 92627, *Modello Industriale Ornamentale* (1961), Archivio Centrale dello Stato, Rome (describing "*Borsetta di*

today as we consider whether our public cultural interest is actuated by the tangible Bamboo Handle or by features of the design of the Bamboo Handle, no matter of which material they are made. If the later, the features of the design of the Bamboo Handle would be copyrightable, like features of Duchamp's *In Advance of a Broken Arm*. To communicate our public cultural interest in a Birkin Bag is the same- our public cultural interest is so tied to the fashion design of a Birkin Bag, it is such a stereotype, let alone archetype, that we do not need the fashion design object at all. Hence, there is also no need to refer back to a tangible object, as fashion design that is copyrightable because it is separable would require. Here, the idea makes any reference to a tangible object unnecessary; every object is the Birkin and the Birkin is the same no matter the object. This justification for why "knock-offs" exist is similar in result but fundamentally different in methodology from Sprigman and Raustala's, which supposes that U.S. copyright law does not protect fashion designs because their copying drives the innovation that copyright seeks to promote. Instead, a justification based on public cultural interest imagines that some fashion designs are so intrinsically wedded to the idea of what they seek to communicate that they cannot be protected under U.S. copyright law because everyone should be able to have access to them, wear them, and do anything else with them because of their great public *cultural* (and not necessarily innovative or creative) interest.

In this sense, the preservation and historical and cultural importance of certain fashion designs goes even further than the fair use argument that is usually levied for certain uses of copyrighted works, like sound-recordings, audiovisual material, film or even text.⁸¹ Certain fashion designs are so inherently equal to an idea of them that they cannot be copyrightable subject matter at all or even subject to fair use or other exceptions because they are so culturally important.

3. Fashion as a Design of an Industrial Article of Creative Character and Artistic Value under Italian Copyright Law

One of the ways to further explore the idea that U.S. copyright law is a type of *ex ante* cultural property regime in the United States that is concerned with protecting designs of useful articles inasmuch as they are like *visible images* is to see if, in Italy, Italian copyright law tries to

signora con manico formato da tasselli di legno o bambù snodati tra loro ed intercalate da elementi di metallo.")

⁸¹ See comments as part of Preservation and Re-Use of Copyrighted Works, Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representative, 113rd Congress, April 2, 2014.

act in the same way when it is applied to Italian fashion designs. Does Italian copyright law also apply to some modern and contemporary Italian fashion designs in a way that is similar to how U.S. copyright law applies to features of fashion designs? Does Italian copyright law overlap in some way with Italian cultural property law?

The constitutional underpinnings for Italian copyright law are found primarily in Article 9 of the Italian Constitution and in Article 33 which protects freedom of expression.⁸³² Italian copyright law is defined as protecting works of ingenuity that have creative character.⁸³³ Like U.S. copyright law, Italian copyright law does not protect ideas-as doctrine notes the originator must transform himself into an author through the externalization or by concretizing of his idea.⁸³⁴ This minimum creativity is comparable to the originality requirement in U.S. copyright.⁸³⁵ Perhaps one of the biggest differences between Italian copyright law, or *diritto d'autore* as it is called, and U.S. copyright law is the recognition *diritto d'autore* affords to collective works. This recognition affects term limits- films, operas and other collective creative works are recognized as of multiple authorship and the use of them requires approval of all the authors; the terms of copyright usually expire seventy years after the death of the last author in the group.⁸³⁶ Article 2, clause 4 notes that "*le opera della scultura, della pittura, dell'arte del disegno, della incisione e delle arti figurative similari, compresi la scenografia*"⁸³⁷ are copyrightable subject matter. Designs, or *modelli*, of industrial articles fall in to a separate category and require more than a minimum of creativity; rather, they require a "*carattere creativo e valore artistico*", a response to the concerns of the overlap between patent and copyright protection.⁸³⁸ This new category was only added to Italian copyright law in 2001.⁸³⁹ Like U.S. copyright law, Italian copyright law distinguishes between an intangible form of a

⁸³² Gianfranco Negri-Clementi and Silvia Stabile, *L'arte e il diritto d'autore* in IL DIRITTO DELL'ARTE, *supra* note 612 in Vol 1 at 64-65. The authors also mention the importance of Article 42, which provides for the inalienability of property, including intellectual property.

⁸³³ Art 1, L n. 633/1941 (cited to in GAUDENZ, *supra* note 567 at 75- 76 also citing to Art. 2575 Codice Civile).

⁸³⁴ GAUDENZ, *supra* note 567 at 76.

⁸³⁵ *Id.* at 78.

⁸³⁶ *Id.* at 89- 90. Which does not even begin to get in to the weeds of the applicability and exercise of moral rights to and by authors of collective works.

⁸³⁷ *Id.* at 81 (citing to L. 633/1941 and noting this is not intended as a closed list at 80, n. 24).

⁸³⁸ *Id.* at 81-83.

⁸³⁹ *Id.* at 83 and Francesca Morri, *Le Opere dell' Industrial Design tra Diritto d'Autore e Tutela come Modelli Industriali: Deve Cambiare Tutto Perché (quasi) nulla cambi?*, 1 RIVISTA DI DIRITTO INDUSTRIALE [The Review of Industrial Law] 177 (2013).

work which is protected and its material support.⁸⁴⁰ Describing the difference between what is protected and what is not as the difference between “*corpus mysticum*” and “*corpus mechanicum*”, or its intangible and tangible elements, Italian copyright law protects the *mysticum* in as much as it is caught up with or fixed in the tangible element in what is called a first copy⁸⁴¹, much like U.S. copyright law doctrine. The overlap between these two different categories of copyrightable subject matter (pictorial or sculptural works on the one hand and works of industrial design of creative character and artistic value on the other) sometimes make for nuanced legal considerations of their common and different scope⁸⁴² and also impact collaborations between artists and designers, who might wish to delineate who owns or has rights in the work of art and design as authors, respectively.⁸⁴³

Two recent cases dealing with how designs of industrial articles are copyrightable under Italian law immediately, without the need for comparison with the category of pictorial or sculptural works⁸⁴⁴, seem to suggest that Italian copyright law, for the specific categories of designs of useful articles, protects, at an earlier stage than Italian cultural property law, design features that are historical or artistically significant. In this sense, the specific category of designs of useful articles reveals connections between cultural property law and copyright law that already exist for other objects firmly in the cultural property “box”, like paintings or other traditional works of fine art. It also indicates that copyright law, across the different legal jurisdictions of Italy and the United States, might be concerned with identifying the intangible parts of designs of useful articles that are of cultural interest.

In a recent 2016 case the court of Milan decided that the Moon Boots, created by the designer Giancarlo Zanatta and his Italian company Tecnica in 1970⁸⁴⁵ were models of industrial design of creative character and artistic value under Article 2, clause 10 of the Italian *diritto d'autore*

⁸⁴⁰ Gianfranco Negri-Clementi and Silvia Stabile, *L'arte e il diritto d'autore* in IL DIRITTO DELL'ARTE, *supra* note 612 in Vol 1 at 67. Also making this distinction in terms of autographic and non-autographic works.

⁸⁴¹ *Id.* at 98.

⁸⁴² *Id.* at 124- 125.

⁸⁴³ For further discussion of this see *Id.* at 111-112.

⁸⁴⁴ It is interesting to note that, while U.S. copyright law speaks of thin and thick copyrights with respect to photographs, Italian copyright speaks of simple photographs, those that simply reproduce images of other works. See Gianfranco Negri-Clementi and Silvia Stabile, *L'arte e il diritto d'autore* in in IL DIRITTO DELL'ARTE, *supra* note 612 at Vol 1 in 106 (citing to Art. 88 of L. n. 633/1941). A photographer may reproduce such simple photographs, but they will need to obtain the permission of the author of any work (or person) displayed in the photograph. *Id.*

⁸⁴⁵ ITEMS: IS FASHION MODERN?, *supra* note 604 at 181.

L n. 633/1941. In its reasoning, the court deliberately noted that it could not apply the separability test previously in force in Italy⁸⁴⁶, which was much like the previous dual physical and conceptual separability test in force in the United States. The court insisted that it conduct its evaluation with reference to the *unicum* of the Moon Boot.⁸⁴⁷ A recognition of creative character and artistic value would have to be applied to a union of the *corpus mysticum* and the *corpus mechanicum*.⁸⁴⁸ Pointing to the design's impact in design history to justify its reasoning⁸⁴⁹, the court characterized its ascertainment of the historical import of the boots' design alongside artistic elements, which it evaluated by looking to evidence of the boot in cultural environments to avoid a value judgment. The court sought not an *ex post* evaluation of artistic value⁸⁵⁰, but an evaluation in the moment with reference to a

⁸⁴⁶ For a description of how Italian copyright cases previously applied a separability test to Italian design objects and the shift to non-separability after the relevant EU Directive see Francesca Morri, *Le Opere dell' Industrial Design tra Diritto d'Autore e Tutela come Modelli Industriali: Deve Cambiare Tutto Perché (quasi) nulla cambi?*, 1 RIVISTA DI DIRITTO INDUSTRIALE [The Review of Industrial Law] 177 (2013).

⁸⁴⁷ *Tecnica v. Anniel*, Tribunale Sez. Spec. Impresa, Trib. Sez. Speciale Impresa, Milano, 12/07/2016, DEJURE.

⁸⁴⁸ *Id.* The terms *corpus mysticum* and *corpus mechanicum* have also been used to refer to the conception of cultural property in the work of Giannini in Giuseppe Morbidelli, *Il valore immateriale dei beni culturali* in 1 AEDON (2014), <http://www.aedon.mulino.it/archivio/2014/1/morbidelli.htm>.

⁸⁴⁹ *Id.* ("Ora, pare al Tribunale che i Moon Boots ben possano fregiarsi delle caratteristiche di opera creativa, dotata di valore artistico al fine dell'accesso alla tutela prevista dall'art. 2 n. 10 della legge sul diritto d'autore, in considerazione del loro particolare impatto estetico, che, alla sua comparsa sul mercato, ha profondamente mutato la stessa concezione estetica dello stivale doposci, divenendo vera e propria icona del design italiano e della sua capacità di fare evolvere in modo irreversibile il gusto di un'intera epoca storica in relazione agli oggetti d'uso quotidiano.")

⁸⁵⁰ *Id.* ("Al fine di dare per quanto possibile concreto fondamento a tale valutazione — al di là dei giudizi comunque sempre personali ed arbitrari in ordine al valore artistico o meno di un'opera, destinati spesso nel tempo a mutamenti anche radicali — appare necessario rilevare nella maniera più oggettiva possibile la percezione che di una determinata opera del design possa essersi consolidata nella collettività ed in particolare negli ambienti culturali in senso lato, estranei cioè ai soggetti più immediatamente coinvolti nella produzione e commercializzazione per un verso e nell'acquisto di un bene economico dall'altro. In tale prospettiva acquista particolare positiva significatività della qualità artistica di un'opera del design il diffuso riconoscimento che più istituzioni culturali abbiano espresso in favore dell'appartenenza di essa ad un ambito di espressività che trae fondamento e che costituisce espressione di tendenze ed influenze di movimenti artistici, al di là delle intenzioni e della stessa consapevolezza del suo autore, posto che l'opera a contenuto artistico assume valore di per sé e per effetto delle capacità rappresentative e comunicative che essa possiede e che ad essa vengono riconosciute da un ambito di soggetti più ampio del solo consumatore di quello specifico oggetto. Tale interpretazione consente di delimitare sul piano qualitativo l'effettivo ambito di applicabilità della tutela del diritto d'autore a quei (pochi) oggetti del design industriale ai quali risulta diffusamente conferita una consolidata e permanente capacità rappresentativa ed evocativa specifica, prescindendo da indeterminati e soggettivi riferimenti a profili comunicativi e suggestivi che determinerebbero la possibilità di un apprezzamento

cultural and critical consensus.⁸⁵¹ Industrial designs which are not of this present historical interest are presumably in a negative space of Italian copyright law.

Here we see close links between the reasoning of Italian cultural property law and the reasoning of Italian copyright law. Just as Italian cultural property law might look to historic evidence seventy years after a property's execution and after its author is no longer living to ascertain whether there is a sufficient intangible public cultural interest caught up in the tangible property to protect it, so Italian copyright law seems to look at similar *indicia* during the life of the design to ascertain whether sufficient creative character and artistic value exists in that intangible design, which is inherently part of a tangible object and cannot be separated from it, so that it may be protected by the author during his lifetime and for a certain period afterwards.

The Moon Boots case is an example of how fashion design is copyrightable subject matter in Italian law. It seems to indicate that copyright law and cultural property law are part of a larger cultural heritage legal framework for fashion design objects. While some might see copyright only as an alternative to cultural property protection, exploring how copyright law and cultural property law can both apply to one subject matter shows that they can in fact work in tandem. This larger cultural heritage framework, however, is not confined to the subject matter of fashion design. Other tangible objects of our modern and contemporary culture can first be copyrightable and later cultural property. Recently an Italian court has decided that the design of a Ferrari is of sufficient creative character and artistic value to be copyrightable under Italian copyright law. In newspaper reports, the Court was quoted as reasoning that the Ferrari 250GTO was an icon, whose

“valore artistico... ha trovato oggettivo e generalizzato riconoscimento in numerosi premi e attestazioni ufficiali», in ‘copiose pubblicazioni’ e nella riproduzione ‘artistica’ su monete e sotto forma di ‘sculture’,

autonomo dell'oggetto in un ambito strettamente artistico privo di collegamento con le funzionalità d'uso ad esso proprie, in tal modo di fatto riproponendosi la tesi della scindibilità e negando la stessa possibilità di tutela dell'industrial design sotto il profilo del diritto d'autore” (ord. Tribunale Milano 28/11/06; ripresa in ord. Tribunale Milano 29/12/06, est. Marangoni).”

⁸⁵¹ *Id.* (“Naturalmente non si tratta di acquisizione del “valore artistico” ex post, bensì della sua valutazione, che in qualche modo richiede un apprezzamento che contestualizzi l'opera nel momento storico e culturale in cui è stata creata, di cui assurge in qualche modo a valore iconico, che può richiedere (come per tutti i fenomeni artistici) una qualche sedimentazione critica e culturale.”)

periodicamente esposte nei musei."⁸⁵²

Here are implicit references to history and explicit references to art and museums, other parts of the cultural heritage sphere. There are also references to the reproducibility of the design in other materials- on coins and in sculptures. Italian copyright, in decisions deciding the copyrightability of industrial designs of creative character and artistic value after the abolition of its own separability test, seems to attempt to identify aspects of the design that later might qualify the tangible property for inclusion in the Italian cultural property "box." This relationship provides evidence that copyright seems to be a first way, an *ex ante* way of identifying and legally protecting early iterations of cultural property. The Italian examples give us a further clue as to what U.S. copyright law seems to be attempting when it recognizes that certain parts of fashion designs may be copyrightable subject matter. There seems to be a common interest in recognizing the parts of designs of useful articles that may be of future public cultural interest.

4. U.S. Copyright Law and Italian Cultural Property Law: Closer Ties?

Examining how Italian fashion design objects might be cultural property under Italian cultural property law and copyrightable under Italian copyright law leads to consideration of the overlaps between cultural property law and copyright law generally. Certain fashion designs seem protectable as fashion design objects under Italian cultural property law because they are like visible images, like the image of a Van Gogh sunflower which is caught up with the tangible property of the canvas and yet always refers to it. Such fashion designs are, like other paintings, tangible enough. The *Star Athletica* case and its reasoning implies that U.S. copyright law, when deciding how designs of useful articles are part of the pictorial, graphic and sculptural works category through separability, is also concerned with identifying the same type of potential relationship between intangible features of a tangible property and the public cultural interest that exists in Italian cultural property law. Both Italian cultural property law, when identifying works of artistic or historic interest, and U.S. copyright law, when identifying designs of useful articles as pictorial, graphic and sculptural works, seem mainly to deem designs which can exist as *visible images* to be within their purview. Lest it seem as though this comparison between U.S. copyright law and Italian cultural property law is too far-fetched, Italian copyright law, or *diritto d'autore*,

⁸⁵² *La Ferrari 250 GTO è un'opera d'arte, lo dice il Tribunale. La prima volta per un'auto*, IL SOLE 24ORE, 20 Giugno 2019, <https://www.ilsole24ore.com/art/la-ferrari-250-gto-e-un-opera-d-arte-dice-tribunale-ACdBBHT>.

shows us that copyright law in Italy does blatantly consider cultural interest through evidence of historic impact and significance when deciding whether designs of industrial articles, of which fashion designs are a part, are copyrightable. While existing in different legal jurisdictions, the legal frameworks for U.S. copyright law and Italian copyright law might not be that different when applied to fashion designs.

Certain examples of modern and contemporary Italian fashion design objects give us more practical examples of these overlaps between jurisdictions and between cultural property and copyright. Take the *Flora* design on a Gucci scarf. The *Flora* design, created in the 1960s by Vittorio Accornero at the request of Rodolfo Gucci for Grace Kelly⁸⁵³, was also successfully registered at the U.S. Copyright Office as a pictorial, graphic and sculptural work.⁸⁵⁴ How can we understand this fashion design as an Italian cultural property and as a pictorial, graphic and sculptural work? We know, thanks to the case law and the statutes above, that U.S. copyright law does not protect fashion designs that would replicate their underlying useful article, in this case, the *Flora* scarf. We also know that Italian cultural property law does not protect intangibles like text, that are the same no matter where they are located. In addition, we know that U.S. copyright law also does not protect fashion designs that are like intangible text, the same no matter their material, despite the fact that they would be the ideal candidate for copyright protection because their copying, as descriptions of the *knock off* economy attest, effectively produces the same property, effectively replacing it, like intangible text which is always the same and always communicates the same message no matter where it is placed. So, how might we square the fact that the *Flora* scarf is copyrightable subject matter and cultural property?

One way to understand why U.S. copyright law protects the *Flora* design, despite its close relationship to the tangible scarf as a useful article, is that U.S. copyright law protects the *Flora* design inasmuch as it is a *visible image*, an image that refers back to the original scarf, reminding us of its existence, while not replicating the scarf itself because it can be applied to many other materials. Italian cultural property law, on the other hand, a certain number of years after the *Flora* design has been replicated on other materials, when the public's

⁸⁵³ GUCCI: THE MAKING OF, *supra* note 158 at 86 et seq.

⁸⁵⁴ Gucci did so under a FORM GATT, "a copyright claim in a work in which U.S. copyright was restored under the 1994 Uruguay Round Agreements Act (URAA)." For this description see Form GATT Instructions, THE COPYRIGHT OFFICE, <https://www.copyright.gov/forms/formgatti.pdf>.

cultural interest in that intangible feature of the tangible, useful scarf has been ascertained, will likely decide to protect the relationship between the *Flora* design and the public cultural interest. The *unicum* of intangible design feature and tangible scarf in one or multiple iterations is the cultural property, while the intangible square floral design alone is copyrightable subject matter.

Critics might say that the *Flora* is, notwithstanding this analysis, can be like an intangible text, the same wherever it is printed. This may be so but when it functions thusly, as a design that means the same no matter what material it is printed on, neither cultural property law nor copyright law seems like the best law to apply. Instead trademark might be a better choice. When the *Flora* acts as an intangible text it is communicating authenticity and source no matter the public's cultural interest in the historic, artistic value or cultural expression. Authenticity and source is the province of trademark, not copyright. While there may be similarities between the subject matter and even reasoning of copyright and trademark, they fundamentally protect two different aspects of the *Flora* and other design features. The U.S. Patent and Trademark Office's recent refusal to register the phrase "PRODUCT BAG" as applied to a bag sheds light on these differences.⁸⁵⁵ In response to a request from Off-White, Virgil Abloh's brand based in Milan, the USPTO noted that it could not register

*'PRODUCT BAG' because 'the applied-for mark...does not function as a trademark'... [it] does 'not indicate the source of [Off-White's] goods' nor does it 'identify and distinguish [Off-White's goods] from [those of] others.'*⁸⁵⁶

In contrast to this trademark reasoning, the U.S. Copyright Office would likely register "PRODUCT BAG" as a copyrightable feature of the design of the bag, as a two-dimensional artwork, just as it registered "REAL GG". Neither the phrase's failure to indicate source nor its descriptive nature when applied to a bag would deny "PRODUCT BAG" copyright protection. As a copyrightable pictorial, graphic or sculptural work "PRODUCT BAG"'s ability to be an artistic feature and then be repeated on other materials without replicating the useful article of the bag itself would matter alone. For trademark, in contrast, the material upon which the "PRODUCT BAG" is first placed matters *not because it is a useful article but because it describes the bag,*

⁸⁵⁵ *Off-White is Trying to Register One Specific Use of its Famed Quotation Marks*, THE FASHION LAW, September 19, 2019, <http://www.thefashionlaw.com/home/off-white-is-seeking-to-register-one-specific-use-of-its-famed-quotation-marks>.

⁸⁵⁶ *Id.*

which is impermissible for a trademark unless secondary meaning, or evidence of source identification through the phrase, also exists. Our interest in trademarks is not cultural, but commercial; the relationship between the mark and object matters inasmuch as it fails to identify source, not inasmuch as it indicates a pictorial, graphic or sculptural work, something that is like a *visible image*. These are two different types of authenticity that are not the same.

The hypothesis that U.S. copyright law and Italian cultural property law are close when seen through the lens of certain modern and contemporary Italian fashion design and fashion design objects, does come with still other nuances and some caveats.

First, this proposed relationship between cultural property law and copyright law compromises a view that copyright is only a tool of valorization and not meant for preservation. For rare books, for example, reproduction regulated through copyright can be a way to increase both sales and cultural appreciation.⁸⁵⁷ Far from just seeing copyright law as a way to valorize tangible cultural property that occurs in originals and copies or does not depend on norms of authenticity, copyright law might also be a way to preserve and protect intangible or even tangible works as a first matter. This is of course a proposal that needs more nuancing and investigation if it is to be applied beyond the narrow scope of designs of useful articles as pictorial, graphic and sculptural works. Indeed, while legislative history admits that preservation and copyright law need to strike a balance⁸⁵⁸, such an observation still stops short of admitting that preservation, as it is understood in copyright with reference to libraries, archives and other cultural institutions in the U.S., is an explicit goal of copyright law. Notwithstanding this the relationship between copyright and cultural heritage is present in considerations of the applicability of copyright law, even in the United States.⁸⁵⁹

While both copyright and cultural property might be concerned with recognizing our public cultural interest in certain properties, they do have different scopes and terms, notwithstanding that their individual time thresholds might at times overlap. When considering designs of

⁸⁵⁷ Christopher Buccafusco, *Discovery, Cannibalization, or Both: How Digitization affects Demand for Physical Copies*, Intellectual Property JOTWELL, April 16, 2019, <https://ip.jotwell.com/discovery-cannibalization-or-both-how-digitization-affects-demand-for-physical-copies/>.

⁸⁵⁸ Preservation and Re-Use of Copyrighted Works, Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representative, 113rd Congress, April 2, 2014 at 2.

⁸⁵⁹ *Id.* at 6.

useful objects in the pictorial, graphic and sculptural works category, U.S. copyright law seems to primarily protect *visible images* as intangibles fixed in tangible property at the beginning of their creation for the life of their author and for seventy years after that. Italian cultural property law, on the other hand, seeks to recognize the intangible public cultural interest in an *unicum* of intangible and tangible property for the same category. In this sense, Italian copyright law for designs of industrial articles seems interested in protecting *visible images* inasmuch as they are connected to physical objects and are of cultural interest because it leans on historical evidence and cultural impact to do so. While there is not yet a case in which a modern and contemporary Italian fashion design object has been declared cultural property under Italian law, we might imagine that the administration might make similar observations about the fashion design being, like a painting with its composition, of cultural interest for specific aspects of its design. Rosa Genoni's *Primavera* dress may be of interest for its embroidery, which takes inspiration from Botticelli's *Primavera*.

