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Fashion's Brand Heritage, Cultural Heritage, and the Piracy Paradox

Felicia Caponigri

FASHION'S BRAND HERITAGE, CULTURAL HERITAGE, AND *THE PIRACY PARADOX*♦

FELICIA CAPONIGRI*

ABSTRACT

This Article explores the role that heritage has on our understanding of the appropriateness of intellectual property protection for fashion designs in light of Christopher Sprigman and Kal Raustiala's seminal work in The Piracy Paradox. *At times, heritage seems to both reinforce Sprigman and Raustiala's argument that fashion thrives in a low-IP regime and, at other times, heritage challenges that argument. Taking Italian fashion design as a case study, this Article considers the intersection of brand heritage, cultural heritage, and intellectual property law and makes three central observations. First, that fashion designs reflecting brand heritage thrive in a low-IP regime. Second, that fashion designs might only benefit from a higher-IP regime in instances where we understand fashion designs not as brand heritage alone, but as part of a wider cultural heritage. Finally, understanding the relationship between copyright law and cultural heritage law is central to exploring how a higher-IP regime might benefit fashion designs today.*

* Term Teaching Professor, Program Director of the IP & Technology Law Program, and Acting Director of International and Graduate Programs, Notre Dame Law School. Ph.D., IMT School for Advanced Studies Lucca; J.D., *magna cum laude*, Notre Dame Law School; B.A., *cum laude*, The University of Notre Dame. Contact fcaponig@nd.edu. The author warmly thanks the editors of the *Cardozo Arts & Entertainment Law Journal*, as well as fellow participants in the virtual discussion on *The Piracy Paradox in an Era of Disruption*. The author also thanks colleagues at Notre Dame Law School for their helpful comments during the presentation of this work at a Spring 2021 Faculty Colloquium, as well as students in her Fall 2020 Fashion Law class at Notre Dame Law School for their classroom engagement with the topics explored in this paper. Please note that most translations in this article from the original Italian are by the author and have been so noted in footnotes. Any errors are my own.

INTRODUCTION

In 2018, the *Camera Nazionale della Moda Italiana*, in conjunction with the city of Milan and national economic agencies, co-sponsored an exhibition *Italiana: L'Italia Vista dalla Moda 1971–2001* at the Palazzo Reale. Meant as a reflection on Italian fashion's rightful place as part of culture, a celebration of the Italian fashion system, and a catalog of the forms of Italian fashion that had had an international impact over this important thirty-year period,[1] the exhibition displayed a pair of Tod's Gommino moccasins among its wider collection of Italian fashion design objects. Classified within the section "The Italy of Objects," the Gommino was described as one of many "must haves" of Italian fashion which "we all wanted, and that we often still possess . . . [that] reappear every now and then in the form of reeditions proposed by companies applying the logic of brand consolidation through so-called classics."[2] Described in the catalog as an iconic luxury product, the Gommino's presentation traced its origin story as a shoe for the leisure activities of the *haute bourgeoisie* since the 1970s while also referring to it as an inheritance from Native-American moccasins, related to contemporary American slip-on shoes.[3] The Gommino's continued relevance was cast in light of contemporary iterations by Tod's—copies—which did not alter a recognition of

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1 MARIA LUISA FRISA, GABRIELE MONTI & STEFANO TONCHI, ITALIANA: L'ITALIA VISTA DALLA MODA 1971–2001 [Italiana: Italy Through the Lens of Fashion 1971–2001] (2018).
2 *The Italy of Objects: Room 9*, https://italiana.cameramoda.it/en/rooms/9 [https://perma.cc/XBB7-KA4A] (last visited May 21, 2021) (reproducing exhibition wall text). Other examples included Ferragamo's Vara, the Fendi baguette bag, and Gucci moccasins.
3 Elda Danese, *Tod's Gommino*, *in* ITALIANA, *supra* note 1, at 351.

its historic value but, rather, naturally referenced its historic, original iteration.[4]