Despite, or perhaps because of, their different scopes and at times overlapping terms, U.S. copyright law and Italian cultural property law seem to at times be at odds with the very public cultural interest to which they are related and to produce some asymmetrical results. Libraries, museums and archives find themselves having to grapple with orphan works and permissions, for example. The overlaps between economics and culture and commerce, or *beni culturali* and *beni patrimoniali*, as Giannini would say, might frustrate public cultural interest just as much as it might facilitate it. A lack of economic value may allow cultural property to be more easily unloaded, sold or donated by a private owner for the benefit of the public. Likewise, it has been observed that "copyrighted works possessing commercial value historically have a better record of being made publicly available"⁸⁶⁰ and are therefore more susceptible to an assignment of public cultural interest. In addition, while copyright is characterized as protecting the intangible work caught up in a material copy alone, the connection between the tangible copy and the intangible work is admitted in some circumstances, as when libraries lament the limits placed on them to combat tangible deterioration of a work because they cannot copy the intangible.⁸⁶¹

⁸⁶⁰ Preservation and Re-Use of Copyrighted Works, Hearing before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary, House of Representatives, 113rd Congress, April 2, 2014 at 116 at 10.

⁸⁶¹ *Id.* (Referring to audiovisual material in the context of Section 108(c): "Time is of the essence. Waiting until deterioration is evident, as the law currently requires, not only is

The overlaps between copyright law and cultural property law, while perhaps facilitating cultural interest and cultural consensus on the one hand, can also create asymmetrical interests between copyright and cultural property, especially for works which do *not* have a commercial value during the copyright term but are of a potential cultural value. While such a lack of market power might support an appreciation of the *unicum* of tangible and intangible work later, it can first frustrate an appreciation of cultural value in the intangible aspects of a work at the beginning of its life.⁸⁶²

counter to best preservation practice, it also significantly and permanently devalues the archived preservation file which will in time be the only best surviving copy.”) In response to the various testimonies the Copyright Office has issued updated guidelines for Section 108. See U.S. Copyright Office, Section 108 of Title 17, A Discussion Document of the Register of Copyrights, September 2017

<https://www.copyright.gov/policy/section108/discussion-document.pdf>

⁸⁶² *Id.*

CHAPTER 5: MORE THAN TWO WAYS⁸⁶³ OF THINKING ABOUT ITALIAN FASHION DESIGN OBJECTS AS CULTURAL PROPERTY?

The previous chapters imagined a new standard that would facilitate the inclusion of certain modern and contemporary Italian fashion design objects as cultural property under Italian cultural property law. They also imagined how modern and contemporary Italian fashion designs might be understood as copyrightable subject matter under U.S. copyright law and under Italian copyright law with reference to Italian cultural property law. In contrast, this Chapter notes that there are legal avenues other than copyright in the United States which might best recognize and protect a public cultural interest in intangible fashion designs that are caught up with tangible objects or a public cultural interest in tangible fashion design objects directly. The primary legal avenue is historic preservation law. The Chapter examines the limits to protecting fashion design objects under historic preservation law and how it might be extended, with reference to still other legal definitions, to protect modern and contemporary Italian fashion design objects as cultural property in the United States.

1. Fashion Design Objects as Historic Property or “Art” in the United States

The previous chapters have examined how Italian cultural property law might identify individual modern and contemporary Italian fashion objects, outside a museum collection, as cultural property under the law. The standard proposed requires examining how the public cultural interest attaches to the tangible parts of certain Italian fashion design objects. These tangible parts may in fact contain intangible parts, much as other objects of fine arts like painting do, and the public cultural interest might attach to these intangible parts that are inherently caught up or attached to the tangible property and related to them, much as the Van Gogh and Vermeer paintings described above present intangible images that are inherently connected to and informed by their tangible canvases. In this sense, there are two categories that Italian fashion design could be compared to in order to be protected as cultural property under Italian law: *tangible text* and *visible images*.

⁸⁶³ Again, based on Merryman, *Two Ways*, *supra* note 2.

At the same time, modern and contemporary Italian design objects could also be protected as testaments having the value of civilization, like a manuscript containing Petrarca's *Rime* or Dante's poetry or J.D. Salinger's *The Catcher in the Rye*. Such a classification as cultural property would entail protecting the tangible Italian fashion design object because it testifies to the designer's creativity, to a specific moment or even, like audiovisual materials, because it is able to diffuse and communicate culture. Rosa Genoni's *Primavera* dress and *Pisanello* inspired cape in the collection of the Museo della Moda e del Costume for example might be an example of such a testament having the value of civilization.

The example of Rosa Genoni's dresses are important because they present us with a challenge under Italian cultural property law: how to protect Italian fashion design objects that are like intangible texts. In other words, how do we protect the relationship between the public cultural interest and intangible objects, objects that are understood as complete replacements for each other, that are the same no matter upon which material they are placed. Rosa Genoni's dress with its designs might be understood as sufficiently like visible images, or they may be understood as like intangible texts: we may not be able to identify a public cultural interest in the dress design as it relates to a specific material, but we may *always* see a public cultural interest in the *unicum* of intangible and tangible, effectively making, even the physical dress, an intangible text that is the same no matter where it is and that, therefore, should not be protected either in its tangibility or in its intangibility because such properties are meant to be disseminated and copied, made in multiple forms.

Giannini tells us that such types of properties- properties that exist like intangible texts- are not protected by Italian cultural property law, but that they are protected by copyright law, which regulates private actors relationships with them, and then by the public domain. In addition, Giannini also tells us that in legal jurisdictions that do not have cultural property law, we will generally find cultural property in the public domain anyway. As a result, given that the United States is a country which does not have a cultural property-like legal regime for types of movable objects of historic interest like modern and contemporary fashion, U.S. copyright law was examined to see if Giannini's hypothesis might hold. Does U.S. copyright law protect the intangible texts Giannini mentions, does it step in, given its term limits, as an *ex ante* cultural property regime?

For certain intangible texts, like literary works, and intangible images,

like photographs, U.S. copyright does seem to. It protects these intangible things as original works of authorship fixed in a tangible form of expression for the life of the author, seemingly allowing the author to shape and influence the public's interest in this intangible property before it enters the public domain. For other objects, however, which are like intangible texts, as with most modern and contemporary Italian fashion designs, U.S. copyright law does not protect them. Some fashion designs do seem to enter the pictorial, graphic and sculptural works category, as we saw through a presentation of the old separability test and the *Star Athletica* case, when they can be understood as visible images: intangible features of a tangible article in which they are fixed that may refer back to that article but which may also have a cultural life of their own, without replicating the article itself. In other words, U.S. copyright law, when dealing with fashion designs, seems to allow them to be copyrightable subject matter only when they can exist like the composition of a fresco or the outline of a guitar on another material object. Here, U.S. copyright law seems to protect a potential public cultural interest in the intangible fashion design at the same time as it insists that it does not identify the tangible *unicum* of the intangible design and the tangible object as copyrightable subject matter and that it does not identify the fashion design as an intangible text as subject matter.

The reason or the first limiting of the scope of copyrightable subject matter is based in the U.S. copyright law doctrine that separates ownership of the physical object from ownership of the intangible property within it. Selling a work of art, for example, does not mean you sell the copyright to the composition of the work of art or the copyright to the sculptural design. The second limit is more difficult to understand, given that U.S. copyright would be the best legal regime to protect fashion designs when they exist as intangible texts because U.S. copyright seems meant to protect properties that are perfect substitutes for one another. This second limit, however, was justified in terms of the idea/expression, or merger, doctrine in copyright. Some intangible texts, of which some fashion designs may be a part, are *so identified with the idea of the fashion design, they are such stereotypes*, that we cannot protect them as intangible texts in copyright because the public needs them in order to participate in cultural communication and to forge some sort of eventual cultural consensus. It is for this reason that, despite their ideal inclusion in U.S. copyright, some images and texts and fashion designs are outside the purview of copyrightable subject matter and that their copying cannot and should not be regulated *at all*. Instead of entering the public domain after a certain period of time, these fashion designs and texts and images enter

the public domain immediately.

U.S. copyright rules however are not, as we saw, the same for all copyright jurisdictions. Italian copyright law seems to recognize that fashion designs that are both like *visible images* and potentially like *intangible text* can be copyrightable subject matter under Italian law. Here, Italian copyright law seems to deliberately step into the shoes of the Italian cultural property legal regime for fashion designs as Giannini supposes it does for intangible texts. At the same time, Italian cultural property law might be able to protect some of the fashion designs inasmuch as they are *tangible texts or testaments having the value of civilization*. In this sense, the notion of cultural property under Italian cultural property law may include certain modern and contemporary Italian fashion design objects.

In this sense, Giannini's hypothetical is modified. *Copyright law* can protect intangible texts instead of cultural property law, as Italian copyright law seems to do. In jurisdictions where copyright law, however, acts as a sort of *ex ante* cultural property law regime, some intangible texts are outside the purview even of U.S. copyright.

There is another avenue of protection for modern and Italian fashion design objects in the United States, however. Historic preservation law, which already protects immovable objects of historic or artistic interest, and even what we might characterize as testaments having the value of civilization, both at the federal and state levels, might be extended to protect our public interest in the intangible facets of fashion design and other forms of design as they are inherent to or related to their tangible properties.

1.1 The United States' Historic Preservation Law: Common Dilemmas across the Atlantic

One of Giannini's suggestions, as we saw above, is that Italian cultural property law might one day be revised to include objects which are not yet in its purview. Similarly, there have been some suggestions that United States historic preservation law, the most obviously complementary legal regime in the United States to Italian cultural property law, be amended to include certain works of art or even certain rights in its purview, or at the very least that it be supplemented by some sort of public trust or community right.⁸⁶⁴

⁸⁶⁴ Gerstenblith, *Architect as Artist*, *supra* note 78 at 433; Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 179 (2001); Maliha Ikram, *Long-Term Preservation*

The notion that U.S. historic preservation law could be expanded to include certain movable objects, including Italian fashion design objects now mainly preserved in certain museums in the United States, or that the United States could offer some other legal changes, including easements on works of art that would follow these objects no matter whether they were in a museum or not⁶⁶⁵, is not such a far afield idea.

From a comparative perspective, there are some similarities between historic preservation law and Italian cultural property law in the way in which they affront some of the characteristic dilemmas of cultural property. Such similarities can help us to problematize, along the same lines as we did above, what a protection for Italian fashion design objects in the U.S. might look like, in comparison to Italy. From a historical perspective, Grisolia and Cantucci in their separate books on the protection of early categories of Italian cultural property law in the 1950s devoted sections to the laws and rules in place in the United States. In addition, at least one architect of an influential historic preservation law at the state level prior to the implementation of the 1966 Historic Preservation Act, Albert S. Bard in New York, was also aware of Italian cultural property law generally.

1.1.1 Aesthetics and “Antiquity” at the Beginning of U.S. Historic Preservation Law

An awareness of U.S. preservation effects is evident in Italy as early as 1909 when Rosadi during his presentation of the law to protect object described above notes *“Negli Stati Uniti d’America la tutela è nella legge: i distretti dove sono le maggior bellezze naturali sono dichiarate ‘parchi nazionali’ e le stesse montagne rocciose non possono essere trasformate.”*⁶⁶⁶ Later, in *Tutela delle Cose d’Arte*, written in the

of Public Art: From Cultural Heritage to the Confederacy, 14(1) NORTHWESTERN J. L. & SOC. POL’Y 38 (2018); Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U.L. REV. 759 (2011).

⁶⁶⁵ The Ellis rule is one such proposal. The rule suggests that “A museum selling a work should ensure that the institution or individual to which or whom the work is sold commit in some binding form to equal or higher conservational standards and equal or higher public access to the work in question. Subject to that condition being met, the museum should be able to exercise appropriate discretion with respect to how it spends or invests the proceeds of the sale, and specifically, should not be required to use it solely for the acquisition or conservation of art.” Adrian Ellis seems to have proposed the rule as early as 2009. For a recent presentation of it see Adrian Ellis, *Should a Museum Be Allowed to Cash In on Its Art? Yes, But on Two Conditions*, ARTNET, January 18, 2018, <https://news.artnet.com/opinion/deaccessioning-adrian-ellis-ellis-rule-1202147>.

⁶⁶⁶ EMILIANI, *supra* note 381 at 207.

1950s, Grisolia presents U.S. historic preservation law from an Italian perspective. He draws the reader's attention to the 1906 Antiquities Act's mention of "'objects of antiquity'" and "'objects of historic or scientific interest'"⁸⁶⁷, the 1935 Historic Sites Act's mention of "'historic American sites, buildings, objects, and antiquities of national significance'", and Cantucci to a 1949 amendment to the U.S. Code regulating "'archeological ruins and objects'."⁸⁶⁸ He notes the importance of state laws for the protection of specific categories of objects on par with Italian cultural property at the time, and the role of private preservation initiatives.⁸⁶⁹ Grisolia observes

*I presupposti ed i fini della tutela giuridica, nel nostro campo, hanno quindi, a quanto sembra, carattere spiccatamente locale, e non coinvolgono beni della civiltà di altri paesi, di cui del resto gli Stati Uniti non sono molto provvisti. Si spiega così, data questa relativa deficienza, perché sia facilitato l'afflusso di cose d'arte, concedendo per esse larga libertà nel territorio federale: il liberismo, in questo caso, appare un riflesso della relativa scarsità degli Stati Uniti in fatto di cose d'arte antica, in confronto alla sua ricchezza in altri settori.*⁸⁷⁰

Such an observation about the local peculiarities of the United States, which allowed for the preservation of objects indigenous to its soil but not works of art as in Italy, have also been spotlighted by American legal scholars like Patty Gerstenblith. Gerstenblith casts this uniqueness of U.S. historic preservation law and cultural property protections, which were relatively late to protect objects belonging to indigenous communities, as related to the colonists'

almost exclusive[focus] on their Mediterranean and European cultural

⁸⁶⁷ GRISOLIA, *supra* note 431 at 72; CANTUCCI, *supra* note 148 at 86 (including a much more detailed investigation of historic preservation in the United States than in Grisolia and recounting early preservation efforts in the 19th century after the Civil War).

⁸⁶⁸ CANTUCCI, *supra* note 148. In addition, Cantucci spotlights the 1916 National Park Service Act, Executive Orders in the 1930s. *Id.* at 87. Cantucci also observes the differences in duties and obligations when cultural property is classified as such in the United States and in Italy. "È da notare come la classificazione come monumento storico non importa negli Stati Uniti alcun effetto giuridico e non incide affatto sul diritto che ha il proprietario del monumento di usarne a suo piacere." *Id.* at 88. At the federal level, with the exception of historic property which must be taken into account during federal undertakings, Cantucci's comments are still characteristic. State historic preservation laws, with their certificates of appropriateness, do, however, affect a private owner's use of their historic property, although owners generally have a greater say in whether their property can be recognized as such in the first place. See NATIONAL HISTORIC PRESERVATION LAW *supra* note 362 at 70.

⁸⁶⁹ GRISOLIA, *supra* note 431 at 72.

⁸⁷⁰ *Id.* at 75.

*ancestry and on the question of whether a legitimate North American but European-derived culture with its own style of art, architecture and literature could develop.*⁸⁷¹

Indeed, Grisolia does not mention any constitutional protection at the federal level for cultural property in the United States because there was (and is) none. Historic preservation is, instead, justified based on numerous clauses including the Property Clause⁸⁷², the Commerce Clause and General Welfare Clause of the United States Constitution⁸⁷³, and the Tenth Amendment, which notes “*powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively or to the people.*”⁸⁷⁴

This lack of an explicit constitutional clause did not prohibit Americans, however, from thinking about how to protect their public cultural interest in certain properties, much as Italian cultural property law preceded the constitutional clause in today’s Italian Constitution. Just as early iterations of Italian cultural property law took their cue from aesthetics as a first order and antiquity, or history, as a second, so U.S. historic preservation law began in two strands: preserving aesthetic beauty, or making the city beautiful, and the historic.⁸⁷⁵ The earliest preservation efforts in the United States in the late 19th century centered on history and preserving the physical spaces inhabited by one great man of American history, George Washington. One of Washington’s cabins was purchased by the State of New York in the 1850s, while the Mount Vernon Ladies’ Association saved George Washington’s plantation in Virginia.⁸⁷⁶ These historically minded preservation efforts, were usually either privately instigated or special, *sui generis* actions by government. Moreover, despite a lack of explicit constitutional mandate at the federal level, state government, much like regions in pre-unified Italy, took it upon themselves to enshrine some sort of protection for (mainly immovable) things of artistic or historic interest. The earliest constitutional articles on the subject date to 1918 in the

⁸⁷¹ Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States* [hereinafter Gerstenblith, *Identity and Cultural Property*], 75 B.U. L. REV. 559, 562, 575 (1995).

⁸⁷² U. S. CONST., art. IV, § 3 (The Property Clause) (allows Congress to regulate property that is owned by the United States.)

⁸⁷³ U. S. CONST., art. I, § 8, clause 3; U. S. CONST., art. I, § 8, clause 1.

⁸⁷⁴ U. S. CONST., amend. X.

⁸⁷⁵ See generally WILLIAM J. MURTAGH, *KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA* (3rd ed., 2006) and *Albert Bard and the City Beautiful* in ANTHONY WOOD, *PRESERVING NEW YORK: WINNING THE RIGHT TO PROTECT A CITY’S LANDMARKS* (Routledge, 2008).

⁸⁷⁶MURTAGH, *supra* note 875 at 14.

Massachusetts Constitution. Its Article 51 stated that

*The preservation and maintenance of ancient landmarks and other property of historical or antiquarian interest is a public use, and the commonwealth and the cities and towns therein may, upon payment of just compensation, take such property or any interest therein under such regulations as the general court may prescribe.*⁸⁷⁷

This is not, of course, to say that individual states and local governments were not attempting to preserve structures for historic or even aesthetic reasons prior to 1918. Similar to the case which we have seen in New York in the 1850s, Massachusetts also attempted to preserve the aesthetic integrity of its urban spaces through “efforts to enforce some manner of conformance with her existing architectural standards and traits.”⁸⁷⁸

Early aesthetic concerns became even more pressing for members of the American elite with the advent of the so-called City Beautiful movement, inspired by the 1893 World’s Fair in Chicago.⁸⁷⁹ In emphasizing the complex web of early private preservation efforts, state statutes and local ordinances alongside the larger cultural movement for beauty taking place in early 20th century America the Pennsylvania Station origin myth which commonly begins the narrative of historic preservation in America is dispelled, as Anthony Wood has already noted.⁸⁸⁰

While these early historic preservation actions seem confined to the urban landscape, individual actors and the U.S. government in the early 20th century also attempted to preserve and protect movable objects in the United States, but also United States’ natural treasures. The history of the bill’s passage in various drafts proposed both in the House of Representatives and in Congress is enlightening because it reveals some similarities with Italian cultural property law, but also specific adaptations for the uniqueness of the American territory. Restricted to public lands, multiple bills on the same subject were proposed in the House and Senate in 1904. One first proposed in March 1904 in the House of

⁸⁷⁷ JACOB MORRISON, HISTORIC PRESERVATION LAW 58- 59 (1965). Grisolia also mentions this article in the Massachusetts’ Constitution. GRISOLIA, *supra* note 431 at 72- 73.

⁸⁷⁸ MORRISON, *supra* note 877 at at 22 (citing to Public Statute c. 104 and noting an 1887 judicial decision which struck down a town ordinance prohibiting owners from “erect[ing], rebuild[ing] or essentially chang[ing] any building for any purpose that is not a dwelling house without first obtaining a written permit from the Board of Alderman.”)

⁸⁷⁹ WOOD, *supra* note 875 at 16- 19.

⁸⁸⁰ *Id.* at 9.

Representatives emphasized as its broad purposes “preserving and protecting from wanton despoliation”⁸⁸¹ and prohibited counterfeiting of

any archeological object which derives value from its antiquity, or making of any such object, whether copied from an original or not, representing the same to be original and genuine...⁸⁸²

Bills proposed in the Senate in February 1904 delegated power to the President to

from time to time, set apart and reserve from sale, entry, settlement or occupancy so much of any of the public lands on which are located aboriginal monuments, ruins, or other antiquities...when in his opinion said aboriginal monuments, ruins, and other antiquities are of sufficient public interest to make their preservation desirable...⁸⁸³

Bills introduced in the Senate defined the subject matter of the law as movable objects that would include

other ancient remains which serve to illustrate the early history of the aborigines, including... implements, utensils, and other objects of wood, stone, bone, shell, metal, and pottery, or textiles, statuettes and statuettes,

⁸⁸¹ Section 1, H.R. 13349, 58th Congress (March 2, 1904) (Bill introduced by Mr. Rodenberg in The House of Representatives). The word “wanton” was later struck out by the Senate. See S. 5603, 58th Congress (April 25, 1904).

⁸⁸² Section 8, A Bill For the preservation of historic and prehistoric ruins, monuments, archeological objects, and other antiquities, and to prevent their counterfeiting, S. 5603, 58th Congress (April 25, 1904). Intent was, obviously a necessary prong. The April 25, 1904 report by Mr. Fulton, with amendments, added the phrase “found on any public lands of the United States” after any archeological object. An April 20 version of the bill proposed earlier in the Senate had a counterfeiting section. See A Bill For the preservation of historic and prehistoric ruins, monuments, archaeological objects, and other antiquities, and to prevent their counterfeiting, S. 5603, 58th Congress, (April 20, 1904). Eventually the final bill evolved to not include “wanton” and was a combination of bills first proposed in the House, which would have given control of objects and excavations to the Smithsonian. For evidence of these various changes see AN ACT For the preservation of historic and prehistoric ruins, monuments, archaeological objects, and other antiquities, and to prevent their counterfeiting, S. 5603 (58th Congress) (January 19, 1905).

⁸⁸³ A Bill For the preservation of aboriginal monuments, ruins, and other antiquities, and for other purposes, Section 1, S. 4127, 58th Congress, (February 5 1904). Comments during the hearings registered comments with the ways in which certain other bills in the House were crafted, dividing responsibilities between the Department of the Interior and the Smithsonian Institute, criticized because it “would lead to constant friction and to a clashing of authority, which would be apt to neutralize the beneficial results of the legislation.” S. Doc. No. 814, at 6 (1904).

*and other artificial objects.*⁸⁸⁴

These bills introduced in 1904 also placed emphasis on the education value that artifacts could have and specifically named American archeology and ethnology as disciplines which the preservation of these objects were meant to aid.⁸⁸⁵

Committee hearings on these bills reveal that they were meant to address the immediate concern of the removal of archeological objects from the United States⁸⁸⁶, much as Italy's early laws were also meant to address the exportation of their works of art. And indeed, Italy was on the minds of those testifying at the hearings.

Referencing the future testimony of Mgr. Dennis J. O'Connell, rector of the Catholic University of America⁸⁸⁷, Doctor Kelsey from the University of Michigan and the Archeological Institute of America⁸⁸⁸ observed "The United States is at a great advantage in dealing with this question [of preservation] when compared with the countries of Europe. As Monsignor O'Connell will inform you, from his long residence in Rome, [they] have long since attached the question with much greater advantage than we...."⁸⁸⁹

Italy was specifically mentioned by those testifying. Reverend Doctor Baum, President of Records of the Past Exploration Society offered, "*...[T]he great desire to go into a ruin and get the best there has led to an utter neglect of the scientific excavation of our ruins, which would not be tolerated for one moment, as Professor Kelsey knows, in Italy*

⁸⁸⁴ Section 3, Section 1, S. 4127, 58th Congress, (February 5 1904). The bill also placed much responsibility for the protected objects in the hands of the Smithsonian Institution instead of in the Department of the Interior, which was the choice of the House of Representatives' bill.

⁸⁸⁵ Section 12, Section 1, S. 4127, 58th Congress, (February 5 1904).

⁸⁸⁶ S. Doc. No. 814, at 4 (1904). (testimony of Doctor Kelly, "As an instance to illustrate the importance of immediate legislation, in Denver a short time ago, when I was present at a public meeting, a gentleman of the city who presided at the meeting, said that very recently two carloads of boxes containing objects of archeological interest from the southwest had recently passed through the city....Part of them were to be shipped abroad...We are all aware of the facts. Catalogues of collectors suggest the conclusion that parties are constantly at work upon the public lands extracting all available objects of value; and these objects of value are not merely extracted, but the environment of them is so completely disfigured in the process that the remains become valueless for scientific purposes, either for exhibition or for any other purpose.")

⁸⁸⁷ S. Doc. No. 814, at 1 (1904).

⁸⁸⁸ *Id.*

⁸⁸⁹ S. Doc. No. 814, at 5 (1904). Doctor Kelley also noted that it was easier to regulate the densely populated areas of the country, as opposed to the wide open swaths of the American frontier where most of these objects were found, which made it much harder to regulate than what we might term the looting of antiquities in Europe.

or Greece.”⁸⁹⁰ While Doctor Hilprecht from the University of Pennsylvania who had excavated in Nippur wrote of his “great satisfaction” for the bill he hoped it would be expanded to all American lands given that “[i]n Turkey, Egypt, Greece, and Italy the law provides for the Government permit for all excavations having in view the examination of ancient sites by pick and shovel in the whole Empire.”⁸⁹¹

This testimony and the arguments for the regulation of certain objects of antiquity germane to the United States reveals a common concern with the public interest in objects of historic, anthropologic, and ethnographic interest both in the United States and in Italy, around the same time period.⁸⁹² As was noted during the hearings “The general public has awakened to a realization of the importance of preserving in America these remains of the past, not simply for present interest, but for the future.”⁸⁹³ When the Antiquities Act was finally passed as a law “for the preservation of American antiquities”⁸⁹⁴ its subject matter had considerably broadened in scope. For the President’s proclamations the focus had shifted from “reserving” public lands which contained the relevant subject matter of public interest to the power to

*declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments...*⁸⁹⁵

⁸⁹⁰ S. Doc. No. 814, at 1, 12 (1904).

⁸⁹¹ S. Doc. No. 814, at 13 (1904).

⁸⁹² An emphasis here on historic since anthropological and ethnographical were not added in to Italian cultural property law until 1939. See *infra*.

⁸⁹³ S. Doc. No. 814, at 5 (1904).

⁸⁹⁴ H.R. 11016, 59th Congress, (March 12, 1906).

⁸⁹⁵ Section 2, H.R. 11016, 59th Congress, (March 12, 1906). This is a distinctly historic approach to the Antiquities Act, given the discussion of the President’s powers of it under President Trump and other scholars’ notes about its continued viability as applied to certain objects. See PRESIDENTIAL EXECUTIVE ORDER ON THE REVIEW OF DESIGNATIONS UNDER THE ANTIQUITIES ACT [hereinafter EXECUTIVE ORDER], April 26, 2017, OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, <https://www.whitehouse.gov/the-press-office/2017/04/26/presidential-executive-order-review-designations-under-antiquities-act>. But see ALEXANDRA M. WYATT, CONG. RES. SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS (2016) (analyzing whether the President has authority to modify and revoke national monument designations and grounding Congress’ authority to designate national monuments in the Property Clause – separate from the Intellectual Property clause) and Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage* 28 NEW ENG. L. REV. 63 (1993-1994), available via HEINONLINE (noting dueling case law U.S. v. Diaz and U.S. v. Smyer, deciding whether or not the term ‘object of antiquity’ in the Act was unconstitutionally vague).

A year after the Antiquities Act was passed Albert S. Bard, the future legal architect of New York State's preservation law and one of the most influential private actors in the preservation movement in New York City, traveled to Europe.⁸⁸⁶ Over the years Bard would make more trips to the Continent and his diaries from his 1922 trip to Italy in September survive. Among his many stops were Venice, Florence, Rome and Naples. In Florence he commented on the beauty of the Fra Angelico in San Marco. In Rome he observed of San Giovanni in Laterano "[l]ike all the churches hit by the Baroque which followed M. Angelo [sic], the church itself is ruined."⁸⁸⁷ Indeed, such observations were very much in Bard's character. A devotee of art and architecture, he had become active in art societies in New York while practicing as a lawyer in the city, joining the Municipal Art Society in 1901.⁸⁸⁸ In this year, the Municipal Art Society in particular, "*focused its energy away from presenting the city specific works of art, and instead concentrated more broadly on the cause of making New York a more beautiful city.*"⁸⁸⁹

One of the first places the Municipal Art Society began, along with other societies like the representative Fine Arts Federation of New York⁹⁰⁰, was with the plight of billboards in New York City. As we

⁸⁸⁶ WOOD, *supra* note 875 at 24.

⁸⁸⁷ See Notes regarding Bard's trip through Italy in 1922 and carbon copy of his diaries in Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 146, Folders 10-11.

⁸⁸⁸ WOOD, *supra* note 875 at 24- 25.

⁸⁸⁹ *Id.* Furthermore, lists of so-called landmarks and important works of art drawn up by individuals and art societies in New York in the early 20th century pinpointed properties which held both "historical and architectural merit." See ALBERT ULMAN, A LANDMARK HISTORY OF NEW YORK: ALSO THE ORIGIN OF STREET NAMES AND A BIBLIOGRAPHY (Appleton & Co, 1901); WORKS OF ART BELONGING TO THE CITY OF NEW YORK, 1905- 1905. A GUIDE TO THE WORKS OF ART OF NEW YORK CITY (Florence Levy, ed., 1916). Later, in the 1960s, one of the ways that the Municipal Art Society would encourage grass roots support for a Landmarks Law was to publish a book entitled *New York Landmarks* and offer guided tours of parts of Manhattan. See August 1964 Newsletter (mentioning the New York Landmarks book). See Meeting Minutes, April 25, 1955, Municipal Art Society Archives. It is important to note that the Municipal Art Archives' are a wealth of information but that an exhaustive study of all their material and this history of the organization is outside the scope of this dissertation. The same applies to the Bard Papers in the New York Library and the Archives of American Art in New York.

⁹⁰⁰ Established in 1895 and incorporated in 1897 to "ensure united action by the Art Societies of New York in all matters affecting their common interests, and to foster and protect the artistic interests of the community." This purpose is found in the Federation's 1897 Certificate of Incorporation, included in *Fine Arts Federation of New York, Certificate of Incorporation, Constitution, By-Laws, As Amended to October 1949*, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 54, Folder 1. Similar information can be found on the Fine Arts Federation's current website: *Mission + History*, THE FINE ARTS FEDERATION OF NEW YORK, <http://fineartsfederation.org/mission-and-history/> ("The Fine Arts Federation of New

have seen above, at this time, the scope of laws passed to protect objects of antiquity and broad swaths of land in the United States mainly applied to public property.⁹⁰¹ Indeed, the challenge for those who wished to make a city beautiful by removing the heinous billboards advertising of everyday products from the avenues of Manhattan in the early 20th century was to find a way to regulate private property, and the aesthetics, the view, of the private property at that.⁹⁰² The concern with billboards was not confined to New York City nor to fine arts societies. As early as 1905, as Anthony Wood mentions, the American Scenic and Historic Preservation Society's Annual Report had included an article entitled "The Poster Nuisance / An Argument Against the Abuses of Outdoor Advertising."⁹⁰³ Bard himself was on the Mayor of New York City's Billboard Advertising Commission in 1913.⁹⁰⁴ It is in this fight that aesthetics played an important role.

One of the earliest legal actions taken by an arts society with which Bard was involved was a constitutional proposal for the protection

York was established in 1895 as a unique advocate for design excellence in New York City and beyond. The Federation is comprised of member organizations of diverse constituencies with professional expertise in public art, architecture, landscape architecture, planning, urban design, and open space in New York City. Today, the organization is the only alliance of its kind acting on behalf of the city's art and design professions in support of a well-designed public realm. The Federation's founding mission is "to ensure united action by the Art Societies of New York in all matters affecting their common interests, and to foster and protect the artistic interests of the community."

⁹⁰¹ See *supra* note 877 discussion of the Massachusetts' ordinance in MORRISON.

⁹⁰² WOOD, *supra* note 875 at 26 ("What government lacked was the ability to control private property for aesthetic purposes. Time and again, efforts to advocate for the control of private property on the grounds of appearance ran up against questions of constitutionality." ... "Gilmartin [in SHAPING THE CITY: NEW YORK AND THE MUNICIPAL ART SOCIETY (Clarkson Potter, 1995)] ...described one of the Municipal Art Society's failed efforts to place modest limitations on the use of private property, in this case an effort to prohibit the placement of billboards on the roof of buildings, as being 'a bit like trying to pass a gun control law in Texas.'")

⁹⁰³ WOOD, *supra* note 875 at 28- 30.

⁹⁰⁴ *Id.* at 27 ("Particularly troubled by the billboard blight was the Fifth Avenue Association. In 1912, because of growing complaints 'in relation to nuisances in connection with billboards and signs used for advertising purposes,' Raymond Fosdick, New York City's commissioner of accounts, issued 'A Report on an Investigation of Billboard Advertising in New York City'. This report led the Avenue Association's president Robert Grier Cooke to write Mayor Gaynor urging the appointment of a commission to further study this growing problem. The mayor told Cooke to select a committee and he would appoint them. He named Cooke its chair. One of the seven members of the commission and its secretary was Albert Bard.") Such histories of the plight of billboards in the United States and later successful historic ordinances brings interesting comparisons with Italian cultural property law, such as the garden case mentions *supra*, which do succeed in indirectly protecting vistas around historic property.

of beauty. In 1915 members of a Special Committee of the Five⁹⁰⁵ of the Fine Arts Federation, proposed the following amendment to the New York State Constitution:

*The promotion of beauty shall be deemed a public purpose, and any legislative authority having power to promote the public welfare may exercise such power to promote beauty in any matter or locality, or part thereof, subject to its jurisdiction. Private property exposed to public view shall be subject to such power.*⁹⁰⁶

In a letter Bard wrote to the Committee he elaborated on the purpose of such language,

*A constitutional amendment which shall have the effect of making the creation of beauty a public purpose and aesthetic considerations a proper basis for legislation; in other words, an amendment which will free the legislative power from the hampering effects of reactionary court decisions. [...] The purpose of the clause submitted is simply to put beauty on a parity with health, sanitation and the other recognized objects of legislative power, and to do so as briefly as possible while safeguarding private property which has no relation to the public.*⁹⁰⁷

Foreshadowing contemporary doubts about the worthiness of aesthetics as a deployable standard, and also, from a comparative perspective, the eventual rejection of a solely aesthetic approach to cultural interest under Italian cultural property law altogether, at least one member of the Special Committee was not as keen on using beauty alone as a public purpose and as the foundation for preservation, notwithstanding the embrace of aesthetics and beauty by Bard and others⁹⁰⁸. “*It seems to me that your program is very well*

⁹⁰⁵ The Committee was established to “ ‘report to the Federation the means whereby the interest of Art Commissions and of City Planning Commissions, throughout the State, may be furthered before the coming State Constitutional Convention.’” *Letter to the Members of the Special Committee of Five of the Fine Arts Federation from Albert S. Bard, Chairman*, January 21, 1915, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 54, Folder 1 at page 1.

⁹⁰⁶ *Letter to the Members of the Special Committee of Five of the Fine Arts Federation from Albert S. Bard, Chairman*, *supra* note 905 at enclosure 2. Wood seems to suggest that the language of this proposed amendment came directly from the Mayor’s Billboard advertising commission and was then proposed by the Fine Arts Federation. The common member of the two groups was, of course, Bard. See WOOD, *supra* note 875 at 28, 30.

⁹⁰⁷ *Letter to the Members of the Special Committee of Five of the Fine Arts Federation from Albert S. Bard, Chairman*, *supra* note 905 at page 2.

⁹⁰⁸ One member George B. Ford wrote to Bard “I think your letter of January 21- to the Members of the Committee of Five of the Fine Arts Federation is excellent. The three amendments which you suggest are all well worth while [sic] and I will certainly do all

arranged, but I should doubt the wisdom of trying to write 'beauty' into the words of the constitution in the manner proposed."⁹⁰⁹ Such an observation might also, today, be grounded in hierarchical concerns. Especially when thinking of modern and contemporary Italian fashion design objects, the criteria of beauty might skew judgments in favor of luxury and not to other design objects of traditions different than the Western canon.

Articles and notes Bard wrote later in his life clue us in to a distinction he may have developed to address the issue raised by his colleague. *Public Aesthetics and Private Aesthetics*, published decades later in 1951⁹¹⁰, makes an interesting case which recalls the discussion of public interest as related to aesthetic interest in Italian legal doctrine discussed above. Bard had to draw this distinction in order to emphasize how aesthetics could be a valid public purpose under the law alongside others, like public safety. Bard defined private aesthetics as "*the desire of an individual landowner not to have a new building on a neighbor's land interfere with his view.*"⁹¹¹ Such private aesthetics would not justify the taking or regulation of private property, but public aesthetics would:

No court today would support the sumptuary laws of several centuries ago which told the private citizen what he might or might not wear, upon the basis of its cost. But it is a far cry from these concerns of personal taste and choice to a generalization that in the planning of a community reasonable regulation of private property may not be based upon public appearance, even when the planning for appearance is not so inextricably tied in with matters or property values, tax basis, etc., etc., [sic] that the aesthetic regulation can be dissected out and placed by itself, i.e. is 'separable'. The concepts and terms 'private aesthetics' and 'public aesthetics' should now become accepted forms in legal

that I can to held in forwarding them." Ford's letter is on stationary of the City of New York, Board of Estimate and Apportionment, Committee on the City Plan, Municipal Building. *Letter from George B. Ford to Albert S. Bard, January 26, 1915*, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 54, Folder 1. It is important to note that the Board of Estimate also played a role in the advent of New York historic preservation law, given that they were charged with approving city expenditures.

⁹⁰⁹ *Letter from John S. Pine to Albert S. Bard, January 28, 1915*, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 54, Folder 1.

⁹¹⁰ *Public Aesthetics and Private Aesthetics*, July 1951 (for the American City Magazine, Issue of August 1951) in Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 135, Folder 2.

⁹¹¹ *Id.*

*classification and terminology.*⁹¹²

Thinking about how such public and private aesthetics would have applied to a fashion design object were they to be included as objects subject to preservation under historic preservation law raises the issue of public and private appearance of individuals. One of the risks in regulating aesthetics separately, when it is in a public space, as fashion design objects already are when displayed in museums and divorced from bodies on the street, is of making content based judgments on what is worthy of preservation or not. As Bard observed, no one would want to return to sumptuary laws (as we have seen in the introduction with the case of leggings, fashion in the public sphere is already charged enough with only social norms at stake). At the same time, by choosing which fashion design objects were worthy to be preserved, even by negotiating a the relationship between a public cultural interest and their tangible material, we might be unnecessarily choosing certain fashion design objects over others, and therefore certain viewpoints over others in the public space, another dilemma of cultural property.

At the same time, the idea that aesthetics, or other cultural interests, can be separated from property values or other economic facets of property is one which we have seen in Italian cultural property law. Here we see reflections of Pugliatti, Grisolia, Cantucci and even Giannini's explanation of how a cultural property is at once the same as and yet separate from a *bene patrimoniale*. In his work on how to preserve and protect private properties through government regulation on the basis of aesthetic interest, and later historical interest, Bard seems to make arguments for similar processes of identification as his Italian counterparts.

While the constitutional beauty amendment was not ratified at the New York Constitutional Convention in 1915, the notion of beauty and aesthetics as a worthy public purpose that would justify the government's prevention of certain activities and uses of private property only grew, despite critiques inside⁹¹³ and outside the hallowed halls of law. Eventually, interest in the aesthetic under proposed laws to first protect urban spaces in New York, like interest in the aesthetic under cultural property law in Italy,

⁹¹² *Id.* at 3.

⁹¹³ Wood notes a 1909 decision stating "'esthetic considerations are a matter of luxury and indulgence rather than necessity.'" WOOD, *supra* note 875 at 28 (citing to City of New York, Report of the Mayor's Billboard Advertising Commission of the City of New York, August 1, 1913, 28).

embraced the complementary criteria of history.

While there is thus far no direct evidence from this time that Bard and his fellow activists were aware of the Italian laws of 1902 and 1909, with its 1927 revisions protecting villas and gardens⁹¹⁴, Bard was generally aware of the legal differences between the United States and Europe which frustrated preservation. He was quoted as noting,

*'Americans generally are far behind many other nations in realizing the value of beauty as a municipal asset expressible in dollars, to say nothing of its daily contribution to the happiness of the citizen.'*⁹¹⁵

In the late 1930s, on behalf of the fine arts societies, Bard took a second try at a constitutional amendment to the New York Constitution, this time considerably broadening its language and therefore its potential scope,

*'The natural beauty, historic associations, sightlines and physical good order of the states and its parts contribute to the general welfare and shall be conserved and developed as a part of the patrimony of the people, and to that end private property shall be subject to reasonable regulation and control.'*⁹¹⁶

Anthony Wood, in his examination of the evolution of New York City's Landmarks Law, notes that Bard referred to this proposed constitutional amendment as 'the patrimony of the people' clause.⁹¹⁷

⁹¹⁴ See Art 1, footnote 3, L. n. 364/1909, Testo Coordinato.

⁹¹⁵ WOOD, *supra* note 875 at 30 (citing to Bard's testimony on behalf of the Municipal Art Society "before the Commission on Building Districts and Restrictions [of The City of New York]" in New York (N.Y.) Commission on Building Districts and Restrictions, Final Report, June 2, 1916 (City of New York, Board of Estimate and Apportionment, Committee on the City Plan, 1916), 82)).

⁹¹⁶ WOOD, *supra* note 875 at 30-31 ("Introduced into the Constitutional Convention by Hon. O. Byron Brewster of Elizabethtown, New York at the request of the City Club of New York, the Citizens Union, and the Fine Arts Federation of New York, it read: "The natural beauty, historic associations, sightlines and physical good order of the states and its parts contribute to the general welfare and shall be conserved and developed as a part of the patrimony of the people, and to that end private property shall be subject to reasonable regulation and control.'" (citing to Bard papers and to 'Constitutional Amendment Proposed for New York' New York State Planning News 2, no. 6 (July 20, 1938).)

⁹¹⁷ *Id.* ("In 1938, at the age of seventy-one, Bard saw yet another opportunity to advance the cause of aesthetic regulation. The every-twenty-year question of whether there should be a Constitutional Convention in New York has received a positive answer and the big event had been scheduled for that summer. Bard went to work writing and promoting a proposed new clause for the constitution... The main focus of Bard's efforts was the

Here, for comparative purposes, there is a distinct advancement towards later language of Italian cultural property law in 1939 regulating landscape⁹¹⁶, but also the use of the word patrimony, which would later be used by the Commissione Franceschini⁹¹⁷ and then enshrined in the text of Italian cultural property law.⁹²⁰

Bard spent the majority of his activities with the fine arts societies participating in committees on legislation and corresponding with other like-minded activists in other parts of the United States. His correspondence reveals a copious, detailed attention to the evolution of case law which addressed the issue of protecting aesthetics as a public purpose as it developed across the United States.⁹²¹ Indeed, Bard published commentaries and publicized these cases.⁹²² For the comparative purposes of this dissertation, Bard's most interesting correspondence and publications date to the 1950s, prior to, during and after the passage of the Bard Act, enabling legislation at the state level which allowed New York City to pass its Landmarks Law.⁹²³

There is one piece of Bard's correspondence which makes the links between Italian cultural property law and the evolution of historic

proposed amendment that he called 'the patrimony of the people' clause (Intro 508, No. 535).")

⁹¹⁶ See Art. 1, L. n. 1497/1939 (noting "Sono soggette alla presente legge a causa del loro notevole interesse pubblico: le cose che hanno conspiciui caratteri di bellezza naturale...i complessi di cose immobili che compongono in caratteristico aspetto avente valore estetico e tradizionale...le bellezze panoramiche...").

⁹¹⁷ PER LA SALVEZZA, *supra* note 511 at 22 (titling DICHIARAZIONE I as *Patrimonio della Nazione*).

⁹¹⁸ Art 1, Art 2, T.U., D.L. 490/1999 and of course in Art. 2, L. N. 42/2004.

⁹¹⁹ See Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Boxes 135 and 136. Note that a full investigation of the evolution of the term aesthetics as recorded by Bard in legislation and case law is beyond the scope of this dissertation.

⁹²⁰ As one example, Albert S. Bard, *The Latest Billboard Decision: Supreme Court of Indiana recognizes Evolution in Law Relating to Esthetics- City of Indianapolis* in THE AMERICAN CITY August, 1930, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 135, Folder 5. There is also evidence that Bard kept track of the links between aesthetics and the police power as early as 1916, when he saved an article from the New York Law Journal entitled *Police Power and Public Aesthetics* dated Tuesday October 1916. Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 135, Folder 11.

⁹²¹ See *Albert Bard and the City Beautiful* in WOOD, *supra* note 875. The New York Preservation Archive Project has a history of the bill. See Bard Act (1956), THE NEW YORK PRESERVATION ARCHIVE PROJECT, <http://www.nypap.org/preservation-history/bard-act/> ("The Bard Act provided localities across New York State the authority they needed to pass local laws to protect landmarks, and was the New York State legislation that enabled the creation of a New York City Landmarks Law.")

preservation law in New York even more explicit. In August of 1952 Bard wrote to the Italian Consulate General in New York City as part of his activities with the National Roadside Council.⁹²⁴ In his letter Bard writes,

*Recently a newspaper item stated that the Italian Government had just put into effect a new and drastic law which regulated outdoor advertising in resort areas for the purposes of preserving scenic beauty. This organization would be interested in receiving a copy of the new regulation and would be especially grateful to have an English translation of it.*⁹²⁵

Amid much delay⁹²⁶ and awaiting a reply directly from Rome, Bard corresponded with a colleague at Ohio State University who observed that he

*wish[ed] to send [copies of Bard's article on a New Jersey decision regarding billboards published in a 1951 issue of *The American City*]...to the Touring Club Italiano and other Italian agencies which should be interested in this problem in Italy. On a recent trip to Italy I was shocked by the amount of advertising which had taken over the highway approaches to the largest cities.*⁹²⁷

In response Bard wrote,

*I am interested to note your comment on the outdoor advertising situation in Italy. Last August I wrote to the Consulate General making inquiry as to a new and drastic law regulating outdoor advertising in Italy, to which some newspaper referred, and asking for a copy of the new regulation. The Consul General promised to obtain a copy of the 'Italian Official Gazette containing the law in question'...*⁹²⁸

⁹²⁴ Letter from Albert S. Bard, Vice-Chairman and National Roadside Council to Italian Consulate General, August 23, 1952, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 102, Folder 4.

⁹²⁵ *Id.*

⁹²⁶ The correspondence between the two indicates that the Italian Consulate's original letter of response had been lost in the mail and that the Consulate was waiting for a response from Rome. Letter from Consulate General of Italy in New York to Albert S. Bard, September 13, 1952, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 102, Folder 4.

⁹²⁷ Letter from Charles R. Sutton to Albert S. Bard, May 25, 1953, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 102, Folder 4.

⁹²⁸ Letter from Albert S. Bard to Charles R. Sutton, May 27, 1953, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 102, Folder 4.

Following this exchange, in a second letter to the Consulate Bard shared “Only recently I have a letter from a correspondent which says, ‘On a recent trip to Italy I was shocked by the amount of advertising which had taken over the highway approaches to the largest cities.’”⁹²⁹ Eventually the Italian Consulate General answered Bard’s inquiry by referring to law n. 1497 of 1939.

The Ministry of Foreign Affairs in Rome to which we have referred your inquiry of September 13 has furnished us with the following information: ‘A law which regulates outdoor advertising in resort areas for preserving scenic beauty has been in existence in Italy since June 29, 1939. According to paragraph 14 of the above mentioned law permission to erect posters in determined areas must be obtained from the Authorities administering the road (communal, provincial or State).’⁹³⁰ The same regulation applies to posters placed in the civinity [sic] of monuments or buildings of historic interest, [sic] However, a new comprehensive regulation affecting the whole matter is at present under consideration but we are not in a position to state when it will be issued.’⁹³¹

No copy of the law seems to have been included with the letter. In response Bard not only requested a copy but also commented on the abuse of discretion he felt the Italian legislation in effect offered:

⁹²⁹ Letter from Albert S. Bard to Consulate General of Italy, May 27, 29153, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 102, Folder 4.

⁹³⁰ The full article 14 of the law reads, “Nell’ambito e in prossimità dei luoghi e delle cose contemplati dall’art. 1 della presente legge non può essere autorizzata la posa in opera di cartelli o di altri mezzi di pubblicità se non previo consenso della competente regia soprintendenza ai monumenti o all’arte medioevale e moderna, alla quale è fatto obbligo di interpellare l’ente provinciale per il turismo. Il ministro per l’educazione nazionale ha facoltà di ordinare per mezzo del prefetto, la rimozione, a cura e spese degli interessati, dei cartelli e degli altri mezzi di pubblicità non preventivamente autorizzati che rechino, comunque, pregiudizio all’aspetto o al libero godimento delle cose e località soggette alla presente legge. È anche facoltà del ministro ordinare per mezzo del prefetto che nelle località di cui ai nn. 3 e 4, dell’art. 1 della presente legge, sia dato alle facciate dei fabbricati, il cui colore rechi disturbo alla bellezza dell’insieme, un diverso colore che con quella armonizzi. In caso di inadempienza, il prefetto provvede all’esecuzione d’ufficio ai termini e agli effetti di cui all’art. 20 del vigente testo unico della legge comunale e provinciale.” See Art 14, L. n. 1497/1939.