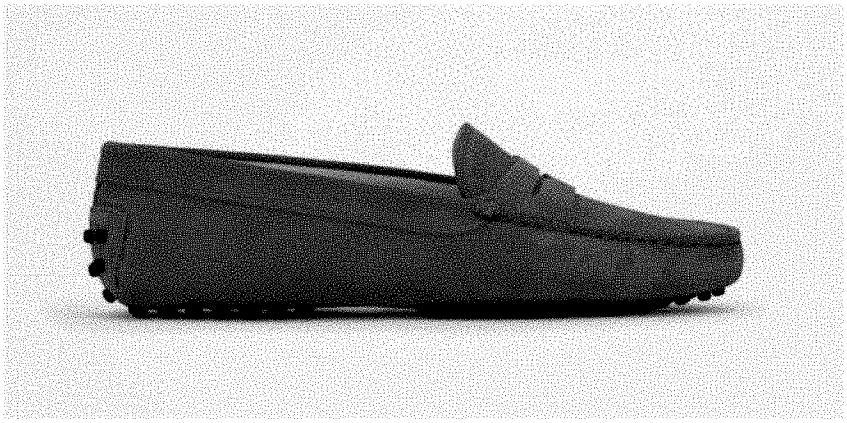

Figure 1. Tod's Gommino Driving Shoe.[5]

The inclusion of Tod's Gommino and its historicization within an exhibition created by the Italian fashion industry reflects an important market shift since the publication of Christopher Sprigman and Kal Raustiala's seminal article *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*. Published fifteen years ago in the midst of heated debates regarding whether to extend some if not all of copyright's exclusive bundle of rights to fashion design, the article's arguments have had an immense effect on the way we conceive of the suitability of intellectual property (IP) law for fashion. Taking an obvious but previously underexplored and important anomaly as the starting point for their argument, Raustiala and Sprigman observed that the fashion industry produces a huge variety of goods without the benefit of strong IP protection.[6] Apparel designs in the fashion industry, they observed, are largely "outside the domain of IP law."[7] "Design copying is ubiquitous,"[8] and yet apparel designs continue to be produced. Fashion innovation—

[4] *Id.*
[5] *Gommino Driving Shoes*, TOD'S, https://www.tods.com/us-en/p/XXW00G00010RE0G805/ [https://perma.cc/GPN8-KRRM (last visited May 23, 2021).
[6] Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1689 (2006).
[7] *Id.* By their description of a low-IP regime, Sprigman and Raustiala refer to the fact that "the three core forms of IP law—copyright, trademark, and patent—provide only very limited protection for fashion designs." *Id.* at 1699. They refer to: (a) copyright law's protection of a two-dimensional sketch, but not a three-dimensional garment from that sketch, and the ability of copiers to freely use that three-dimensional garment as a model, (b) design copies as not being considered counterfeits under trademark law's secondary meaning requirement, and (c) a relatively high bar of novelty in design patent and its practical application process. *Id.* at 1698–1705.
[8] *Id.* at 1689.

continued production of new designs in the fashion industry, and the industry's very survival—continues apace in a low-IP regime.

Raustiala and Sprigman answer this "puzzling outcome,"[9] which is contradictory in light of the standard utilitarian theory of IP rights, with a compelling thesis: copying, they argue, fails to deter innovation in the fashion industry because, counterintuitively, copying is not very harmful to originators. Freely copying an apparel design leads to its induced obsolescence, which spurs customers' desires for a new apparel design.[10] Moreover, freely copying leads to the anchoring of a trend, by which consumers understand which status-conferring apparel designs they should be wearing and which should be copied from originators in the first place.[11] All this copying brings added value on the market for originators' apparel designs. Viewed as a status-conferring good, apparel design and originators' status only grows and evolves with copying. Copying of apparel designs in the industry "may actually promote innovation and benefit originators."[12] This is the "piracy paradox."[13]

As part of their argument, Raustiala and Sprigman give various examples, including Tod's Gommino and the copying of its design.[14] In their observations of the copying of this shoe, the authors note that design copying, while still ubiquitous in this case, can occur "with a lag."[15] The Tod's driving shoe falls a bit outside the authors' model of induced obsolescence and anchoring, but they nevertheless argue that their process is "still at work" in the copying of the driving shoe, even as the fashion industry's convergence on this particular theme occurs over decades,[16] and the design does not become obsolete. But does this example fit the piracy paradox? What anchoring process is actually "at work" in this example, especially in light of contemporary observations of the iconic, historic nature of the design of Tod's driving shoe? Does induced obsolescence really work for fashion designs that remain constant and fashionable over long periods of time?