⁹³¹ Letter from F. to Papini, Consul General of Italy to Mr. Albert S. Bard, November 14, 1952, Copy n. 29099 enclosed in a Letter From the Consul General of Italy to Albert S. Bard, dated June 3, 1953 (“we are forwarding you, herewith enclosed, copy of the letter we mailed to your address on November 14, 1952 containing information on the law which regulates outdoor advertising in Italy”). Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 102, Folder 4.

*Your letter of Nov. 14 quotes The Ministry of Foreign Affairs in Rome as stating that the Authorities administering the road, whether State, provincial or communal issue permits for outdoor advertising. It would seem from the comment by my correspondent which I quoted to you in my letter of May 27, that the administrative officers who have authority to issue or refuse permits are over-generous to the advertisers and negligent toward the beauty of Italy. Seemingly their authority needs serious limitation by legislative action or ordinance. If you are able to obtain without too much trouble the provisions of the law governing the issue of permits, I should be interested to see them. So far as the statement of the Ministry of Foreign Affairs in Rome goes the highway authorities seem to have complete discretion- a discretion they have abused, if my correspondent is correct. I should be interested to have any further comment or information as to the situation referred to.*⁹⁰²

Here, Bard's copy of the correspondence in the New York Public Library archives ends, but it allows us to make a few comparative observations and raise unanswered questions. While there is no hard evidence that Bard knew of Italy's law n. 1089 of 1939 protecting movable works of artistic or historic interest, it is for certain that Bard was aware of law n. 1497 of 1939. In addition, Bard was aware of Italy's law on the books and also of its limitations. Did this further influence his work and activism for early forms of historic preservation legislation? Did Bard satisfy his curiosity and look further into Italy's cultural property law in English translations and did that influence the wording of the 1956 Bard Law for "works of art and other objects having a special character, or special historical or aesthetic interest"? A definitive answer to this question has not appeared, and Bard's other work with the New York City Chapter of the American Institute of Architects and the New York Regional Chapter of the Institute of Planners from 1954 to 1956 does not particularly concentrate on Italian law.⁹⁰³

⁹⁰² *Letter from Albert S. Bard to Italian Consul General*, June 4, 1953, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 102, Folder 4.

⁹⁰³ See *Planning for Community Appearance*, Report of the AIA-AIP New York area joint Committee on Design Control (edited by Henry Fagin and Robert C. Weinberg) February 26, 1958 at p. i. Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundation. Box 138, folder 1. Although the report mainly considers European laws in effect through Germany and France with accompanying translations, some Italian references are included in the bibliography. One article is entitled "Architectural Control over Town Development in Italy." See Part IV and Bibliography in *Id.*

Passed in 1956, as the culmination of Bard's and other New York activists'⁹³⁴ many efforts, the text of the Bard Act read,

*To provide for places, buildings, structures, works of art and other objects having a special character, or special historical or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use, which may include appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both. In any such instance, such measures, if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, or, if constituting a taking of private property, shall provide for due compensation, which may include the limitation or remission of taxes.*⁹³⁵

The inclusion of "works of art" in the Bard Act as objects to be protected might be due to Bard's awareness of the presence of art objects in architectural buildings and as part of urban spaces, both in the United States⁹³⁶ and in Italy.⁹³⁷ It could be related to the perspective that architecture is art, although the placement of "works of art" after "building" and "structures" makes this hypothesis less plausible. While vagueness might have been unwanted, terms which would allow a broad scope of subject matter and broad application of the law seemed to have definitively been on Bard's mind. When presenting the law's passage in both houses of the New York State Congress and Governor Harriman's request for more details before signing it to the Municipal Art

⁹³⁴ It is important to note here that Robert Moses' proposed actions in much of New York City during this time led to many grass roots efforts which also culminated in the legislative action. An analysis of these events is beyond the scope of the dissertation, but for details see *The Bridge, The Castle, and Moses* in WOOD, *supra* note 875.

⁹³⁵ THE NEW YORK PRESERVATION ARCHIVE PROJECT, *supra* note 923.

⁹³⁶ In a letter from 1956 Bard observes "I think the Sculpture Society and the Fine Arts Federation should both take up the matter of the illegal removal and destruction of the figure of Mohamed from the top of the Appellate Division Court House." *Letter from Albert S. Bard to Miss Katherine Thayer Hobson*, June 12, 1956, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 54, Folder 6.

⁹³⁷ A 1930 letter about decorations for a festival in Santa Barbara points Bard to decorations in the Palazzo Davanzati in Florence. *Letter from Harry B. Brainerd to Albert S. Bard*, February 24, 1930, Albert S. Bard papers. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox, and Tilden Foundations. Box 13, Folder 9 ("Pursuant to our telephone conversation relative to street decorations for the Santa Barbara summer festival...In the field of archeology you will find an illustration of provision for street decorations in a book entitled *The Davanzati Palace, Florence, Italy* a restored palace of the Fourteenth Century measured and drawn together with a short descriptive text by Louis Conrad Rosenberg, published in 1922 by the Architectural Book Publishing Company of New York.")

Society, Bard observed to members that *“To have included details would have been entirely inconsistent.”*⁹³⁸

In any event, the exploration of Bard’s work, the advent of the Bard Act, and other laws protecting objects of antiquity which came into force in the early 20th century contemporaneous to developments in Italy point to how U.S. historic preservation law, at its heart, answers the issues surrounding what counts as cultural property and how to identify it in a way similar to that of Italian cultural property law throughout its history. Both link the reason the State should regulate the subject matter to a public interest, and reflect that the public interest, while linked to aesthetics and history, is in actuality related to the needs of society and the collective and naturally evolves with society. Certain threads of U.S. historic preservation history reveal, despite the deftly drawn boundaries between the United States as a market nation and Italy as a source nation, a similar foundation for regulation: the public interest.

1.1.2 Time Mechanisms and Things too?

Just as the time thresholds of Italian cultural property law are not bright lines, so historic preservation law in the U.S. also presents us with time thresholds that indicate the complex decision making process behind the identification of a public cultural interest in certain tangible properties. Indeed, just as with Italian cultural property, there is a relationship between types of historic properties and time thresholds in U.S. historic preservation law, especially for New York Landmarks Law.

After the passage of the Bard Act, and after the protests of many New Yorkers who opposed Robert Moses’ development plans in the city, and almost contemporaneous to the demolition of Penn Station, Mayor Wagner created a Committee for the Preservation of Historic and Aesthetic Structures in June of 1961.⁹³⁹ This committee, in turn, recommended the establishment of a temporary⁹⁴⁰

⁹³⁸ Special Business Section, Meeting Minutes, April 25, 1955, Municipal Art Society Archives, at 3.

⁹³⁹ Press Release, Sunday July 1, 1962, City of New York, Office of the Mayor, New York City Department of Records, Mayor Wagner files, Landmark Preservation at 2.

⁹⁴⁰ The description of the Commission as such was made in an essay in the newsletter of the Municipal Art Society announcing passage of the Landmarks Law in 1965. Edward R. Finch, Jr, *The Municipal Art Society and the Landmarks Preservation Commission* in THE MUNICIPAL ART SOCIETY NEWS, June 1965 News, Municipal Art Society Archives at 2. The Municipal Art Society was quite active in the passage of the Landmarks Law in New York City at this time. Indeed, Geoffrey Platt, the eventual head of the Landmarks Commission,

Landmarks Preservation Commission. The Commission was instituted by the Mayor in April of 1962, with the words

Our heritage and local traditions provide the basis for that vital sense of continuity [as a City that is always looking to the future, but must never forget that we are always building on the past], stability and pride which stimulates sound growth and development.⁹⁴¹

The Commission was tasked both with “designat[ing] for preservation buildings, structures, monuments, statues and works of historic and/or esthetic importance and their surroundings” and “prepar[ing] for the Mayor a detailed legislative program for the effective protection of public landmarks.”⁹⁴² In May of 1964, the Commission shared their legislative proposal with the Mayor.⁹⁴³ From the Fall of 1964 to the Spring of 1965 hearings were held on the bill and the city record reporting on these hearings and the status of the bill in March of 1965 made some observations on the Landmark Law’s evolution. It noted an inclusion of a specific age requirement where before there was none.

The original bill authorized designation of any building without regard to age. The bill as revised provides that only buildings which are 30 years old or older shall qualify for designation. The reason for the change was that the most immediate need is to preserve our older historic and architectural qualifying structures. Newer buildings which qualify, it was agreed by the Commission, are very unlikely to be affected by...demolition in the foreseeable future. In those isolated cases which may arise the Committee agreed to recommend to the Council that suitable amendment to the law would be considered upon recommendation of the Commission.⁹⁴⁴

Age here is, like in the Italian case, a number which is related to practical concerns germane to the category of objects at issue.

was a member of the Municipal Art Society. See also August 1964 Newsletter, Municipal Art Society Archives.

⁹⁴¹ Press Release, Sunday July 1, 1962, City of New York, Office of the Mayor, New York City Department of Records, Mayor Wagner files, Landmark Preservation at 1. Among those on the Commission were members of the Municipal Art Society and Fine Arts Federation, including Geoffrey Platt.

⁹⁴² Press Release, Thursday February 6, 1962, City of New York, Office of the Mayor, , New York City Department of Records, Mayor Wagner files, Landmark Preservation at 1.

⁹⁴³ Letter from Geoffrey Platt to Mayor Robert Wagner, October 28, 1964 at 2 in New York City Department of Records, Mayor Wagner files, Landmark Preservation.

⁹⁴⁴ The City Record, Thursday March 25, 1965 in New York City Department of Records, Mayor Wagner Files, Landmarks Preservation at 1993.

In the presentation of the 1939 law in Italy, Bottai had highlighted the links between the choice of fifty years, non-living authors and the importance of allowing the passage of time to concretize a cultural judgment by the collective while balancing public and private interests in the objects of artistic or historic interest. Here, similar concerns for immediate preservation, with the possibility that newer buildings may also qualify as landmarks under the law, also indicate a link to cultural consensus. Thirty years is related to collective cultural consensus and demolition just as fifty years, seventy years, and in some case no age limit, is in Italian cultural property law.

The 1966 National Historic Preservation Act also indicates a dependency on age. Today, this federal law requires a minimum of fifty years while also allowing certain properties to be classified as historic property before they reach fifty years of age if they are of exceptional significance.⁹⁴⁵ During debates and hearings of the Act, the question of a particular age seems not to have come up. Indeed, histories of the fifty year requirement reveal that it originated from the criteria that properties date to before 1870 during the Historic Sites Survey, part of the National Historic Sites Act of 1935.⁹⁴⁶ The specific criteria of 50 years was later crafted in the 1950s during a review of the Historic Sites Survey and was incorporated as a criteria for historic property on the National Register in 1965.⁹⁴⁷ Enshrined in the regulations set by the Ministry of the Interior in charge of the National Register, fifty years is characterized much like fifty years in Italian cultural property. “[T]he time needed to develop historical perspective and to evaluate significance”.⁹⁴⁸ Commentators have further noted that while “there is no evidence in the record as to why 50 years was initially chosen as a waiting period”... “[t]he criterion limited pressure to review or designate properties

⁹⁴⁵ 54 U.S. Code § 300308 defines historic property in relation to which properties are eligible to be listed on the National Register. See also NATIONAL HISTORIC PRESERVATION LAW *supra* note 362 at 50-51.

⁹⁴⁶ Preservation Leadership Forum, *50 Years Reconsidered*, FORUM JOURNAL AND FORUM FOCUS, September 12, 2015 5:35 pm, <https://forum.savingplaces.org/viewdocument/50-years-reconsidered>, (citing to John H. Sprinkle, Jr. “‘Of Exceptional Importance’: The Origins of the ‘Fifty-Year Rule’ in Historic Preservation”, *The Public Historian* 29, No. 2 (Spring 2007), 82). For a more detailed history of The Historic Sites Act see generally CHARLES BRIDGHAM HOSMER, PRESERVATION COMES OF AGE: FROM WILLIAMSBURG TO THE NATIONAL TRUST, 1926-1949, VOLUME I (1981).

⁹⁴⁷ Preservation Leadership Forum, *50 Years Reconsidered*, *supra* note 946.

⁹⁴⁸ Preservation Leadership Forum, *50 Years Reconsidered*, *supra* note 946 (citing to Marcella Sherfy and W. Ray Luce, *Guidelines for Evaluating and Nominating Properties that Have Achieved Significance Within the Past 50 Years*; available from www.nps.gov/nr/publications/bulletins/nrb22/; accessed 4/2010.)

associated with contemporary values and living persons.”⁹⁴⁹

The New York Landmarks Law as it was proposed and then enacted also exhibits changes to its subject matter. The report in the city record notes that *“The bill originally provided that a member of the Landmarks Commission [should include] a practitioner of the fine arts.”⁹⁵⁰* Indeed, the temporary commission had included a practitioner of the fine arts.⁹⁵¹ The report went on, however, to explain the change of the types of commission members with reference to the subject matter the bill intended to regulate.

The bill as originally developed and as now proposed...enacted into law is to apply to exteriors. Therefore, it was recommended to the Committee by the Commission that the provision restricting one of the members [of the] permanent Commission to be a practitioner of the fine arts was unnecessary...in the limited cases where the Commission needs advice on the interior of buildings, it can retain consultants in fine arts.⁹⁵²

This initial limit on the subject matter of the Landmarks Bill is just, as the report suggests it is, a temporary limit. Like Italian cultural property law, Landmarks Law in New York City evolved. Over time, however, it evolved to explicitly include interiors of buildings as well as exteriors.⁹⁵³

Today, landmarks as interiors are defined as

[a]n interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as an interior landmark pursuant to the provisions

⁹⁴⁹ *Id.* (citing to John H. Sprinkle, Jr. “‘Of Exceptional Importance’: The Origins of the ‘Fifty-Year Rule’ in Historic Preservation”, *The Public Historian* 29, No. 2 (Spring 2007), 82 at 83).

⁹⁵⁰ *The City Record*, *supra* note 944 at 1993.

⁹⁵¹ The Press Release instituting the temporary commission names Karl Gruppe, a sculptor. Press Release, City of New York, Office of the Mayor, New York City Department of Records, Mayor Wagner Files, Landmarks Preservation at 2.

⁹⁵² *The City Record*, *supra* note 944 at 1993.

⁹⁵³ A Local Law to amend the New York City charter and the administrative code of New York, in relation to the establishment and regulation of landmarks, landmark sites, and historic districts, n. 779-883, at 207.10(i) in New York City Department of Records, Mayor Wagner Files, Landmarks Preservation at 5 (although defining an improvement as “*Any building, structure, place, work of art, or other object constituting a physical betterment of such property, or any part of such betterment.*”)

of this chapter.⁹⁵⁴

As in Italian cultural property law, it seems historic or aesthetic interest can apply to various types of tangible properties.

Other parts of the New York Landmarks Law on their face also indicate that the landmark status of tangible properties is linked to case by case determinations of intangible historic and aesthetic interest. Like Italian cultural property's concern with *decoro*, the New York Landmarks Law also issues certificates of appropriateness for changes to tangible properties.⁹⁵⁵ While drawing perhaps more bright lines than Italian cultural property law⁹⁵⁶, the law still notes that consideration of appropriateness includes "the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color."⁹⁵⁷ Here, like in Italian cultural property law, the Commission must decide how intangible cultural interests embodied through historic and aesthetic interest match tangible properties, both at the outset of its regulation and after it has been declared a landmark.

The changing types of landmarks indicate a continuing negotiation of what tangible properties might exhibit intangible cultural interest, but it also indicates that landmark is a liminal notion itself.

⁹⁵⁴ N.Y. City Administrative Code, Chapter 3, Landmark Preservation and Historic Districts, § 25-302, [http://library.amlegal.com/nxt/gateway.dll/New%20York/admin/title25landuse/chapter3landmarkspreservationpreservatio?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:newyork_ny\\$anc=jD_T25C003](http://library.amlegal.com/nxt/gateway.dll/New%20York/admin/title25landuse/chapter3landmarkspreservationpreservatio?f=templates$fn=default.htm$3.0$vid=amlegal:newyork_ny$anc=jD_T25C003). Today's Code does not have a definition of what types of professionals may be on the Commission, but simply states "The agency is comprised of a panel of 11 commissioners who are appointed by the Mayor and supported by a staff of approximately 80 preservationists, researchers, architects, historians, attorneys, archaeologists, and administrative employees." See also *About LPC*, NYC LANDMARKS HISTORIC PRESERVATION COMMISSION, <https://www1.nyc.gov/site/lpc/about/about-lpc.page>.

⁹⁵⁵ N.Y. City Administrative Code, Chapter 3, Landmark Preservation and Historic Districts, § 25-307, [http://library.amlegal.com/nxt/gateway.dll/New%20York/admin/title25landuse/chapter3landmarkspreservationpreservatio?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:newyork_ny\\$anc=jD_T25C003](http://library.amlegal.com/nxt/gateway.dll/New%20York/admin/title25landuse/chapter3landmarkspreservationpreservatio?f=templates$fn=default.htm$3.0$vid=amlegal:newyork_ny$anc=jD_T25C003).

⁹⁵⁶ *Id.* at § 25-307b(3) (noting "the commission, in making any such determination, shall not apply any regulation, limitation, determination or restriction as to the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses, other than the regulations, limitations, determinations and restrictions as to such matters prescribed or made by or pursuant to applicable provisions of law, exclusive of this chapter.")

⁹⁵⁷ *Id.* at § 25-307b(2).

In order to decide what is a landmark, not only do you determine based on the public interest, but you also need to implicitly seek the advice of experts in the field. Other disciplines inform what a landmark is under local law in the United States, just as other disciplines inform what counts as cultural property under Italian cultural property law.

What still remains an open question is whether “works of art” defined as part of improvements could ever evolve into the protection of movable works of art by the Landmarks Commission. Certainly individual works of art that are fixtures (consider a chandelier) might be considered sufficient qualifying parts of an interior.⁹⁵⁸ Clocks, for example, although larger in scale than fashion design objects, have been considered historically significant enough to be determinative for interiors’ classifications as landmarks in New York City.⁹⁵⁹ Of course, fixtures may not always be fixed. Arabella Worsham’s Gilded Age closet, for example, has been installed in The Metropolitan Museum of Art, along with the historic fashion design objects in it.⁹⁶⁰ Other examples, such as Isabella Stewart Gardner’s framed Worth gown underneath her favorite painting *Rape of Europe* by Titian, provide an example as to how a fashion design object, or a piece of it, might become a work of art and a fixture eligible as an improvement or an interior landmark.⁹⁶¹ The painting still hangs in Stewart Gardner’s house museum today.

Federal law makes the questionable scope of local historic preservation laws such as New York City’s even more pertinent for our purposes. Objects are considered a type of property under National Register Guidelines, but only insofar as these objects are

⁹⁵⁸ Some things which we might consider largely movable but also immovable have been considered landmarks. Two trees have been designated. See Dana Schulz, *The Only Two Living Things in NYC to Have Been Landmarked Are Trees*, 6SQFT, February 25, 2015, <https://www.6sqft.com/the-only-two-living-things-in-nyc-to-have-been-landmarked-are-trees/>. As have some sidewalk clocks. See Landmarked Sidewalk Clocks, 12 of NYC’s Most Unusual Landmarks, UNTAPPED CITIES, February 22, 2016, <https://untappedcities.com/2016/02/22/12-of-nycs-most-surprising-landmarks/7/>.

⁹⁵⁹ *Save America’s Clocks, Inc. v. City of New York*, 33 N.Y.3d 198 (N.Y. Ct. of Appeals, March 28, 2019) (discussing the ramifications of certificates of appropriateness and alterations as applied to interiors when an interior containing a clock was to be closed to the public).

⁹⁶⁰ A few years ago, Worsham’s closet provided a cultural dialogue with another modern closet containing clothes as part of a temporary exhibition. See Sara Berman’s Closet, THE METROPOLITAN MUSEUM OF ART, March 6 2017- November 26, 2017, <https://www.metmuseum.org/exhibitions/listings/2017/sara-berman-closet>.

⁹⁶¹ For an exploration of the piece and its history see Anne Higonnet, *Museum Sight* in ART AND ITS PUBLICS 133- 147 (A McLellan, ed., 2004).

still connected to a physical place.⁹⁶² In terms of fashion, some immovable structures can exhibit historical significance linked to the fashion industry. The Triangle Shirtwaist Factory or the Brown Building in New York, for example, is listed on the National Register of Historic Places “as a reminder of both the triumph and the tragedy of the labor movement in early twentieth century America.”⁹⁶³ The Macy’s Department store on 34th Street in New York City is also on the National Register of Historic Places, noted for its impact on “American retailing.”⁹⁶⁴

The protection of such buildings does not, however, equal the protection of an individual fashion object. This is a limit that is potentially evident in Italian cultural property law as well, despite its regulation of movable objects. Indeed, presentations of “Fashion Law” in Italian scholarship mention cultural property law as something to be aware of only when seeking permission to use a historic building during a photoshoot.⁹⁶⁵

While U.S. historic preservation law seems to answer cultural property dilemmas in a similar way to Italian cultural property law. It focuses on public interest, uses changing and constant time thresholds as a standard, and allows aesthetic and historical interests to both actuate the public interest and also link historic preservation to other disciplines in the humanities. At the same time, it does not yet have a space for movable objects of artistic, historic, or other cultural interest like modern and contemporary Italian fashion design objects. As a result, other legal regimes in the

⁹⁶² NATIONAL HISTORIC PRESERVATION LAW *supra* n. 362 at 42. This is why monuments and statues are considered, but usually not objects relocated to a museum. *Id.*

⁹⁶³ The factory was affected by a terrible, devastating fire in 1911 in which many women workers lost their lives. See the historical significance described NPS/NRHP Registration Form, Triangle Shirtwaist Factory, <https://npgallery.nps.gov/pdfhost/docs/NHLS/Text/91002050.pdf>. Other buildings noted as Department Stores are also listed. See, for example the Bon Marché Department Store now Macy’s in Seattle, United States Department of the Interior, National Register of Historic Places Form, Bon Marche Department Store, <https://www.nps.gov/nr/feature/places/pdfs/16000830.pdf>.

⁹⁶⁴ United States Department of the Interior, National Register of Historic Places Form, R.H. Macy and Company Store, <https://npgallery.nps.gov/pdfhost/docs/NHLS/Text/78001873.pdf>.

⁹⁶⁵ SEGNALINI, *supra* note 61 at 79 (“Anche i *location scouts* non dimentichino di consultarlo se la scelta della sede del servizio fotografico o della sfilata è caduta su una dimora storica: caso in cui potrebbe essere necessaria, per lo svolgimento dell’evento, l’autorizzazione del sovrintendente (o di chi per lui) ai sensi del nostro Codice dei beni culturali e del paesaggio (circostanza quest’ultima, che, insieme ai dettagli del luogo prescelto, andrebbe ben evidenziata anche nella didascalia della foto o nel *paper* della sfilata, con formule del tipo: “Palazzo Rossi, per gentile concessione del Mibac” ...).

United States might allow us to protect movable objects which are themselves of historic or aesthetic interest.

1.2 “Art Law” beyond Things

Italian fashion design objects could also be recognized as tangible objects of public cultural interest in the United States through various regulations of public property. Foreign gifts or donations accepted by United States Presidents are understood, for example, as the property of the American people, to paraphrase Charlie Young in an episode of *The West Wing*.⁹⁶⁶ If the President were gifted a fashion design object, it would be protected, at the very least, as public property, much as Amelia Earhart’s suit or Jackie O’s Chanel suit in the Smithsonian are through other regulations. Museum collections, public trusts, and easements are also ways in which to conceptualize protecting individual fashion design objects as cultural property in the United States.⁹⁶⁷

Sui generis laws are also an option. The California Art Preservation Act⁹⁶⁸, for example, seems to regulate art and purport to make decisions of preservation like the rules enshrined in cultural property. In Section 989, while grounding the public interest in preserving an “*integrity of cultural and artistic creations*”⁹⁶⁹ and not a historic or aesthetic interest, the law allows an organization⁹⁷⁰ acting in the public interest to “*commence an action for injunctive relief to preserve or restore the integrity of a work of fine art from*”⁹⁷¹ anyone “*intentionally commit[ing], or authoriz[ing] the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.*”⁹⁷² The Act defines fine art as “*an original painting, sculpture, or drawing, or an original work of art in glass, of recognized*

⁹⁶⁶ 5 U.S.C. §7342(c)(B)(1). *The West Wing*, A Change is Gonna Come, Season 6, Episode 7 (Warner Brothers, 2004).

⁹⁶⁷ See *supra*.

⁹⁶⁸ The observation that such art preservation laws are based on a public interest like cultural property law in source nations has been made before. John Henry Merryman noted as much in Merryman, *Public Interest supra* note 375 at 349 (“ ‘art preservation’ laws in California and Massachusetts give further evidence of the public interest in cultural property...”).

⁹⁶⁹ California Art Preservation Act, CA. CIV. CODE § 989(a) (1980).

⁹⁷⁰ Defined as “a public or private not-for-profit entity or association, in existence at least three years at the time an action is filed pursuant to this section, a major purpose of which is to stage, display, or otherwise present works of art to the public or to promote the interests of the arts or artists.” CA. CIV. CODE §989(b)(2).

⁹⁷¹ CA. CIV. CODE §989(c)(3).

⁹⁷² CA. CIV. CODE §987(c)(1).

quality, and of substantial public interest.”⁹⁷³ To determine what constitutes a work of fine art, the judge or jury⁹⁷⁴ “shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.”⁹⁷⁵

On its face, this law sounds quite similar to what has been observed in cultural property law and in historic preservation law. Works of fine art is a liminal notion, defined according to expert opinions. Preservation is founded on a public interest. The Section applies to works of art no matter their age.⁹⁷⁶ While different from the general requirement that individual objects of historic or artistic interest be at least seventy years of age under Italian law or usually at least fifty years of age under U.S. historic preservation law, the lack of a time threshold under the California Preservation Act reflects how malleable the marriage between time thresholds and public interest can be as applied to works of art, one slice of a later cultural property pie.

Like Italian cultural property law, the California Preservation Act seems to apply to works of fine art that reveal an *unicum* between their intangible and tangible qualities, properties to which a public cultural interest attaches because of a union of this tangibility and the intangible public cultural interest. While moral rights might be thought of as actuating a similar type of protection, the fact that, as Grisolia has said, these rights follow the artist and not the object make them problematic as substitutes for cultural property law. Some authors have already even suggested that moral rights might step in as an alternative to more aggressive landmarking to protect public art, architecture and perhaps therefore movable works of artistic interest.⁹⁷⁷ Other American legal scholars have proposed protecting new forms of visual art, like street art, as cultural property through additions to the Visual Artists’ Rights Act.⁹⁷⁸ These, however, do not seem to capture the importance of an object which Italian cultural property law emphasizes and they also

⁹⁷³ CA. CIV. CODE §989(b)(1).

⁹⁷⁴ The statute refers to “the trier of fact.” CA. CIV. CODE §989(d)(3) and §987(f).

⁹⁷⁵ CA. CIV. CODE §987(f).

⁹⁷⁶ CA. CIV. CODE §989(h).

⁹⁷⁷ Gerstenblith, *Architect as Artist*, *supra* note 78 at 433, 464. Merryman noted that ““Moral right” laws in some nations and “art preservation” laws in California and Massachusetts give further evidence of the public interest in cultural property.” Merryman, *Public Interest* *supra* note 375 at 343- 344.

⁹⁷⁸ Griffin M. Barnett, *Recognized Statute: Protecting Street Art as Cultural Property*, 12 Chi.-Kent J. Intell. Prop. 204 (2013).

propose to make the protection of objects more complicated by giving their authors rights in the object over and above a public cultural interest.

2. Fashion Designs in a Negative or *Sui Generis* Legal Space

Fashion design objects of public cultural interest could be protected as cultural property in the United States through an extension to various historic preservation acts at the state and federal levels. Fashion design objects might be compared to art so that they fall within the jurisdiction of *sui generis* statutes which now contemplate a protection of a public interest in certain kinds of fine art. The public trust doctrine could be applied to hold some part of fashion design objects for the benefit of the public. Contractual conditions or easements could be placed on individual fashion design objects. Some tort remedies do acknowledge that historic or artistic value is important when they allow increased damages when private property of historic/literary or artistic value is destroyed.⁸⁷⁹ Despite all these possibilities, fashion designs might still be assigned to some sort of negative legal space that disavows their attachment to tangible properties and therefore an ability to regulate them or preserve them through objects.

In the realm of copyrights, such a negative space often leads to what might be termed social enforcement mechanisms, like naming and shaming and calling out on social media.⁸⁸⁰ The challenges of course with this naming and shaming, which is also often engaged in to protect intangible cultural heritage⁸⁸¹, is that legal standards are usually not used to frame a discussion of what counts as creative, what counts as of cultural interest and why one design may not satisfy either of these bars. Indeed the flexibility of the standard of creativity and cultural interest in naming and shaming activities often seems related to the untouchable cool factor of a brand at a given moment, the social acceptance of the trends it is creating. While there may be some red lines that surround the acceptance of some fashion designs⁸⁸², the nature of fashion, and fashion designs,

⁸⁷⁹ 2nd Restatement of Torts Section 242 comment a.

⁸⁸⁰ Diet Prada here being the premiere example of such regular naming and shaming that often produces results. DIET PRADA, <https://www.dietprada.com>. See critiques of Diet Prada's methods in Jonah Engel Bromwich, *We're All Drinking Diet Prada Now*, N.Y. TIMES, March 14, 2019, <https://www.nytimes.com/2019/03/14/fashion/diet-prada.html>.

⁸⁸¹ See the acknowledgment of the kimono and Kim Kardashian West controversy *infra*.

⁸⁸² As when Gucci created a turtleneck that seemed to promote blackface. See Tiffany Hsu and Elizabeth Patton, *Gucci and Adidas Apologize and Drop Products called Racist*, N.Y. TIMES,

as fluid and changeable, even increasingly in luxury circles, often means that the ability to “fix” the cultural meaning of certain designs to specific objects is almost impossible.

That having been said, as evidenced in the example of Rosa Genoni’s Pisanello mantle above, it is possible to recognize specific cultural values in specific fashion design objects, despite the fact that the cultural meaning of their design is not inherent to the material upon which or in which it is embodied.

Many fashion brands seem to have created a type of *sui generis* regime for themselves by deploying a mix of trademark law, patent law, contract law and, where appropriate, copyright law, to protect and regulate the use of their own designs and products that may otherwise fall into a negative legal space. This form of “self-help”, however, risks not only intimidating and freezing the otherwise legal actions of third parties who may wish to embrace or contest certain fashion designs’ cultural interest, but it also confuses an understanding of what the actual legal rules are in the first place. This confusion is especially visible when fashion designs go digital and digital actors like Instagram affect the cultural reception of fashion designs by insisting that members of the public seek permission from their “Brand Resources”⁸³ site without even offering an option for educational uses or other actors in the cultural field or admitting the scope of the rights in their intellectual property. In this sense, trademark is often confused for copyright by consumers, and almost chilling effects are created in the cultural sphere. One of the key elements of contemplating how fashion designs are to be protected and regulated like cultural property is to, at the very least, imagine how to raise awareness of the improper *sui generis* legal regimes that digital giants and members of the fashion industry are creating around their products.

February 7, 2019, <https://www.nytimes.com/2019/02/07/business/gucci-blackface-adidas-apologize.html>.

⁸³ To see this site which regulates the permission process from Instagram as applied to commercial use, see INSTAGRAM BRAND RESOURCES, <https://en.instagram-brand.com> (giving guidelines for use as well).

CONCLUSION: INHERITING ITALIAN FASHION FOR OUR FUTURE

1. Towards a Legal Framework for Italian Fashion as Cultural Property

Thinking of Italian fashion as cultural heritage might seem increasingly common today as Italian fashion brands archive their products, found museums and stage exhibitions of their products alongside traditional cultural properties. Tradition and heritage, a hallmark of luxury in some management circles⁹⁸⁴, has, just in the last few years, become almost ubiquitous for certain Italian brands and their fashion strategies. Fendi has celebrated its 90th anniversary by staging a fashion show in which it presented its fashion products not only alongside but within the Trevi Fountain in Rome.⁹⁸⁵ Under Alessandro Michele's direction Gucci has played with the past designs of the Bamboo Handle and its green and red and blue and red stripes in its archive to create a new, bohemian fashion which has only increased the brand's relevance.⁹⁸⁶ Donatella Versace has re-issued designs by her brother Gianni Versace, with few to no alterations.⁹⁸⁷ And these are just a few of many more examples.

The links between fashion and culture have, of course, been present on the Italian territory since the Greeks settled parts of Sicily along with their mythology of Pandora and the *peplos*⁹⁸⁸, since the Romans wore

⁹⁸⁴ MANAGING FASHION, *supra* note 18 at 27.

⁹⁸⁵ Fiona Sinclair Scott, *Models walk on water as Karl Lagerfeld makes history*, CNN, August 15, 2016, <https://edition.cnn.com/style/article/fendi-historical-couture-show-trevi-fountain/index.html>.

⁹⁸⁶ Susannah Frankel, "People Need Reality" Alessandro Michele on his Gucci, ANOTHER MAG, February 15, 2018, <https://www.anothermag.com/fashion-beauty/10576/people-need-reality-alessandro-michele-on-his-gucci>.

⁹⁸⁷ See *infra* Chapter 1.

⁹⁸⁸ Marco Brunetti has brought this historical information to my attention. As Marco has explained, Ancient Athens used the myth of Pandora in a non-traditional way, holding Pandora up as the first artisan who learned the art of weaving textile from the goddess Athena herself. See Laslo Berczelly, *Pandora and Panathenaia. The Pandora Myth and the Sculptural Decoration of the Parthenon*, in ACTA AD ARCHAEOLOGIAM ET ARTIUM HISTORIAM PERTINENTIA [JOURNAL PERTAINING TO ARCHEOLOGY AND ART HISTORY] VIII 53- 86, 80 (1992) ("In my opinion, the Attic tradition concerning the first Panathenaic peplos tells us something about the origin of the ritual practice, but it does not directly answer the question of why the votive offering of the peplos has to be made. Only the Pandora myth gives us the mythical explanation: the peplos had to be woven by a team of maidens because the patron goddess of the city could be suitable propitiated and thanked by such an offering. Deep in the mythical past the first Attic woman, Pandora, had learnt the art of weaving peploi from her, and from that time onwards the handcraft has been inspired and protected by Athena. It became in this way the pride of Attic women, and in a certain sense the pride of Athens itself.")

their togas with political implications⁹⁸⁹, since Italian city-states passed sumptuary laws to regulate what could be worn in public⁹⁹⁰, since Baldassare Castiglione wrote on *sprezzatura* as a complex of actions, clothes and aesthetics that created a style⁹⁹¹, since Cesare Vecellio observed the habits of dressing of peoples⁹⁹², since Italian women in the early 1800s began to wear the *Pamela* hat⁹⁹³, since Rosa Genoni designed her gowns taking inspiration from Botticelli and Pisanello⁹⁹⁴, since Salvatore Ferragamo learned his craft in his small town outside of Naples. Italian fashion's relationship to Italian culture has always been present, almost as long as mankind has existed and adorned itself, and time has allowed us to cherish Italian fashion as not only of artistic significance but also as of historic significance for our civilization.

The intuition that fashion is a part of our cultural heritage and its long history on the Italian territory does not, however, answer the complex question of how fashion is cultural heritage, especially under the law. There are, in fact, a few ways to think about Italian fashion generally as part of our cultural heritage through cultural heritage law. The majority of these ways are dependent both on the chosen legal instrument and on how to define fashion. It could be considered for example that fashion is really defined by an intangible process- both in its making and in its acceptance. In this sense, the *Convention for the Safeguarding of Intangible Cultural Heritage*, which defines intangible cultural heritage as

the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as

⁹⁸⁹ *Miscellany: Loosely Belted*, LAPHAM'S Q., <https://www.laphamsquarterly.org/fashion/miscellany/loosely-belted>.

⁹⁹⁰ *Sumptuary Laws and Fashion: Between Uniformity and Change* in PAULICELLI, *supra* note 102 at 31-42.

⁹⁹¹ PAULICELLI, *supra* note 102 at 54 (noting how *sprezzatura* in Castiglione's work "takes on different meanings depending on its context. It can be associated with the concealing of artifice, looking natural, projecting a constructed or 'gained naturalness' or simply with being graceful. In other circumstances, it can mean to be cool and calm even in the most trying of situations, without ever sacrificing style and distinction in dress and demeanor. The complexity of the term alerts us to two basic tenets of Castiglione's argument in *The Courtier*: the defining of a set of aesthetic and political rules that create a *je ne sais quoi* of style that lies somewhere between informality and elegance, and the difficulty of capturing it in words or teaching it.")

⁹⁹² CESARE VECELLIO, DE GLI HABITI ANTICHI ET MODERNI DI DIVERSI PARTI DEL MONDO [ON ANTIQUE AND MODERN DRESS FROM DIFFERENT PARTS OF THE WORLD] (1590).

⁹⁹³ See *supra*, Section 2.1 in Chapter 2.

⁹⁹⁴ *Rosa Genoni (1867-1954)*, ARCHIVI DELLA MODA DEL NOVECENTO, <http://www.moda.san.beniculturali.it/wordpress/?percorsi=rosa-genoni-1867-1954-2>.

*part of their cultural heritage*⁹⁸⁵

and one of its manifestations as “*traditional craftsmanship*”⁹⁸⁶ might adequately apply to Italian fashion. It could be argued that, like the art of the Neapolitan pizzaiuolo⁹⁸⁷, the artisanship of Italian fashion “fosters social gatherings and intergenerational exchange, and assumes a character of the spectacular” with “knowledge and skills [that] are primarily transmitted in the ‘bottega’.”⁹⁸⁸ Classifying Italian artisanship like the recent Venetian practices which produced Dolce & Gabbana’s *Alta Moda* dresses⁹⁸⁹ as intangible cultural heritage would encourage Italy to foster even more safeguarding mechanisms for these processes and would also potentially allow for the protection of certain examples of the Venetian practice of *soprarizzo* velvet creation under Article 7-bis of the Italian Code of Cultural Heritage and Landscape.

Such an initial hypothesis of protecting Italian artisanship or practices of *Made in Italy* as intangible cultural heritage necessarily brings up, however, crucial questions and reveals the complexity of legally protecting Italian fashion as cultural heritage at the international level and at the national level. Can the cultural interest underlying considerations of Italian fashion as part of cultural heritage be separated into processes of artisanship and the *Made in Italy* on one hand and the tangible iterations of those processes on the other? If it is decided that higher safeguards should be imposed for Italian artisanship, what does that mean for Italian fashion brands today, like Dolce & Gabbana, and the wider fashion industry, who still use and even define themselves through this artisanship? Is it possible to divorce a cultural interest from one designer and assign it to a collective group of artisans? Can we assign a public cultural interest to a fictional brand or company in order to protect both or something else other than designers or artisans? What effect might protecting Italian artisanship and its manifestations as intangible cultural heritage mean for the creativity of Italian fashion

⁹⁸⁵ Art 2(1), United Nations’ Convention for the Safeguarding of the Intangible Cultural Heritage (2003), October 17, 2003, 2368 U.N.T.S. 42671 (see also http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html).

⁹⁸⁶ *Id.* at Art. 1(2)(e).

⁹⁸⁷ Art of Neapolitan ‘Pizzaiuolo’, UNESCO, <https://ich.unesco.org/en/RL/art-of-neapolitan-pizzaiuolo-00722>.

⁹⁸⁸ *Id.*

⁹⁸⁹ One of the gowns was made by Bevilacqua Weaving in Venice from “handmade *soprarizzo* velvet...an ancient handcraft renowned for its use of two different irons: an intricate and delicate process that enhances the homespun manufacturing of this unique textile.” See a video of the process on Dolce & Gabbana’s Facebook page from July 11, 2019, <https://www.facebook.com/DolceGabbana/>.

designers today- is Dolce & Gabbana culturally appropriating Venetian heritage? Would that perpetuate a Northern versus Southern Italian hierarchy, an urban over rural reality? What is the difference between a contemporary Dolce & Gabbana fashion design object and a Venetian artisan's work? What ramifications do drawing such differences mean for the originality of Dolce & Gabbana's fashion designs and their protection under intellectual property law? Do different cultural interests exist in each product? Are they different parts of our cultural heritage?

A legal framework for Italian fashion as cultural heritage necessarily leads to questions about Italian fashion's products, about Italian fashion design objects. Answering how Italian fashion design objects are one piece of the cultural heritage pie under the law - cultural property- can help us understand whether there is a way to protect Italian fashion in its most elemental and present part- in its objects- as part of cultural heritage for the future.

Drawing this legal framework reveals that there are considerable overlaps and intersections between different bodies of law. As detailed above, intangible cultural heritage law overlaps with national cultural property law. National cultural property law also overlaps with property law and constitutional law: constitutional articles can enable or frustrate the protection of fashion design objects as cultural property by allowing for its protection, privileging private property, or striking some delicate balance in between. This is the case in Italian constitutional law where Article 9 protects Italy's cultural heritage, but Article 42 protects private property within certain limits.¹⁰⁰⁰ At the same time, cultural property law in Italy predates constitutional law in Italy, and so this body of law shapes constitutional law and the property in question. But to which category of property Italian fashion design objects belong is also fundamental question. Italian fashion design objects are certainly of a public cultural interest like a Botticelli painting or the Trevi fountain, and they are accepted items of Italian cultural property through museum collections. But where is the public cultural interest in these fashion design objects located? Depending on where it is, two different categories of property may be in play- real property or intellectual property. An intangible intellectual property fixed in a tangible fashion design object might be masquerading as cultural property, or a tangible real property with intangible elements may be cultural property and of cultural interest. Deciding which category of legal subject matter is crucial. Cultural property is not only ruled by the

¹⁰⁰⁰ See *supra* Chapter 2 (Massimo Severo Giannini, *Basi Costituzionali della Proprietà Privata*, SCRITTI, VOL VI, 187- 245 (2005)).

tyranny of things under Italian cultural property law⁷⁰⁰, but some jurisdictions, like the U.S., largely understand fashion designs, and the objects of which they are a part, as belonging to the realm of intellectual property and not cultural property. Deciding on real property or intellectual property also brings up questions of how to decide and who should decide. Administrative law here provides rules and procedures that govern the recognition and declaration of cultural property in Italian law, as well as its regulation. Administrative law also plays a crucial role in intellectual property protection in the United States through registration processes and guidelines. The rules and procedures affecting fashion design objects as real or intellectual cultural property are certainly not confined to the local or national level. The rules and procedures could also be supranational, as with the European Union's rules on design rights. They could be international beyond cultural heritage law itself, as, for example, through use of the Berne Convention. Still other bodies of law that are defined by subject matter, like Fashion Law and Art Law, might offer their own legal methodologies for a legal framework of Italian fashion design objects as cultural property under the law.

So, what is the legal framework for Italian fashion design objects as cultural property exactly? What are its institutions, its rules, its procedures, its interests, its functions and its terms? Is it the same as cultural heritage law today? Are current cultural heritage law rules and norms enough, or does the law need to evolve? Can other legal fields, like Fashion Law, provide the necessary tools or would they hinder the protection and regulation of Italian fashion design objects as cultural property? Are legal rules and norms to protect Italian fashion design objects as cultural property even needed?

1.1 Can Cultural Property Law fully embrace Italian Fashion Design Objects?

The most appropriate legal regime to answer how to recognize, protect and then regulate Italian fashion design objects as cultural property seems to be Italian cultural property law. One part of a larger legal framework for the protection of cultural heritage and landscape on the Italian territory, Italian cultural property law brings with it a historic consideration of what characteristics indicate what is cultural property under the law. It also brings a framework of institutions charged with recognizing, protecting, and regulating cultural property. The Ministry of Cultural Heritage and

⁷⁰⁰ See *supra*, Chapter 2, Section 2.3.

its relevant field offices declare private property to be cultural property; they also work with museums in charge of the cultural property in various public collections. At the same time, constitutional clauses, Italian doctrine and case law assign preservation of cultural property to the State while distinguishing between preservation and valorization. This allows both Regions and the State to concurrently promote cultural property and to work together while balancing sometimes diverging interests. Likewise, Italian cultural property law provides an accompanying judicial appeals process to these administrative procedures, with established rules for reviewability and deference to administrative decisions.

At the same time, however, as Italian cultural property law gives us these institutions and procedures, its fundamental legal institute, the term cultural property, is characterized by dilemmas which, when applied to Italian fashion design objects, are both manageable and problematic. First, cultural property is of a potentially boundless cultural interest.¹⁰⁰² Evolving from an emphasis on aesthetics, art and antiquity alone, Italian cultural property is now defined by multiple interests, from ethnoanthropological to numismatic, art-historical and the broad ability of a property to be a testament having the value of civilization. At the heart of these multiple interests is not a definitive social function, one social purpose or even a social use of the property in question alone. Cultural property does not conceive of the property as belonging to the commons. Rather, a public cultural interest beyond the property's ownership is what defines cultural property under Italian cultural heritage law. The public, members of society, converge their cultural interest on a property and it is they who decide that it is of public cultural interest to them, as a whole. A public cultural interest seems to already attach to fashion in Italy under certain circumstances, as when a building expropriated by the Region of Lombardy was deemed put to a proper use as a future fashion museum within the context of the city of Milan.¹⁰⁰³ Certain Italian fashion design objects like Rosa Genoni's Pisanello-inspired *Mantello* are already presumed to be of a public art-historical interest or to be testaments having the value of civilization when they are treated as cultural property by the institutions and museums which hold them.¹⁰⁰⁴ Here, public cultural interest seems to include what might be called a public fashion history interest in

¹⁰⁰² See *supra* Chapter 2, Section 2.1.

¹⁰⁰³ See *supra* Chapter 2, Section 2.1.

¹⁰⁰⁴ See *supra* Chapter 1, Section 2.

certain Italian fashion design objects.

At the same time, a boundless cultural interest is also potentially problematic for the classification of Italian fashion design objects as cultural property. How fashion design objects come to be cultural property, how a public fashion history interest is recognized in fashion design objects or presumed to exist, is a complex process. Doctrine tells us that it is the public that decides the cultural interest of an object and that the administration actuates that cultural interest for the public. But is it realistic to think that the public administration can objectively decide what Italian fashion design objects the public has a cultural interest in without potentially succumbing to the whims of a specific Italian brand, its popularity and even its marketing strategy? While needing a public cultural interest might mean that not all or every Italian fashion design object is cultural property, a potential battle of the experts is on the horizon here. There is a risk of perpetuating certain hierarchies in the Italian fashion industry. Might the administration be more apt to recognize a dress of Dolce & Gabbana as cultural property than the same dress made by Bevilacqua Weaving alone? Italian cultural property law does place limits on administrators' discretion, requiring them to motivate their decisions- simple sentimental judgments are not enough.¹⁰⁰⁵ At the same time, however, as Dolce & Gabbana, or Gucci or Ferragamo, continue to lay claim to a piece of fashion history in Italy, how could their Italian fashion design objects not be considered of sufficient public cultural interest in the future, if they are not already? This also brings up the issue of authenticity *as one cultural interest out of many*. A public cultural interest may attach to a property for many reasons- the author may be of interest, the time period may be important, the provenance, the design apart from its creator. Often, cultural properties are celebrated because they reflect the hand or touch of the artist. But how does the public administration decide what is this authorship, authenticity or other interest that might found our public cultural interest as applied to Italian fashion design objects? Who, in effect, decides? If Salvatore Ferragamo designed the *Invisible Sandal* in 1947¹⁰⁰⁶, [Figure 31] but the company continues to make it, does that affect how to decide if an Invisible Sandal made today is cultural property seventy years from now? Can architecture here provide guidance; is such a comparison proper? What about the public's

¹⁰⁰⁵ See *supra* Chapter 2, Section 2.1.

¹⁰⁰⁶ See *supra* Chapter 1, Section 2.

opinion- should that affect conceptions of authorship?¹⁰⁰⁷ What should the public administration do about counterfeits? Should they treat them as unable to be cultural property or see them as variations with their own, different, potential cultural interest, like copies of celebrated works of art might still be recognized as cultural property themselves? Where does a public cultural interest end- is a fashion illustration enough or is a finished accessory needed? These challenges also highlight the liminality of public cultural interest and implies potential relationships to other legal regimes. Should protection by copyright be some sort of indicator of public cultural interest and later cultural property protection? How far should we redraw borders between different types of laws, if at all? The requirement of a public cultural interest allows Italian cultural property law to embrace Italian fashion design objects as part of cultural property. At the same time, there are ever-present concerns about hierarchies, about selective cultural preservation, and even about the fear of losing future cultural property by applying outdated metrics when the time is ripe.