Today, we see an increased presentation of fashion's heritage value throughout segments of the fashion industry. While heritage is usually the province of luxury or high fashion items—and will be the focus of

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9 *Id.*
10 *Id.* at 1722.
11 *Id.* at 1728–29.
12 *Id.* at 1691.
13 *Id.*
14 *Id.* at 1712.
15 *Id.*
16 The lasting popularity of the Tod's shoe is evidenced by its twenty-fifth anniversary. *Id.* at 1729 (citing Armand Limnander, *The Remix; Back to Collage*, N.Y. TIMES MAG. (Aug. 28, 2005), https://www.nytimes.com/2005/08/28/magazine/style/the-remix-back-to-collage.html [https://perma.cc/5F2R-XHTZ]).

this Article—a retailer like Banana Republic, an American lifestyle brand that caters its designs to working women at the fast-fashion producer Zara's prices, has recently been touting "heritage collections."[17] What role might heritage play in the argument that copying is paradoxically good for the fashion industry, promoting innovation and benefiting originators? Does the importance of heritage in the fashion industry still indicate that fashion thrives in a low-IP regime?

Figure 2. Email communication from Banana Republic, promoting reissued iconic pieces from its archives.[18]

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[17] Banana Republic's recent digital campaign touted its heritage collection with the taglines "Reissued from our archives. Reimagined for today. The Heritage Collection." *The Women's Heritage Campaign*, BANANA REPUBLIC, https://bananarepublic.gap.com/browse/category.do?cid=1160880 [https://perma.cc/BLW9-YQSF] (last visited Feb. 23, 2021) (presenting Safari-inspired jackets alongside otherwise-ubiquitous halter tanks indicates historic designs linked to the brand's history and the related differentiation of designs one could easily also purchase elsewhere without that history); *see also* Amy Jurries, *Limited Edition Eddie Bauer Originals Collection*, GEAR CASTER (Sept. 27, 2016), https://www.thegearcaster.com/2016/09/limited-edition-eddie-bauer-originals-collection.html [https://perma.cc/L5DS-TB7] (reporting about the launch of Eddie Bauer's heritage "Originals Collection").

The use of "originals" to distinguish the value of a reissued design that can be made in multiples also raises the issue of why fashion designs, as originals like text, are outside the scope of copyright law, which seems best suited to regulating subject matter that is effectively the same, no matter where it is placed, and always an "original." This Article does not explore heritage in terms of originals and copies as the author has in other working papers and in her dissertation. The author leaves the difference between fashion designs as originals and copies, and the more express analysis of the tangible and intangible divide it requires, to future work. Note, however, that the prevalence of re-issued designs in the high-fashion and luxury sector has been even more pronounced. *See* Osman Ahmed, *From Versace to Helmut Lang, the Rise of Re-Issues*, BUS. OF FASHION (Oct. 12, 2017), https://www.businessoffashion.com/articles/fashion-week/from-versace-to-helmut-lang-the-rise-of-re-issues [https://perma.cc/RJ4Y-AE65].

[18] Email communication from Banana Republic, promoting reissued iconic pieces from its archives

Before the COVID-19 pandemic, the presentation of heritage within fashion designs was predominantly manifested by the physical presentation of fashion in museums. The fashion journalist Suzy Menkes, writing for *The New York Times* in 2011, 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.[19] Histories of other American museum collections, such as the evolution of the Fashion Institute of Technology's collection from a Design Lab to a museum,[20] demonstrate that our interest in fashion has evolved throughout the late-twentieth century from one focused not only on the use of past fashions to inform present designs but also to one focused on the preservation of fashions due to their historic, artistic, and still other cultural values.

In Europe, the connection between heritage and fashion is even more pronounced than in the United States. France collects examples of contemporary French fashion as part of its governmental support of French cultural heritage.[21] Italy, the primary case study for this Article, founded in 2009 a state-supported digital archive of fashion designs from

(July 13, 2020, 6:10 PM) (on file with author).

[19] 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 [https://perma.cc/S759-DDRZ]. The argument that fashion is like art has been explored to justify extending copyright design to fashion design. This Article deliberately sets aside arguments about fashion as art and explores fashion's place in the wider category of cultural heritage, which is also a legal term and category in international, supranational, and national law. For a comparative exploration of the recognition of fashion's artistic value and fashion's status as a work of art in Italian and U.S. copyright law, see Lucrezia Palandri, *Fashion as Art: Rights and Remedies in the Age of Social Media*, 9 LAWS (2020), https://doi.org/10.3390/laws9010009 [https://perma.cc/4YEB-WHB8].