Time- this is another manageable yet problematic dilemma for Italian fashion design objects as cultural property. The bottom line is that while Italian fashion might be now be considered cultural heritage, while museums might be visited to see fashion's tangible products, current Italian cultural property law cannot yet stop the vast majority of tangible fashion design objects of public cultural interest from disappearing into a private archive or collection and never potentially being seen again. The reason for this is that simply not enough time has passed for most Italian fashion design objects. Private owners cannot yet be required to conserve the Italian fashion design object, nor could they potentially be required to make it accessible to the public.¹⁰⁰⁸ On one hand, this makes sense. For individual Italian fashion design objects that are not part of a public or not for profit collection, for those that are either in private hands or even owned by an Italian fashion brand, these Italian fashion design objects may still provide inspiration for contemporary designs as part of business activities. The fashion design objects might even still be worn. The purpose of time under cultural property law is to foster and support cultural consensus. Some Italian fashion design objects may still be too cutting edge or of too uncertain cultural impact to classify as cultural property.

¹⁰⁰⁷ As has been recently suggested for the issue of authorship in copyright law. See Timothy J. McFarlin, *Shouting the People: Authorship and Audience in Copyright*, 93 *TUL. L. REV.* 443 (2019).

¹⁰⁰⁸ See Art. 53, *CODICE*, D.L. n. 42/2004.

Cultural consensus about certain fashion design objects may not yet be crystalized. Notwithstanding this there are certain categories of Italian cultural property which do not need a certain amount of time to pass at all. Think of the designs by Versace presented soon after his untimely death, or the suit Armani designed for Richard Gere in *American Gigolo*.¹⁰⁰⁹ Would these Italian fashion design objects be of such public interest immediately, so soon after their initial creation and production, as to be appropriately included alongside Michelangelo's *David* or Caravaggio's *Bacchus*? Italian cultural property law also usually requires an *unicum* of a non-living author and seventy years for individual objects in private collections to be declared or for individual objects in public or not for profit collections to be verified as cultural property. Not only are most designers still living but brands potentially never die. Returning to our example of Salvatore Ferragamo's *Invisible Sandals*, is the first pair of *Invisible Sandals* created in 1947 eligible to be cultural property because Salvatore Ferragamo is no longer living, or is it definitive that he created them as part of Salvatore Ferragamo the brand and not the man? Does it matter? Should we compare the *Invisible Sandals* to individual documents or other things of public cultural interest that do not need a specific time threshold because they refer to literary, artistic or other categories of history?¹⁰¹⁰ Should we apply this category to Italian fashion design objects? Do Italian fashion designers need to be no longer living? Can an Italian fashion brand still survive and produce cultural property? Right now, the mechanisms of time might allow some Italian fashion design objects to be embraced as Italian cultural property, but they are not completely definitive for all categories of Italian fashion design objects. The existence of some time thresholds accompanied by the lack of them frustrates a bright line rule for how fashion design objects are or may become cultural property. These time thresholds reveal how important case-by-case determinations and evaluations of fashion design objects' cultural interest in defined circumstances may be.

Perhaps the most problematic and least manageable dilemma for Italian fashion design objects is what was referred to as the tyranny of things, a hallmark of the notion of cultural property under Italian law.¹⁰¹¹ Despite a detour into possibly protecting intangible properties like text in the 1999 Testo Unico and the inclusion of Article 7-bis in the 2004 Code to comply with its obligations under

¹⁰⁰⁹ See *supra* Chapter 2, Section 2.2.

¹⁰¹⁰ Art 10(2)(d), CODICE, D.L. n. 42/2004.

¹⁰¹¹ See *supra* Chapter 2, Section 2.3.

the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*, Italian law circumscribes the legal category of cultural property to tangible things. At the same time, as Giannini said, the intangible public cultural interest is what is definitive of the legal notion of Italian cultural property.¹⁰¹² It is, therefore, the relationship between the intangible public cultural interest and tangible properties that seems to be the true hallmark of the notion of Italian cultural property under Italian law.

Far from being confined to tangible properties, our public cultural interest in properties can attach to tangible properties that have intangible elements- think of a painting. While cultural property law might protect the *unicum* of a painting that is reproducible (whether through photography or other digital or non-digital means) and its physical canvas, our public cultural interest might attach to the intangible element of the painting more than to its tangible element. The composition, seen on a slide show or on another support, might be the definitive reason for a tangible properties' classification as cultural property.¹⁰¹³ The limit here is not that our intangible public cultural interest only attaches to tangible properties, but that cultural property law in Italy only recognizes and protects the tangible *unicum* of an intangible property and its tangible property *even when the public cultural interest attaches to the intangible, reproducible elements of a property*. If there is no *unicum*, then cultural property law in Italy does not apply. Activities, cultural expressions or manifestations unmoored to physical objects, despite perhaps benefiting from other safeguarding mechanisms or financial incentives, cannot be protected as cultural property under Italian cultural property law. The only exception seems to be for objects that are classified as testaments having the value of civilization. For this category there need not be an *unicum* between a tangible property and its intangible elements, but the tangible property is rather considered, despite the ability of its intangible parts to be reproduced and culturally significant elsewhere, as representative of the physical touch of an author, or a community, a spark of creativity, or even a cultural moment.¹⁰¹⁴ For Italian fashion design objects this tyranny of things creates a crucially problematic issue: when should the public administration, acting for the public, decide that an intangible, reproducible fashion design is part of an *unicum* with its tangible accessory, purse, dress or shoe? The administration, without having to identify whether a

¹⁰¹² *Id.*

¹⁰¹³ Discussed in categories *infra* Chapter 4.

¹⁰¹⁴ See *supra* Chapter 2, Section 2.3.

public cultural interest lies in a fashion design itself, might of course bypass this issue by conceiving of an Italian fashion design object as a testament having the value of civilization, much as it already seems to implicitly do with Rosa Genoni's *Mantello* or *Primavera* dress.

One of the ways to conceptualize the different categories of cultural property and the way they might apply to Italian fashion design objects' classification as cultural property under Italian law is by thinking of a spectrum of *tangible text*, *visible images*, *intangible text* and *intangible images*, and *testaments having the value of civilization*. There are some categories of text which, although first thought of, like fashion design, as presumably reproducible and the same no matter in what accessory or dress they are embodied, are materially dependent. The messages of these texts change and their cultural significance differs based on the material support upon which they are placed. As discussed above, some ancient Greek examples of text on funerary monuments and symposium cups fall in to this category.¹⁰¹⁵ Fashion designs that incorporate text reveal how fashion designs, which might be thought of as completely intangible like most texts, can also be materially dependent. Moschino's statement on its evening gown, or the "REAL GUCCI" placed on a Gucci bag are examples.¹⁰¹⁶ Intangible fashion designs that fall into the *tangible text* category can be an *unicum* that satisfies the legal institute of cultural property. Here, fashion design objects can satisfy a tyranny of things. Still other fashion designs, however, seem to be on the edge between *tangible text* and *visible images*, like Valentino's dress with the Dante text.

Other fashion designs can be like *visible images* and therefore cultural property. They can also be like intangible images and not cultural property. At the same time as Matsuda's letters falling in to a shirt pocket might be materially dependent, Zuccoli's design with Santa Maria Novella might be a *visible image* or Moschino's McDonalds' Ms might be *intangible images*. Moreover, when trying to categorize these fashion designs, the issue of the scope of cultural interest arises. Should the public administration consider that there are different, separate cultural interests in Zuccoli's use of the Santa Maria Novella façade as part of a dress and in the Santa Maria Novella façade on the Santa Maria Novella church itself? Should Poiret's dress, Armani's iteration, and Isabelle de Borchgrave's iteration all be of different cultural interests and therefore each a

¹⁰¹⁵ See *supra* Chapter 3, Section 2.

¹⁰¹⁶ See *supra* Chapter 3, Section 3.

cultural property?¹⁰¹⁷ Or, should the public administration consider a cultural interest to be so tied to the intangible design of the Santa Maria Novella façade no matter where it is placed, so tied to Poiret’s design no matter who reinterprets it or who “copies” it in an innovative manner? In that case, the public cultural interest would therefore attach to an intangible property meant to travel and not be “frozen” in a material iteration as cultural property under current Italian cultural property law. Poiret’s dress, Armani’s iteration, and Borchgrave’s iteration might all exist in a negative space of cultural property law.

We could also reframe this problematization of the existence of cultural interest in fashion design objects in terms of scope or claiming, terms often used by design law scholars.¹⁰¹⁸ We might, for example, at first claim that cultural interest may attach to Armani’s entire skirt and pants design, but comparing it with what was designed before by Poiret and what has been done afterwards by Borchgrave may limit what exactly we may find of public cultural interest in Armani’s version. In this sense, the borders of other laws may aid a determination of public cultural interest. If copyright law would see the design of a skirt and pants combination as like *scenes-a-faires*, or unprotectable subject matter, then perhaps cultural property law should as well. In this sense, the borders of different legal regimes as applied to certain fashion design objects may match.

For some Italian fashion design objects these questions of the existence and scope of cultural interest are not easy or obvious. Their inclusion in the proverbial cultural property “box” would likely depend on a standard which would evaluate the relationship between a fashion design and a fashion design object in terms of the public cultural interest according to a particular circumstance and in light of the fashion design’s specific place, support, message, and *at times* context.¹⁰¹⁹ Incorporating such a legal standard into the legal

¹⁰¹⁷ See *supra* Chapter 3, Section 1.

¹⁰¹⁸ Mark A. Lemley and Mark P McKenna, *Scope*, 57(6) WILLIAM AND MARY L. REV. 2197 (2016) (defining scope as the extent of a right, or “the range of things the IP right lawfully protects against competition” and proposing “a unified scope regime” across intellectual property law); Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123, 161 (2018) (discussing what parts of designs different intellectual property law regimes effectively identify as their protectable subject matters and how, noting that in copyright “the copyright work itself is used as the prototype against which all allegedly infringing works are compared...” and exploring how an automatic protection of copyright in part frustrates a claiming methodology).

¹⁰¹⁹ See *supra* Introduction, Section 4 and Chapter 3, Section 1.

institute of cultural property might allow the public administration to determine when and how specific Italian fashion design objects could be classified as cultural property under current Italian cultural property law, with or without reference to the catch-all or implicit category of testaments having the value of civilization.

Of course, this legal standard brings up still further questions. What is context? How exactly might the public administration determine the message of a fashion design and /or fashion design object? Is it possible for the public administration to be content-neutral in practice when making these decisions? In pinpointing the intangible cultural interest, can procedural mechanisms and constitutional protections stop the public administration from recognizing or giving more proverbial cultural space to certain messages over others? What is the difference between recognizing a public cultural interest and privileging a specific cultural communication? The concepts of *style* or *schema* might already place a limit on the public administration, effectively stopping it from protecting fashion designs that are so intangible, so common to multiple objects and even so stereotypical¹⁰²⁰ that, despite their historic importance or archetypal nature¹⁰²¹, they need to travel unrestricted both proverbially and practically. At the same time, however, allowing certain intangibles like certain fashion designs to always be outside the cultural property box does not begin to parse how these fashion designs become of such great cultural interest to us with or without cultural, legal and even political processes.

Italian cultural property law, with its legal institute of cultural property and the complex of norms and legal requirements which characterize it, including preservation, valorization, mechanisms of time and authorial requirements, things, public cultural interest, and limits of intangibility, to name a few, seems able to embrace *some but not all* Italian fashion design objects as cultural property. While this result seems to leave out some important objects which might be of public cultural interest, it is not necessarily a counterintuitive result. Such an inapplicability of cultural property law might not, however, be counter to the purpose of the legal institute of cultural property itself. Nor might it frustrate the preservation of Italian fashion. A classic Valentino red dress designed in a simple silhouette should perhaps be as unclassifiable as Dante's text currently is. To protect a design alone as cultural property might prohibit its very cultural existence, let alone be

¹⁰²⁰ See *supra* Chapter 3, Section 1 and Section 4.

¹⁰²¹ See *supra* Chapter 3, Section 4.

almost practically impossible. Indeed, to embrace *all* Italian fashion design objects as cultural property might frustrate a proper discernment of cultural consensus and a public cultural interest. To not differentiate based on the passage of time might improperly classify certain trends as cultural property. The partial embrace of Italian fashion design objects currently proposed under Italian cultural property law might correctly satisfy and substitute, in fact, for a full embrace at first sought.

1.2 The Key Role of Copyright in the Protection of Fashion Design Objects as Cultural Property

As noted above, the marriage of a public cultural interest with fashion designs unmoored to any tangible fashion design object, in other words fashion design's inherent intangibility, likely leads to an inability to protect most fashion design objects through the legal institute of cultural property under Italian cultural property law. Time thresholds further frustrate the application of the legal institute of cultural property to many fashion design objects. This inapplicability is logical in some sense. Most fashion designs are repeatable, necessary tools for the very understanding and dissemination of their cultural interest as part of fashion. At the same time, the inability to classify some fashion design objects as cultural property due to their designs' fundamentally intangible nature might not lead to a completely negative legal space.

First, international cultural heritage law regulating intangible cultural heritage might apply to these fashion designs. With its safeguarding mechanisms and its use as part of naming and shaming¹⁰²² such intangible cultural heritage law still leaves a gap for the modern and contemporary Italian fashion design that is created apart from *and* alongside Italian artisanship and craftsmanship. We might think of Dolce & Gabbana's fashion design, for example, with its use of Venetian, Sicilian and Neapolitan artisanal traditions, to

¹⁰²² As one example of successful naming and shaming with reference to intangible cultural heritage see Kyoto, Japan's letter to Kim Kardashian West, protesting the use of the term Kimono as detrimental to the actual kimono-making process and kimono objects of Japan, which it is seeking to register as Intangible Cultural Heritage. Letter from Daisaku Kadokawa, Mayor of Kyoto to Kim Kardashain West, June 28, 2019, [https://www.city.kyoto.lg.jp/sankan/cmsfiles/contents/0000254/254139/Letter_from_Mayor_Kadokawa\(ENG\)rev.pdf](https://www.city.kyoto.lg.jp/sankan/cmsfiles/contents/0000254/254139/Letter_from_Mayor_Kadokawa(ENG)rev.pdf) ("Kimono is a traditional ethnic dress fostered in our rich nature and history with our predecessors' tireless endeavours and studies, and it is a culture that has been cherished and passed down with care in our living. Also, it is a fruit of craftsmanship and truly symbolizes sense of beauty, spirits and values of Japanese... We are currently undertaking initiatives nationally to make "Kimono Culture", symbol of our culture and spirits, registered to UNESCO's Intangible Cultural Heritage list.")

name just a few, as intangible Italian cultural heritage like the art of Neapolitan pizzaiuoli. But there are still aspects of such a possible protection which seem problematic and counterintuitive for the nature of fashion and the fashion industry. Can the business activities of Italian fashion brands be thought of as intangible cultural heritage? What would safeguarding look like in this circumstance? How would one negotiate between safeguarding and improper restrictions on businesses? Would such protection perpetuate hierarchies, further protecting luxury brand goods and modern and contemporary urban fashion over traditional, more rural or regional realities?

Intellectual property law is sometimes seen as filling the legal space where intangible cultural heritage protections might fail. While most scholarship envisions how patent, trademark, or copyright might function as protections for indigenous cultural heritage or property and even, in some circumstances, cultural products¹⁰²³, intellectual property law might also first protect the cultural interest which is *later* identified as cultural property. This can occur whether or not this is the stated aim or goal of intellectual property law. Indeed, this protection of cultural interest may even be improper. Nevertheless, the use of intellectual property law to restrict or shape the cultural interest in fashion designs and fashion design objects seems to occur when certain fashion design objects exist as *visible images* and also for those fashion design objects that are prized for a cultural significance in the *unicum* of the intangible and tangible.¹⁰²⁴

¹⁰²³ See Introduction, Section 1 and the discussion of Susan Scafidi's work in WHO OWN'S CULTURE?

¹⁰²⁴ Amy Adler and Jeanne Fromer have recently published an article that seems to hint at this phenomenon while not engaging it directly. *Taking Intellectual Property into their own hands* explores how intellectual property owners with rights to subject matter "well within the heartland" of protection act in the shadow of their rights outside the traditional legal system to stop the appropriation of their work and seek attribution, among other remedies. Adler and Fromer note that "Reappropriations, at their core, provide society with new artistic creations. Reappropriators turn the intellectual property paradigm on its head by seeing infringement as an impetus for creativity rather than an obstacle to it." Amy Adler and Jeanne Fromer, *Taking Intellectual Property into their own hands*, 107 CAL. L. REV. 1455, 1459 (2019). Adler and Fromer spotlight the Gucci and "Trouble" Andrew or GucciGhost case as an example of "retaking the copy", where Alessandro Michele's decision to work with Andrew and appropriate his work into Gucci fashion design objects exhibits a self-help act of a rights-holder to avoid misattribution. How, however, Gucci's choice to work with Andrew, in the shadow of their intellectual property rights, might have shaped the cultural interest assigned to Gucci's GG logo, is not explicitly addressed. As the authors acknowledge, Alessandro Michele "loved the possibility of playing with the theme of 'what is real and unreal.'" *Id.* at 1473. An analysis of the relationship between "retaking the copy" in the shadow of rights, and exercises of cultural speech or assignments of cultural interest would be particularly interesting given the opposite,

The fact that a relationship and potential overlap might exist between intellectual property law and cultural property law *for some properties in some circumstances* is already hinted at by Italian cultural property law itself when it acts like one part of intellectual property law, copyright law. Despite arguments that Italian cultural property law should not and does not apply to intangible properties alone¹⁰²⁵, the law carves out a space in which it purports to regulate only an intangible element of cultural properties, their reproduction. Such a regulation is evident in the requirement that commercial reproductions of Italian cultural properties in the hands of the State receive permission from the relevant holding institution.¹⁰²⁶ It is also evident in the requirement that certain cultural property's *decoro* be preserved and that only appropriate actions take place within them.¹⁰²⁷ In regulating reproductions, Italian cultural property law notes that it acts with respect to Italian copyright law, *diritto d'autore*.¹⁰²⁸ But how can the legal institute of cultural property purport to only recognize and protect the attachment of our public cultural interest to intangible elements as they exist within a tangible property at what would be called, in intellectual property terms, the validity stage, only to extend the scope of cultural property to the relationship between our public cultural interest and an intangible property wherever it is at a second "infringing" moment?¹⁰²⁹ Here it would seem that Italian cultural property law wishes to act like a copyright regime in certain circumstances, when copyright no longer applies. Cultural property law's applicability here effectively brings intangible properties like images, and even therefore designs, into the legal institute of cultural property. In certain circumstances, the legal institute of cultural property seems not just about protecting the relationship between the public cultural interest and certain properties, but also about controlling the intangible public cultural interest itself.¹⁰³⁰

In this sense, it seems that copyright law, when incorporated as a set of legal norms into the legal institute of cultural property in Italian law, is an improper partner to the protection of cultural property. Copyright norms within the legal institute of cultural

negative reactions to other examples of Gucci's "retaking of copies", as in the Dapper Dan example. *Id.* at 1470 – 1479.

¹⁰²⁵ See discussion of Giannini in Chapter 2, Section 2.3 and Chapter 4.

¹⁰²⁶ See discussion in Chapter 2, Section 3.

¹⁰²⁷ *Id.*

¹⁰²⁸ See Introduction.

¹⁰²⁹ See *supra*, Chapter 2, Section 3.

¹⁰³⁰ See discussion of David example in Chapter 2, Section 3.

property might effectively allow for a control of public cultural interest instead of its actuation. This might be especially so given the expectation that copyright expires after a certain period of time, that copyright only regulates relationships between private actors in relation to certain creative works, and that copyright does not regulate relationships between private actors and the State.

At the same time as this improper partnership, in other legal jurisdictions where the legal institute of cultural property *does not exist as such* or *not in the same way* as it does on the Italian territory, a partnership between copyright and cultural property might be proper. Indeed, copyright might function as an *ex ante* cultural property regime in practice, albeit by assigning rights to authors instead of to the public administration and controlling intangible properties before they are of the necessary cultural interest and before a cultural consensus.

Fashion design objects provide us with a stage on which to explore the overlap and the partnership between copyright law and cultural property law. Unlike intangible cultural heritage which divides properties into intangible activities and tangible manifestations, the legal institute of cultural property in Italy, with its emphasis on tangible properties which might contain culturally significant intangible elements, provides a ready comparison to copyright, which protects intangible expressions fixed in multiple tangible mediums, first in one and then in other copies.¹⁰³¹ Indeed, one category of U.S. copyrightable subject matter, pictorial, graphic and sculptural works seems to negotiate the entrance of the designs of useful articles into its purview through the conceptual separability test by asking whether these design are like *visible images*, thereby implicating the identification of a possible public cultural interest.

Courts both in Italy and in the United States have grappled with the separability test for designs of useful articles.¹⁰³² Over time, however, these courts, deciding whether certain designs of useful articles, including fashion design objects, were copyrightable subject matter or not, have seemed to move towards the use of explicit and implicit barometers of cultural significance to arrive at their decisions. Italian copyright law, for example, has eventually moved to an *unicum* evaluation.¹⁰³³ Italian courts do not today engage in any

¹⁰³¹ For these definitions see *supra*, Chapter 2, Section 2 and Chapter 4, Section 2.

¹⁰³² Chapter 4, Section 1, Section 2 and Section 3.

¹⁰³³ For a description of this evolution thanks to supranational law see *supra* Chapter 4, Section 3. See also Reichman, *Design Protection supra* note 728 (exploring Italy's

separative analysis for models of industrial designs in order to determine whether they have the necessary creative character or artistic value. Today's analysis, which evaluates the *corpus mysticum* (work of art) and a *corpus mechanicum* (material support)¹⁰³⁴ together, led one Milanese court in 2016 to declare the Moon Boots of sufficient artistic value and creative character, in part because they had changed the course of design history through the impact of their iconic design.¹⁰³⁵ Prior to a clear acceptance of these items, created only in 1970¹⁰³⁶, as cultural property but within the earlier copyright term, the Italian court extended rights in the intangible fashion design and control over its embodiment in tangible materials for the life of its author and seventy years thereafter.¹⁰³⁷

In the United States, the recent *Star Athletica v. Varsity* case addressed whether certain features of the designs of certain cheerleading uniforms – stripes, chevrons, and zig zags – were copyrightable subject matter. The Court abandoned the physical separability test, noting the standard for when features of the designs of useful articles were sufficiently pictorial, graphic and sculptural works was only one of conceptual separability.¹⁰³⁸ In their legal reasoning holding the stripes, chevrons and zig zags to be sufficiently eligible for a classification *only as* copyrightable subject matter, the Court in part compared them to a fresco and its own intangible elements. The chevrons, stripes, and zigzags were like the fresco's composition, not the tangible *unicum* of composition and dome. Drawing a line between corresponding to the shape of a useful article and replicating it, the Court seemed to recognize as copyrightable subject matter the same type of intangible elements in a tangible property on a fashion design object as would be copyrightable on a painting- the fashion design was comparable to a composition. Deliberately rejecting the dissent's notion that they

separability test in comparison to the United States' conceptual separability and the theory of "dissociation" in the Italian test).

¹⁰³⁴ For the use of these terms see *Tecnica v. Anniel*, Tribunale Sez. Spec. Impresa, - Milano, 12/07/2016, *supra* note 845.

¹⁰³⁵ For a discussion of the case see *supra* Chapter 4, Section 3.

¹⁰³⁶ For this date see the catalog of ITEMS: IS FASHION MODERN?, *supra* note 604 at 181- 182, referenced in *infra* Chapter 3, Section 1.

¹⁰³⁷ While the case does not mention Giuseppe Zanatta as the designer, creator or author, but only *Tecnica*, the sports company Zanatta co-founded, the terms of copyright under Italian copyright right are based on authors, who may be single, joint, or a group, and not companies. See GAUDENZI, *supra* note 567 at 90-93 (citing to art. 23- 26 of L n. 633/1941). Italian copyright law seems to have abrogated its work for hire doctrine. See Art. 12-ter in L n. 633/1941.

¹⁰³⁸ For further discussion of the case and for reference to the description in the next few paragraphs see Chapter 4, Section 2.

were attempting to extend copyright to tangible, material properties by protecting a picture of the cheerleading uniform, the Court noted the narrowness of its holding. The Court did not seek to extend protection to the *unicum* of intangible fashion design and tangible fashion design object, nor did it seek to extend protection to an entire fashion design which could be reproduced in any material and sold as such on the fashion market.¹⁰³⁹ It did not seek to protect the shape, cut, or the *style* or *schema*, of the fashion design object. Rather, the Court only seemed interested in deploying its own public judgment to identify which parts of the design could be like a fresco's composition, divorced from the functionality or tangibility of its support.

Read in comparison to the recent Italian copyright case deciding how Moon Boots are copyrightable, in comparison to Italian cultural property law's requirements, and even within the evolution of U.S. copyright subject matter and the separability test, the *Star Athletica* case seems to indicate that, to decide how certain fashion designs are pictorial, graphic and sculptural works, U.S. courts should concentrate on identifying the intangible part of a fashion design object which may be of public cultural interest, without protecting its shape or cut, its silhouette, its *style* or *schema*. While the Court in *Star Athletica* did not explicitly mention a historical or iconic nature of the designs, other recent cases seem to be moving towards such factors or, at least, towards a consideration of what is the uniquely repeatable, and therefore the relevant intangible part, of a useful article such that it may be copyrightable without being an *unicum* of intangible and tangible properties.¹⁰⁴⁰

This comparison between conceptual separability and the test for artistic value and creative character in Italy is not necessarily to urge a unity of art theory of copyright in the United States or to say that the United States may effectively become an Italian *diritto d'autore* regime. Rather, the point is to emphasize, through the

¹⁰³⁹ See *supra* Chapter 4, Section 2.

¹⁰⁴⁰ See 2017 U.S. Dist. LEXIS 94489; Copy. L. Rep. (CCH) P31,113; 123 U.S.P.Q.2D (BNA) 1285 (C.D. Ill., June 20, 2017) at *1286- *1287 (holding a bird silhouette first on a clothespin copyrightable by noting "*The bird portion of the Sparrow Clips, when identified and imagined apart from the useful article--the clothespin--qualifies as a sculptural work on its own.*") See also 2017 U.S. Dist. LEXIS 201498 (C.D. CAL., May 8, 2017) at *8 - *9 (holding a hookah bottle design uncopyrightable but in *dicta* noting a Noguchi table likely copyrightable, "*composed of unique geometric shapes variations or unique combinations of geometric shapes that might pass muster under the Star Athletica test. It is only to say that the water container at issue here is no Noguchi Table. [“The Noguchi Table was designed by Isamo Noguchi in 1939 for the then president of the Museum of Modern Art in New York City, the original remains in the museum’s permanent collection.”]*"). See *supra* Chapter 4, Section 2.

comparison, that United States copyright law may be existing at the border between Italian *diritto d'autore* and Italian cultural property law in its own jurisdiction. Other scholars have proposed that conceptual separability is about conceivability⁷⁰¹ or have explored the historic similarities between the United States' copyright law's application to design and Italy's previous *scindibilità* test⁷⁰². In a similar comparative and theoretical way, so here it is argued that conceptual separability may be about identifying cultural interest. In this sense, copyright law in the United States seems to act as the closest thing to a cultural property law regime when considering fashion designs within the category of pictorial, graphic and sculptural works, since a cultural property regime for individual movable objects does not exist in the United States as it does in source nations.

Unlike in Italy, where copyright like-norms may control the public cultural interest instead of actuating it, in a jurisdiction like the United States where movable non-indigenous objects in private property are not protected as cultural property, copyright law, and the legal institute of copyrightable subject matter, might take cultural property's place *ex ante*. The legal institute of copyrightable subject matter might foster an assignment of the public's cultural interest in certain intangible elements of tangible properties. Here, U.S. copyright law might give authors the ability to protect certain fashion designs in order to support the development of a public cultural interest which may later attach to them.

There are of course limits for considering fashion designs as copyrightable subject matter but not necessarily to the partnership between cultural property law and copyright law and, therefore, to the presentation of U.S. copyright law as an *ex ante* cultural property law regime. Fashion designs may be so equal to the idea of

⁷⁰¹ Mala Chatterjee, *Conceptual Separability as Conceivability*, 93 N.Y.U. L. REV. 558 (2018) (seeing the Courts test in *Star Athletica* as not resolving the conceptual separability issue and proposing a test for conceptual separability drawn from philosophy that is practically the opposite of the Court's test, "'When you conceive of the article as lacking the design element in question, is the article you imagine functionally identical to the actual article?'" , where functionally identical means "central, legitimate utilitarian aspects". *Id.* at 580. While Chatterjee emphasizes functionality in terms that are not explicitly cultural, and also seems to fall into the claiming issues at the heart of understanding what are the pictorial, graphic and sculptural elements in question of a useful article, at times her analysis seems to implicitly approach a consideration of the tangible and intangible divide that is at the heart of the test proposed here. See *Id.* at 568- 569 (discussion of camouflauge).)

⁷⁰² Reichman, *Design Protection* *supra* n. 728; Reichman, *Design Protection* *supra* note 728; and J.H. Reichman, *Past and Current Trends in the Evolution of Design Protection Law--A Comment*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 387 (1993).

the design they visually represent that they cannot be copyrightable at all under the merger doctrine or the idea/expression dichotomy. In addition, fashion designs as copyrightable subject matter, no matter their cultural interest, may be infinitesimally small in scope, raising questions as to how to treat these potentially fully copyrightable fashion designs at the infringement stage. Italian cultural property law, however, might make similar decisions as to validity and scope in its own legal terms and own legal institutes and processes.

In addition to the issue of whether U.S. copyright is meant to actuate the public cultural interest in a manner similar to Italian cultural property law in the first place¹⁰⁴³, the fact that U.S. copyright may act as a partner to an invisible cultural property regime in the U.S., or the public domain¹⁰⁴⁴, brings up issues of control of the public cultural interest *by private parties and not the State*. While the doctrines of fair use and exceptions for certain cultural institutions under copyright law in Section 108 might be enough to foster cultural dialogue around certain intangible properties, copyright law might also frustrate the public's ability to have a cultural consensus around these objects. Authors may control their works to such an extent that it is impossible to publicly comment on them or use them for critique, especially when practical concerns like litigation costs may produce chilling effects. The possibility to control what may be termed counterfeits, for example, is potentially chilling not only for a recognition of the cultural significance of certain fashion design objects, but also for their critique and comment. It may be for this reason that fashion designs in particular, which need to be used and embodied in multiple copies, are mostly deemed outside of U.S. copyright law.

Some fashion designs, like Gucci's *Flora*, might seem like *visible images*, as properly copyrightable because they are like the composition of a painting. Such fashion design objects have an intangible reproducible element that can be applied to many other objects, thereby fostering our public cultural interest. Other fashion designs that are like *intangible texts* or *intangible images*, which might theoretically be properly in the purview of copyright, but are, however, not. The proposal is that this is so because extending protection to these fashion designs, unlike extending protection to an *intangible text* or *intangible image*, would frustrate the very

¹⁰⁴³ Addressed at certain points of Chapter 4 *supra*.

¹⁰⁴⁴ Following Giannini's comments explored in Chapter 2, Section 2.3.

cultural consensus and dialogue that is definitive of fashion itself. The difference between *visible images* and *intangible images* is, however, difficult to draw. It is a fine line to decide what makes a *Flora* design different from a suit or the silhouette of a *Flora* shirt [Figure 32], and to, therefore, identify which fashion designs are unable to be copyrightable subject matter. U.S. copyright law in this sense, with all its potential faults and debatable standards, might in fact be doing fashion design and the public cultural interest in fashion design objects a favor in principle by not allowing the majority of fashion designs to be copyrighted. In this sense, U.S. copyright law might be a necessary partner to an invisible or non-existent cultural property law or even an invisible or non-existent cultural property law. By allowing “counterfeits”, “fakes”, imitations, close copies, or whatever else they might be called for the majority of fashion designs, U.S. copyright law might be acting as a necessary partner in the ascertainment of the public cultural interest in certain fashion design objects.

1.3 Filling the Gap? The Interactions between Fashion Law and Cultural Heritage Law

The appearance of “Fashion Law” in the early 21st century in the face of a gap in copyright protection for fashion design, albeit after laws and norms governing fashion have been present for as long as mankind has clothed itself and still after the appearance of other rules and norms characterized as design law¹⁰⁴⁵, begs the question of whether Fashion Law as a legal discipline might step in to offer legal solace to fashion designs where cultural heritage law might not.

The legal disciplines and norms included in Fashion Law are touted as intellectual property law, business law, international trade law and government regulations, and the laws governing consumer culture and civil rights.¹⁰⁴⁶ In addition, these norms and Fashion Law itself also purport to include public law.¹⁰⁴⁷ The legal institutes of Fashion Law might be deemed, therefore, to include the many that are already included in these disciplines such as property, contract, freedom of expression, businesses and associations, products, employment, and even human rights.¹⁰⁴⁸ Perhaps the primary legal institute of Fashion Law might be fashion itself, with all the liminal

¹⁰⁴⁵ See *supra* Introduction.

¹⁰⁴⁶ See Scafidi’s description of the four pillars in Introduction *infra*.

¹⁰⁴⁷ See Jimenez and Kolsun’s description of Fashion Law in Introduction *supra*.

¹⁰⁴⁸ See Figure 1-1 in FASHION LAW: CASES, *supra* note 13 at 6.

issues that brings along with it, just as the legal institute of cultural property does.¹⁰⁴⁹ Up until now, despite mentions in passing of how fashion might be a cultural product and how Fashion Law is broad enough to include all legal disciplines, the relationship between cultural heritage law and fashion in Fashion Law has been, at the very least, undervalued and underexplored.¹⁰⁵⁰

One of the reasons for this undervaluation might be the strong links between the fashion industry and Fashion Law¹⁰⁵¹, despite the fact that Fashion Law can, of course, apply in areas where members of the fashion industry are not particularly present.¹⁰⁵² But Fashion Law finds itself particularly amenable now to a consideration of cultural property as one of its legal institutes and to an inclusion as part of cultural heritage law because so many fashion businesses and members of the industry are interacting with cultural institutions on a more regular basis, lending their products to museums, sponsoring exhibitions, giving donations, and archiving their own products and touting their historical significance. As of right now, Fashion Law does not explicitly have the tools to address the public's cultural interest in fashion products under the law apart from the interests of fashion products' creators, designers and first owners who are not necessarily all consumers. Fashion Law is able to tell a designer how they might copyright (or not) their fashion design, how to gain design patent or utility patent protection, or how to trademark their logo. Fashion Law can tell a group of investors or a designer how to incorporate, how to sell their products, how to employ people, how to negotiate retail spaces, how to license and advertise. Fashion Law could also tell consumers how to protect themselves against discrimination by fashion companies, how they are legally entitled to wear certain fashions and are protected from unwarranted searches or other acts related to what they are wearing. Fashion Law might, because it envisions itself as including customs law, be able to tell a fashion company's museum whether or not their importation of certain vintage fashion objects for an exhibition will result in a customs fee. Fashion Law

¹⁰⁴⁹ For the discussion of cultural property as a liminal notion see Chapter 3, Section 4 *supra* (citing to Cassese).

¹⁰⁵⁰ See *supra* Introduction.

¹⁰⁵¹ See *The Need for Fashion Law, in FASHION LAW: CASES*, *supra* note 13 at 3-4 (noting how fashion law is "a business-focused combination of legal disciplines", its "growing social and economic importance in the fashion sector" and "the concerted attempt, led by ... [the] (CFDA), to expand U.S. copyright law to include fashion designs.").

¹⁰⁵² As in Fashion Public Law, which Jimenez and Kolsun note as including "freedom of expression", "religious freedom and attire", "criminal law: strip searches, decency laws." Figure 1-1 in *FASHION LAW: CASES*, *supra* note 13 at 6.

might even be able to tell a corporation how to properly negotiate with a museum, how to manage conflicts of interests, and how to sponsor exhibitions. Fashion Law cannot yet, however, tell a consumer or a designer or a fashion brand or corporation how a specific fashion design object is cultural property or even why, from a cultural heritage perspective, some fashion designs are not copyrightable. Fashion Law does discuss cultural appropriation, but that does not apply to modern and contemporary fashion design objects themselves as part of cultural heritage but rather to modern and contemporary fashion design objects' improper use of indigenous and other cultures' heritage.¹⁰⁵³ Fashion Law today cannot fill what might be called a cultural heritage law gap, especially as Fashion Law operates in the United States, because it undervalues how cultural heritage law is applicable to *the very modern and contemporary fashion design objects created by today's fashion industry which Fashion Law seeks to primarily protect.*

It is for this reason that Fashion Law might fruitfully be included in cultural heritage law and also why the dilemmas of cultural heritage law, and of Italian cultural property law in particular, are so relevant for Fashion Law. As time passes and fashion design objects, especially those belonging to Italian fashion brands in Italy, increasingly become recognized as relevant to fashion history and as testaments to certain cultural moments of inspiration and innovation, Fashion Law will need to have the tools to understand how to negotiate and deal with a public cultural interest in fashion design objects. The same, however, is potentially true of intellectual property law more generally: design objects like an Alessi juicer or Ferrari car are just as susceptible to our public cultural interest as a Dolce & Gabbana or Versace dress. The reasons to protect cultural property or not, how to identify it, who decides and when, are all answers which cultural heritage law can give or, at the very least, for which cultural heritage law can provide procedures and answers.

2. Cultural Property Protection and Fighting Counterfeits

One thing Fashion Law does contemplate today, in fact one of the things it prides itself on, is authenticity and fighting against fakes. The comparison between U.S. copyright law, whose explicit statutory protection would be the fashion industry's dream golden ticket, and cultural property law begs the question of whether thinking of modern

¹⁰⁵³ For a discussion of cultural appropriation see *supra* Introduction.

and contemporary Italian fashion design objects as cultural property in some instances helps or undermines the fight against fakes. Is cultural property protection a tool in the fight against counterfeits or a wrinkle?

To problematize this question let us take the case of an Italian fashion design object which might be protected as a cultural property under Italian cultural property law. As discussed above¹⁰⁵⁴, Italian fashion design would likely be eligible as part of a cultural property when it exists as a *tangible text*, like the “REAL GUCCI” or “REAL GG” on Alessandro Michele and “Trouble” Andrew’s recent Gucci bag, or as a *visible image*, like Valentino’s dress with Dante’s text or Matsuda’s shirt or tie with flock-printed letters. If the *unicum* of intangible design and tangible property of such fashion design objects is considered cultural property under Italian cultural property law, however, this does not mean that the fashion design is necessarily copyrightable subject matter under U.S. copyright law. Recalling that Italian cultural property law would recognize the tangible object with this text as cultural property, and that U.S. copyright law would only protect the tangible text as it exists apart from the material and repeated in others, the scope of a copyright in the “REAL GUCCI” or “REAL GG” design, which has been copyrighted¹⁰⁵⁵, may be potentially so thin as to be non-existent or be interpreted broadly. In this sense, the relationship between cultural property and counterfeits, and the scope of each in comparison to the other, might depend on our understanding of the fashion design’s cultural communication and interest.

Following the Court’s conceptual separability test, looking at this Gucci bag, some “pictorial” or “graphic” elements can be spotted. Much like “Trouble” Andrew’s previous graffiti on a wall, the “REAL” has similar pictorial elements like dripping text and the letters are drawn particularly, with the A an upside down V and the letters askew, while the Gucci is embossed. This pictorial work can also be apart from the bag and on another material or in another medium. Indeed, just imagine “REAL GUCCI” placed on a wall as “Trouble” Andrew did as part of his installation in the Gucci Galleria, or on a scarf, as in the foulard Gucci Ghost.¹⁰⁵⁶ At the same time, however, alongside the knowledge that the “REAL GG” design has been copyrighted, recall how the *Star Athletica* court limited the copyrightability of the pictorial, graphic, and sculptural features of designs of useful articles. The Court said that an

¹⁰⁵⁴ See Chapter 3.

¹⁰⁵⁵ Registration Number VA 2-002-720, February 24, 2016, U.S. Copyright Office.

¹⁰⁵⁶ For an image of the wall see *In conversazione con Trouble Andrew*, GUCCI, https://www.gucci.com/it/it/st/stories/inspirations-and-codes/article/agenda_2016_issue05_guccighost_collection_trouble_andrew_qa.

author could only have a copyright in the features of the design inasmuch as the features of the design did *not* stop the production of objects of the same shape, style, or dimensions. In the *Star Athletica* case such a limitation made sense because the chevrons, stripes, and zig zags at issue effectively tracked the *style* or *schema*, the outline, the stereotype, of the cheerleading uniform. Here, that is not the case. So, should a Court see the scope of Gucci's copyright as broad or thin? Should a Court allow the cultural message evident in the *unicum* of the design and bag, which may be protected through cultural property law and communicates authenticity, to inform the scope of the copyright? How do we parse the cultural interest of the message of authenticity here? If a Court were to decide the scope of copyrightability with reference to the design's cultural message as it appears on the Gucci material, it might say that because the specific message of the design is so materially-dependent, Gucci could arguably not prevent other producers of bags from putting "REAL GUCCI" on other materials because the same message would not be conveyed. The message of authenticity would be different and, therefore, "REAL GUCCI" on another bag would be another non-infringing work of authorship fixed in a tangible medium of expression. Irony or sarcasm would be communicated, and not authenticity. This is, in a way, like the fair use or parody defenses to copyright infringement. At the same time, if the Court did not allow an understanding of the cultural interest of this fashion design object to inform the scope of copyrightability, Gucci's copyright might be broad. After all, the Court seems to allow for a copyright which corresponds to the shape of the bag, but which does not replicate it, and its decision is based on the fact that a design may be reproduced in other materials. Is Gucci's ability to reproduce "REAL GUCCI" on any other material indicative of an ability to communicate this message of authenticity or design integrity on any Gucci or non-Gucci material? Is the placement of "REAL GUCCI" or "REAL GG" on other objects the production of derivative works? If the Court is indeed spotting a potential public cultural interest as part of its conceptual separability test, courts might need to consider how the communications at the heart of cultural interest might affect tests for infringement.¹⁰⁵⁷ In this sense, the borders between copyright law and

¹⁰⁵⁷ A full proposal for how public cultural interest might shape different tests for infringement is beyond the scope of this dissertation, but lower courts do seem to have begun to implicitly explore potential differences in the cultural communications between similar copyrightable features of copyrightable designs when discussing the merger doctrine, although there seems as yet to be no court that has explicitly ruled on the issue of infringement. For a discussion of how close reading and distant reading might affect the infringement analysis see Zahr Said, *Close and Distant Reading in Copyright's Infringement Analysis*, working paper presented at the 2019 Intellectual Property Scholars' Conference.

cultural property law may be porous. While acting at different times during the life of a work or property, each may draw from each other when understanding the cultural aspects of a fashion design and how it relates to its fashion design object. In the case of the “REAL GUCCI”, the test for the fashion design object as cultural property proposed here which sees the cultural interest of the design as a tangible text may allow other fashion design objects traditionally considered counterfeits to exist.

Let us take another example of Gucci’s, the *Flora* design on a scarf. Negotiating the relationship between the intangible *Flora* design and the tangible scarf, it is apparent that the appreciation of the design’s message and representation may not necessarily be dependent on the scarf itself. Unlike text, whose material dependency may be more evident, the visual representation of flowers, butterflies, and other elements of nature is susceptible to multiple cultural interests. The fact that the *Flora* design has been repeated on numerous other tangible objects, including on Gucci bags, dresses and shoes hints that it may or may not be like a *visible image*. Its cultural interest may be related to the source of it- Gucci, the brand- than an artistic interest in the rendering of the flowers, butterflies and other elements of nature which, like a composition of a painting, might be attached more readily to the tangible scarf. At the same time as the *Flora* design falls into two potential categories of cultural property, the *Flora* design is copyrightable subject matter under U.S. copyright law.¹⁰⁵⁸ Here the U.S. Copyright Office seems to have made the hard decision that may also be requested of a Ministry Field Office or administrative judge as the case may be at a later date when the time threshold is met: this scarf design is like a *visible image* and not an *intangible text* or *intangible image*. No matter if it is applied to a scarf, it is not *the scarf* nor is it the silhouette of a scarf. The *Flora* design is like the composition of a painting, the composition of a fresco, the outline of a guitar placed on another material support. It is much like the image of a stained glass, whether placed on a window or on a dress [Figure 32]. The pictorial, graphic and sculptural features of the scarf design, the flowers, butterflies and dragonflies, are easily identifiable as pictorial, notwithstanding the fact that they may correspond to the shape of a scarf. The *Flora* is easily repeatable in other materials. These elements are original enough: the *Flora* has similarities to other still life paintings and, therefore, this *Flora* design will be copyrightable and not just copyrightable subject matter. According to the Court’s opinion in *Star Athletica* its author, Gucci, may prohibit its placement on any material, except inasmuch as it attempts

¹⁰⁵⁸ Gucci has in fact copyrighted the design as a PGS work. See Form GATT, VA 1-433-237, July 13, 2012, U.S. Copyright Office.

to stop the production of scarves of the exact same shape, dimension and style of the square *Flora* design. Here, Gucci is given a thick copyright but perhaps no cultural property protection. While provenance and authenticity may not be regulated, nor copies for commercial use, unauthorized copies, or counterfeits, are regulated under copyright law. Here, there is potential, but not certain, unified action by U.S. copyright law and Italian cultural property law. We might interpret this as U.S. copyright law allowing the author, for their life and seventy years, a voice in the cultural messages and communications, in the collective's shaping of its cultural interest in the *Flora* design. In a possible negative space of cultural property law, copyright law might be in fact choose to be a sort of *ex ante* cultural property law regime. But this also brings up concerns about the borders between these types of law. Does Gucci's ability to protect against counterfeits, unauthorized copies of its *Flora* design on other materials, mean that one iteration of the *Flora* design in a fashion design object might eventually gain the necessary cultural consensus to be deemed a testament having the value of civilization, a cultural property under Italian law? Can the public adequately decide that one of the first iterations of the *Flora* scarf is cultural property if Gucci shapes the cultural conversation around the *Flora* design?

The porous boundaries between cultural property and copyright may not be the same in all copyright regimes. In other words, the determination of copyrightability in one jurisdiction and a prohibition on unauthorized copies may not occur in another. Just because an Italian fashion design object is in part eligible for copyright protection under U.S. copyright law does not mean that a fashion design is copyrightable subject matter under Italian copyright law, or vice versa. Indeed, as evidenced by the Moon Boots case, Italian courts engage in cultural property like evaluations- looking at design impact, iconic status, and even aesthetic and artistic dimensions to decide copyrightability. Looking at our previous examples, has the Gucci bag with "REAL GUCCI" or "REAL GG" changed the course of design, like the Moon Boots? The "REAL GUCCI" bag's inclusion in some exhibits might be enough, but, thus far, it seems to only have been included in the Gucci Galleria, which might not rise to a level similar to the classification of the Moon Boots as an exemplary design by the Louvre.¹⁰⁵⁹ There may not yet be an answer. As a result, a determination of Italian copyright protection for certain designs may be more time-sensitive, or at least more related to the timing of cultural property classification, than the entrance of certain designs to categories of copyrightable

¹⁰⁵⁹ *Tecnica v. Anniel*, Tribunale Sez. Spec. Impresa, - Milano, 12/07/2016, *supra* note 845.

subject matter in other jurisdictions like the United States. While copyright law exists from creation, the copyrightability of the fashion designs of some fashion design objects, or designs of useful articles, in Italy may in reality need to be ascertained some time after their creation but before their eligibility as cultural property. This may effectively mean that a prohibition on counterfeits in one jurisdiction is more linked to cultural interest than in another, leading to a potential asymmetry of cultural interest in different locations for the same fashion design object. This is so notwithstanding plaintiffs' use of the word "iconic" to justify their intellectual property rights in the United States.¹⁰⁶⁰ As a result, the nature of counterfeits and their regulation may differ depending on the jurisdiction, with ramifications for fashion design objects' cultural interest. Does creativity's present historical impact, or artistic value, for fashion design objects always require time, a development of an iconic status, to fight against counterfeits? How can a fashion design object obtain iconic status if it is copied without authorization, or do these counterfeits necessarily communicate iconic status? Does being a cultural property preclude the existence of counterfeits under other laws, or does being copyrightable subject matter dictate later cultural property because of a control over counterfeits? Again, the use of cultural interest here may not necessarily be a tool to fight counterfeits.

The porous boundary between cultural property law and copyright law may also explain why some fashion designs are in a negative space of copyright. Within the collective and social nature of cultural property, creativity and fashion, why necessarily extend copyright at all if an intangible cultural interest cannot be further developed by its author? Where creativity meets an exact cultural communication that will not change over time, is there a need for U.S. copyright or even a thin copyright? Cultural property law might indicate when a cultural interest need not be protected, or even incentivized, through copyright law. In this sense, the boundary between cultural property and copyright may indicate some fashion designs and, therefore, fashion design objects, that are neither cultural property nor able to be protected from counterfeiting in Italy or the United States. Despite Giannini's supposition that intangible text is outside the purview of Italian cultural property law and that intangible text might best be protected by regulating the relationships of private actors with the intangible text¹⁰⁶¹,

¹⁰⁶⁰ Complaint at 4, 6, *Gianni Versace, Srl v. Fashion Nova, Inc.*, Case No. 2:19-cv-1007 (C.D. Cal. November 25, 2019) (a recent lawsuit by Versace against Fashion Nova for infringing the copyright of the print of the dress Jennifer Lopez wore to the Grammys in 2000 designed by Versace describes that copyright as "iconic").

¹⁰⁶¹ See *supra* Chapter 2, Section 2.3.

U.S. copyright law does not protect fashion designs that are like *intangible text*. In this sense some Italian fashion design and Italian fashion design objects are both in a negative space of cultural property law and copyright law and are, therefore, susceptible to being counterfeited. Fashion designs and their accompanying objects unprotected as cultural property are not regulated for provenance or authenticity, and fashion designs unprotected by copyright may be freely copied.

At the same time, some designs might still be protected under Italian cultural property law as testaments having the value of civilization whether a fashion design is tangible, intangible or not. The open category of testaments having the value of civilization potentially complicates the border between cultural property and copyright as applied to fashion designs. Italian cultural property law regulates the sale of cultural property on the market, including its provenance and authenticity⁷⁰⁰², but is this necessarily the same as prohibiting counterfeit fashion design objects?

The porous borders between cultural property law, copyright law, and the legal institutes of cultural property and an unauthorized copy (or counterfeit) are illustrated by the *Flora* example. A specific scarf may be a cultural property, if not as a *visible image*, then as evidence of a specific creative moment of Vittorio Accornero, or as a testimony to the relationship between the celebrity Grace Kelly and an Italian brand at that time. Such a classification might allow a modern and contemporary Italian fashion design object to cultural property in its first iteration; copyrightable subject matter in its intangible elements, like a *visible image* or painting with a conceivably reproducible composition; and also copyrightable subject matter under Italian copyright law because it could be argued that the *Flora* design is of historic and artistic interest and effectively has iconic status. Here, the ability to protect the same or similar parts of the object in the different legal regimes of cultural property law and copyright law in different jurisdictions begs the question of how to deal with these overlaps. Would prohibiting exact copies of the *Flora* design in contemporary iterations by infringing actors make the first iteration of the *Flora* scarf more culturally valuable? Does the fact that one iteration of a *Flora* design object is recognized as cultural property make counterfeits, or unauthorized copies, less problematic?

There are still other modern and contemporary Italian fashion design

⁷⁰⁰² Art 64, CODICE, D.L. n. 42/2004.

objects which embody these overlaps and also pose challenges to the drawing of those very overlaps. Ferragamo's *Invisible Sandals*, for example, would most likely be considered of sufficient iconic, artistic and historic importance at the time of their creation, within their specific context, to be copyrightable subject matter under Italian law. At the same time, it is an open question whether or not the *Invisible Sandals* would qualify as an individual cultural property under Italian cultural property law or as a testament having value for civilization. The intangible cultural message of the *Invisible Sandal*, its innovativeness and historical importance, is caught up in the tangible shoe itself and in its materials. Yet, at the same time, that intangible cultural interest can change depending in which of the many tangible *Invisible Sandals* the design is included. Some tangible iterations show the use of one specific patented process, while others show another.¹⁰⁶³ Furthermore, under U.S. copyright law it may be impossible to separate any sculptural aspects of the nylon straps, for example, from their material, from the unique transparency on the foot thanks to how that transparency relates to one specific material. Where should we draw the lines then, if any, between these laws? Should Italian cultural property law protect each individual shoe, based on these variations, or none of them individually, because the intangible cultural interest is repeated across different materials? An image of the *Invisible Sandal* can, and has been, placed on scarves. Does this mean that its design is sufficiently non-replicable of the underlying useful article for U.S. copyright law? How far can the conceptual separability test and its relationship to cultural interest go and, therefore, compromise the efficacy of these overlaps ?

In some circumstances the blurred lines between these three legal regimes, and their support or frustration of counterfeits, seem to be even more uncertain. While U.S. copyright law does not purport to examine historic or artistic interest of a design to determine its copyrightability, in a recent case, the District Court for the Central District of California denied protection to any features of the design of a hookah bottle because they could not identify any as copyrightable subject matter. As part of their explanation of why copyright did not apply, the court noted,

¹⁰⁶³ See Patents n. 426001 (invenzione), of October 17, 1947; n. 26446 (modello d'utilità) of March 29, 1947 and n. 26655 (modello industrial) of May 10, 1947. Archivio Ferragamo. These observations are the result of a close Object Analysis of the shoes in the Ferragamo Archive in December 2018 and February 2019. For a full list of the *Invisible Sandals* examined in the Ferragamo archive see Appendix B, *Archivio Salvatore Ferragamo varianti modello Invisibile*.

there is nothing distinctive or artistic about the individual features--despite Inhale's flowery language describing the features, they are essentially geometric shapes of the most common type. Inhale itself recognizes that 'each individual geometric figure is not likely protectable.'...Combining two or three of these common geometric shapes together does little to improve the situation--the components of the water container at issue are simply not works of art in even the broadest, most liberal sense. See Compendium of Copyright Office Practices II § 503.02(b) ("[t]he [minimal] creative expression . . . [necessary for sculptural works] must consist of something more than the mere bringing together of two or three standard forms or shapes with minor or spatial variations.") This is not to say that there are not some, if not many, useful articles composed of unique geometric shapes variations or unique combinations of geometric shapes that might pass muster under the Star Athletica test. It is only to say that the water container at issue here is no Noguchi Table. ["The Noguchi Table was designed by Isamu Noguchi in 1939 for the then president of the Museum of Modern Art in New York City, the original remains in the museum's permanent collection."]¹⁰⁶⁴

The nature of cultural property and unauthorized copies are not necessarily two sides of the same coin. The possible artistic and historical interest in pictorial, graphic and sculptural features of designs of useful articles may not always be definitive for all copyright regimes. Likewise, the relationship between cultural interest, copyright, and cultural property may not be the same across jurisdictions. As a result, how cultural property law and copyright law should interact, if only to avoid an asymmetry of cultural interest between laws to the detriment of society at large, is an open question. What does seem evident, however, is that a cultural property theory of copyright law may not help fashion and luxury brand goods companies attain the restrictions on counterfeits that they ideally want. Emphasizing the broad cultural interest of a fashion design and fulfilling the proposed test for fashion design objects as cultural property under Italian law may mean that a copyright in a fashion design is so small in scope that counterfeits effectively do not or cannot exist.

3. Beyond Cultural Heritage Law? An Emerging Field for the Protection of Fashion Design Objects as Cultural Property

While this dissertation has proposed a legal standard for when certain Italian fashion designs may be considered fashion design objects eligible for classification as cultural property under Italian cultural property

¹⁰⁶⁴ 2017 U.S. Dist. LEXIS 201498 (C.D. CAL. , May 8, 2017) at *8 - *9.

law, there are many questions which follow. How is copyright law, both in the U.S. and in Italy, related to cultural property law as applied to fashion design objects when determinations of copyrightability seem to look to similar objects and use similar descriptive language as cultural property law? What effect, if any, might an overlap between Italian cultural property law and other copyright regimes have for the prevention of counterfeit, or unauthorized copies of, fashion design objects? What role may Fashion Law have or not have as part of cultural heritage law in addressing the public cultural interest in fashion design objects in the future?

One of the legal spheres this dissertation did not touch on, mainly because Italian cultural property law seems not to explicitly envision it as part of its legal sphere, are other intellectual property regimes like design rights and trademark. Design rights and trademark are important in a discussion of a public cultural interest in fashion design objects because they, often more than copyright, shape the public's perception of fashion design objects by giving owners exclusivity to their design for a period of time, or by assigning a narrow or broad right to proverbially speak on the market through fashion design objects and the symbols on them. Design patent law and trademark law also, moreover, have negotiations between the tangible and intangible inherent in their regimes. Design patent law requires the interpretation of drawings of objects to identify the ornamental, new and non-obvious protected parts which are also non-functional¹⁰⁶⁵, while trademark registrations are based on considerations of the types of material goods to which the mark is applied. The overlaps between cultural property law and these other legal regimes might be especially relevant for other categories of subject matter that are also of cultural interest, but that are not necessarily fashion designs or fashion design objects. In this sense, the relationships between trademark law and cultural property law, and design patent law and cultural property law, seem particularly important to inherit other designs and design objects as cultural property, including certain machines; other tangible examples of processes; or even the everyday design objects which are not part of fashion. Just like fashion design objects, these machines, tangible examples of processes, and everyday design objects may already be accepted as part of cultural heritage. Not only do museums such as the *Museo Nazionale della Scienza e della Tecnologia* in Milan already exist to preserve and valorize such objects, but even categories like photography and film are already protected under Italian cultural

¹⁰⁶⁵ See generally, EDWARD LEE, MARK MCKENNA AND DAVID SCHWARTZ, *THE LAW OF DESIGN: DESIGN PATENTS, TRADEMARKS AND COPYRIGHT: PROBLEMS, CASES AND MATERIALS* 46- 49 (West Academic, 2017).

property law through tangible examples of their processes. As we inherit outdated iPods, computers, televisions, and phones as part of our cultural heritage future, might design patents play a similar role as that here proposed by copyright in promoting (or frustrating) cultural consensus around these objects? Can design patent law at times, albeit for a shorter period of time, also act like an *ex ante* cultural property law regime both in the United States and in other territories that have more robust design law? The same questions may apply to an overlap between the legal notion of trademark and cultural property. As we increasingly inherit old websites and interfaces as part of our cultural heritage, can trademark law function as an *ex ante* cultural property regime to foster cultural consensus around certain intangible properties on the market? The fact that trademark is based on use and has no mandated expiration date means that the potential for overlap with the legal notion of cultural property may be even greater than with the legal notion of copyrightable subject matter. A trademark may continue to be used on the market to identify source and be protected long into cultural property law's time threshold. Does trademark law provide content-based restrictions on cultural consensus about the products to which it may apply? Are there doctrines, like copyright's merger and idea/expression, that may provide relief? How should these concerns be addressed? What is the difference, moreover, between the subject matter of trademark law and cultural property law, between identifying source on the market and the cultural messages and public cultural interest which Italian cultural property law is concerned with preserving? What is the line between source identification on the market and an identification of cultural value inside and outside of the cultural sphere for fashion design objects? Are there similarities between certain trade dress and fashion designs that are eligible for inclusion in the cultural property "box"?

Including certain fashion designs that are like *tangible texts* within the sphere of cultural property also begs the question of whether the institutions and regulatory agencies of cultural property should be expanded too. Should luxury brand goods companies be seen under the law as trustees for certain parts of their fashion products? How might this change their behavior? What about the administrative agencies that do not purport to regulate cultural property now, but regulate parts of intellectual property instead? Should these agencies be fully included within a framework for administrative action towards cultural property? How might this affect other areas of our cultural heritage that may also be in the *tangible text* realm, like literature?

Passing a proverbial cultural property torch to luxury brand goods

companies and administrative agencies who do not operate or conceive of themselves as the protectors of a public cultural interest comes with challenges. The guidelines in place for companies and even foundations may not be enough at the moment to facilitate the preservation and valorization of cultural property that is contemplated under cultural property law. The management of intellectual property rights may not be the same as the management of cultural property. On the other hand, some fashion brands and luxury brand goods companies have already accepted the important task of preserving, valorizing and making their historic fashion design objects available to the public. In some cases, imposing some sort of trustee-like standard, more than a business judgment rule, may be needed for the directors and boards of luxury brand goods companies when they make decisions affecting their fashion products that are considered historic. In other cases an elevated standard might not be necessary. Administrative agencies tasked with issuing trademarks and patents, and registering copyrights, may need to at least think about the ramifications that their actions have for cultural heritage and cultural consensus more broadly, apart from an already present consideration of the public domain of expired design rights, abandoned trademarks, or expired or even unregistrable copyrights. At the same time, such considerations by administrative agencies may lead to restrictions on speech or even on creativity itself.

Of course, one of the primary questions for an emerging field of protection for fashion design objects as cultural property is whether or not a traditional protection or regulation of Italian fashion design objects as cultural property is even needed. The recent Commission established by the Italian Minister of Cultural Heritage to study the matter seems to have sidestepped the issue of explicitly protecting fashion design objects in their tangibility, preferring to concentrate on the role of institutions.¹⁰⁶⁶ In its summary, the Commission emphasized the importance of corporate archives and networks to support artisanship and the creation of Italian fashion. The status of Italian fashion as a living, breathing activity that incorporates many different types of objects and iterations, as well as the importance of Italian style, seems to have led the Commission to privilege institutions and dynamic relationships over a separate “freezing” of objects. According to this summary report, the preservation of fashion design objects should, it seems, occur alongside a multitude of other initiatives. The subject matter of Italian cultural property is uniquely tangible and intangible. It seems it cannot be protected, according to members of the industry investigating the matter for the Ministry, except through a complex

¹⁰⁶⁶ For further discussion of the report see *supra* Chapter 1, Section 3.

network of Italian fashion between digital and physical archives, networks and institutions, archives and museums. At the same time as this report is revelatory, dodging the explicit question of where exactly to locate the public cultural interest of modern and contemporary Italian fashion design objects and how that assignment relates to other legal regimes like copyright may only be avoiding the question that must one day be directly answered. The cultural significance of certain modern and contemporary Italian fashion design objects might risk being lost if fashion design objects are not preserved or regulated as individual objects through Italian cultural property law. It is this cultural significance which must drive considerations of how fashion design objects are to be protected or treated as cultural property and the borders between different laws as we consider how to inherit Italian fashion design and its objects for our future.

APPENDIX A FIGURES

While the images reproduced in the hard copy version of this dissertation are used under fair use principles or with permission of the copyright holder, the images do not appear in the appendix as it is published in the Online Institutional Repository

Figure 1

Dolce&Gabbana Alta Moda Fashion Show, July 2019
Source: Anders Christian Madsen, *Dolce&Gabbana Alta Moda, Autumn/Winter 2019*, VOGUE UK, 6 July 2019,
<https://www.vogue.co.uk/shows/autumn-winter-2019-couture/dolce-gabbana-alta-moda>.

Figure 2

Dolce&Gabbana Alta Moda, Dresses, July 2019

Source: Anders Christian Madsen, *Dolce&Gabbana Alta Moda, Autumn/Winter 2019*, VOGUE UK, 6 July 2019,

<https://www.vogue.co.uk/shows/autumn-winter-2019-couture/dolce-gabbana-alta-moda>.

Figure 3

Dolce&Gabbana Alta Moda, Hats, July 2019

Source: Andrea Tenerani (@andreatenerani), INSTAGRAM,

<https://www.instagram.com/p/Bzi88eflgqQ/?igshid=1vep4d5els68c> (last visited July 16, 2019).

Figure 4

Example of *scheda* from the *Archivio della Moda del Novecento*

Source: ARCHIVIO DELLA MODA DEL NOVECENTO,

<http://www.moda.san.beniculturali.it/wordpress/> (last visited July 17, 2019).

Figure 5

Gucci *Forever Now* Campaign, 2010

Source: GUCCI: THE MAKING OF 368 (Frida Giannini, et al eds., 2010).

Figure 6

Ferragamo Runway Show, Piazza della Signora, June 2019

Source: Getty Images, shared with the article *Ferragamo al*

Pitti, la sfilata in piazza della Signoria, CORRIERE.IT,

<https://www.corriere.it/foto-gallery/moda/pitti-uomo-2019/19-giugno-12/ferragamo-pitti-sfilata-piazza-signoria-3b8ca9fa-8cee-11e9-98ba-037337d4fe50.shtml> (last visited July 16, 2019).

Figure 7

Gucci Pre-Fall 2019 Fashion Ads in Selinunte, Sicily

Source: @Gucci, TWITTER, May 2, 2019,

<https://twitter.com/gucci/status/1123897032840753153>.

Figure 8

Venetian Shoes in the Palazzo Davanzati, Florence, Italy

Source: Photo by author

Figure 9

Futurist Fashion Vest, 1930

Source: ACROSS ART AND FASHION (Stefania Ricci, ed., 2016).

Figure 10

Rosa Genoni's *Primavera* Dress, 1906

Source: ARCHIVIO DELLA MODA DEL NOVECENTO,

<http://www.moda.san.beniculturali.it/wordpress/> (last visited July 17, 2019).

Figure 11

Rosa Genoni's *Tanagra* Dress, 1909

Source: EUGENIA PAULICELLI, ROSA GENONI LA MODA È UNA
COSA SERIA: MILANO EXPO 1906 E LA GRANDE GUERRA (2015).

Figure 12

Comparison between Botticelli's *Primavera* and Rosa Genoni's Primavera Dress; Rosa Genoni's Pisanello Mantle and Pisanello's Drawing

Source: ARCHIVIO DELLA MODA DEL NOVECENTO, <http://www.moda.san.beniculturali.it/wordpress/> (last visited July 17, 2019).

Figure 13

VOGUE 1946 Article with Gucci and Ferragamo accessories in front of the Ponte Vecchio

Source: *The Italian School*, 108 VOGUE No. 9, November 15, 1946 at 166-167 (also reproduced in *GUCCI: THE MAKING OF* at 28) (also referred to in the VOGUE Database as part of a larger article entitled *British Appointments*).

Figure 14

Misni Prints

Source: Lindsay Talbot, *Inside Angela Misni's Rainbow Colored World*, N. Y. TIMES, August 14, 2018,

<https://www.nytimes.com/2018/08/14/t-magazine/angela-misni-fashion-designer-inspiration.html>

Figure 15

Gucci *Flora* prints in former GUCCI MUSEO, Piazza della Signora, Florence, Italy.

Source: Photos by author

Figure 16

Valentino Garavani Museum still

Source: Screen capture from VALENTINO GARAVANI MUSEUM,
<http://www.valentinogaravanimuseum.com/> (last visited
July 17, 2019).

Figure 17

Versace dress referred to as a Landmark by Richard Martin

Source: RICHARD MARTIN ET AL, GIANNI VERSACE 30- 31

(Metropolitan Museum of Art, 1997),

[https://www.metmuseum.org/art/metpublications/Gianni Versace](https://www.metmuseum.org/art/metpublications/Gianni_Versace).

Figure 18

Design Patent n. 73796 of 1958, image of one of many Gucci
"Bamboo Bags", Archivio Centrale dello Stato, Rome, Italy
Source: Photo by author

Figure 19

Moschino "I had nothing to wear" dress Pre-Fall 2015
Source: Photo by author

Figure 20

Ferragamo Rainbow Sandal, 1938

Source: *Collezione*, MUSEO SALVATORE FERRAGAMO,

https://www.ferragamo.com/museo/it/ita/scopri/collezione_e_scarpe/ (last visited July 17, 2019).

Figure 21

Giorgio Armani Dress from 1990, Poiret style / 1911 Poiret dress in the Costume Institute / 1913 Poiret dress at the Museum at FIT / 2016 Isabelle de Borchgrave Poiret work (left to right, from top to bottom)

Source: Photo by author (Armani); *Fancy Dress costume, 1911, Paul Poiret*, THE METROPOLITAN MUSEUM OF ART,

<https://www.metmuseum.org/art/collection/search/81781?&searchField=All&sortBy=Relevance&ft=paul+poiret&offset=0&rpp=80&pos=1> (last visited July 17, 2019) (Poiret);

Evening Dress, THE MUSEUM AT THE FASHION INSTITUTE OF TECHNOLOGY, <http://fashionmuseum.fitnyc.edu> (last visited

April 9, 2019) (Poiret); MODA DI CARTA: ISABELLE DE BÖRCHGRAVE A VILLA NECCHI CAMPIGLIO 77 (2016) (left to right, from top to bottom).

Figure 22

Mary Ping installation in *Items: Is Fashion Modern?*, MUSEUM OF MODERN ART, New York, New York, U.S.A.

Source: Photo by author

Figure 23

L.H.O.O.Q., Marcel Duchamp, 1919

Source: ArtStor, © 2008 Artists Rights Society (ARS), New York / ADAGP, Paris / Succession Marcel Duchamp (using under fair use principles, access through IMT School for Advanced Studies Lucca Library)

Figure 24

"REAL" Gucci, Autumn-Winter 2016

Source: Photo by author, GUCCI GALLERIA, Florence, Italy

Figure 25

Valentino Dress with Dante Text, Spring 2015 Couture

Source: Larry Busacca/Getty Images, "*Manus x Machina: Fashion In An Age Of Technology*" Costume Institute Gala – Arrivals, GETTY IMAGES,

<https://www.gettyimages.it/immagine/rachel-mcadams-valentino->

[manus?phrase=rachel%20mcadams,%20valentino,%20manus&sort=best#license](https://www.gettyimages.it/immagine/rachel-mcadams-valentino-manus?phrase=rachel%20mcadams,%20valentino,%20manus&sort=best#license) (last visited July 17, 2019) (used under fair

use principles)

Figure 26

Matsuda tie and shirt, 1988 and 1989

Source: Photos by author, with permission to take and use in dissertation but not to publish online from the Museum at FIT.

Figure 27

A rhapsode...

Source: *Neck-amphora*, THE BRITISH MUSEUM,

http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?assetId=221978001&objectId=399287&partId=1 (last visited July 17, 2019) (describing as

“Amphora Made in Attica, Attributed to the Kleophadres Painter, 490- 480 BC, Collection of the British Museum, Roman and Greek Antiquities”).

Figure 28

Zuccoli Dress with Santa Maria Novella Façade, 1990

Source: Photo by author, MUSEO DELLA MODA E DEL COSTUME,
Florence, Italy.

Figure 29

Moschino McDonald's Fall 2014 Ready-to-Wear

Source: Photo by author, with permission to take and use in dissertation but not to publish online from the Museum at FIT.

Figure 30

Designs of Cheerleading Uniforms at issue in the *Star Athletica* case

Source: Varsity Brands et al v. Star Athletica, No. 14-527, slip. op (6th Cir., August 19, 2015).

Figure 31

Invisible Sandals in the Archivio Ferragamo

Source: Photos by author, with permission to take and use in dissertation from Archivio and Museo Salvatore Ferragamo.

Figure 32

Gaultier and Stained Glass (top), Gucci Flora Shirt (bottom)

Source: Photo by author, METROPOLITAN MUSEUM OF ART

CLOISTERS, New York, New York, U.S.A.; GUCCI.COM

(previously available for sale)

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Legge 22 aprile 1941, n. 633 e successive modificazioni, Protezione del diritto d'autore e di altri diritti connessi al suo esercizio;

Decreto Legislativo 30 giugno 2003, n. 196, Codice in materia di protezione dei dati personali; allegato A2, Codice di deontologia e di buona condotta per i trattamenti di dati personali per scopi storici;

Decreto Legislativo 42/2004, Codice dei beni culturali e del paesaggio, e in particolare: artt. 2 e 10 sulla definizione di bene culturale; art. 103 sulla gratuità dell'accesso agli archivi pubblici per finalità di lettura, studio, ricerca; artt. 107 e 108 sulla riproduzione dei beni culturali e i corrispettivi ad essa connessi; art. 122 sulla consultabilità dei documenti conservati dagli archivi storici; art. 126 sulla protezione dei dati personali;

Decreto Ministeriale 20 aprile 2005, n. 18460, Indirizzi, criteri e modalità per la riproduzione di beni culturali, ai sensi dell'articolo 107 del decreto legislativo 22 gennaio 2004, n. 42;

Legge 9 maggio 1989 n. 168 concernente l'autonomia delle università.

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