[20] 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, held in trust, and not used as a functioning piece of clothing. *See History of the Museum*, MUSEUM AT FIT, http://www.fitnyc.edu/museum/about/history.php [https://perma.cc/UEM9-VRQT] (last visited Feb. 19, 2021). *See also* Lawrence L. Bethel, President, Fashion Inst. of Tech., Tentative Proposal of a Design Laboratory in Textiles and Costumes (Oct. 15, 1962) (on file with Costume Institute Records, The Metropolitan Museum of Art Archives, Box 5, Folder 15) (testifying to divergent opinion about the founding of the Museum at FIT by staff at the Metropolitan Museum of Art).

[21] Joelle Diderich, *French Government to Buy Five Designer Items Every Season*, WOMEN'S WEAR DAILY (Apr. 28, 2017), https://wwd.com/business-news/government-trade/french-government-to-buy-five-designer-items-every-season-10877385/ [https://perma.cc/V6SQ-XAH9] (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"); *see also* Robert F. Caillé & Jean-Philippe Lecat, *La Haute Couture, Notre Patrimoine* [Haute Couture, Our Heritage], VOGUE FR., Mar. 1980, at 283 (illustrating that the notion of *haute couture* was part of French cultural heritage as early as 1980); Jean-Philippe Lecat, *1980 L'année du Patrimoine* [The Year of Heritage], VOGUE FR., Mar. 1980, at 284 (same).

the twentieth century and, as part of the ceremony, declared this to be evidence that fashion is a part of cultural heritage.[22]

Figure 3. The Italian digital archive of fashion designs from the twentieth century.[23]

Today, the question of the relationship between heritage and IP law is increasingly important in light of changes to the fashion industry. As fashion retailers and consumers have been forced to largely abandon traditional shopping and embrace online platforms, and as museums have remained closed, heritage has gone digital. In a digital world where one website may be designed like another, and consumers cannot touch the clothes or otherwise physically experience a space of public trust, a fashion brand's corporate heritage and its links to cultural heritage within a nation or across geographic boundaries are market differentiators that can succeed alongside important emphases on sustainability and diversity.

This Article explores the role that heritage has in our understanding of the appropriateness of IP protection for fashion designs. At times, heritage seems to both reinforce Sprigman and Raustiala's argument and, at other times, challenge the notion of a low-IP regime. Taking Italian fashion design as a case study and using a comparative law methodology in light of Italian fashion brands' operations on both sides of the Atlantic, this Article uses the different conceptions of brand heritage and cultural heritage at play in the fashion industry to explore the role that a low-IP

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[22] *See, e.g.*, Donato Tamblé, Soprintendente archivistico per il Lazio [Archival Superintendent for Lazio], Intervento alla Conferenza Nazionale degli Archivi: Progetto "Archivi della moda del '900" [Presentation at the National Conference of Archives: Project "Fashion Archives of the 1900s"], at 3 (Nov. 20, 2009), https://www.moda.san.beniculturali.it/wordpress/wp-content/uploads/2011/07/Tamble.pdf [https://perma.cc/8GDU-9TZG] ("With the permanent manifestation of fashion in the fashion archives, we arrive . . . at the recognition of fashion as a cultural property.") (translation by author).

[23] ARCHIVI DELLA MODA DEL NOVECENTO, https://www.moda.san.beniculturali.it/wordpress/ [https://perma.cc/U2B2-KVYT] (last visited May 23, 2021).

regime has in promulgating fashion designs' heritage values.[24] It explores how heritage seems to, at times, spur greater IP protection for fashion. This Article makes three central observations. First, fashion designs reflecting brand heritage thrive in a low-IP regime. Brand heritage does not need more than trademark protection and, at times, does not even need trademark protection at all. Indeed, brand heritage is hard-pressed to be copied at all, which means that exact copies of fashion designs can be relatively unharmful in the fashion industry. Brand heritage seems to function both as part of the value proposition of a fashion design, allowing it to be identified as a trend (or, more aptly, a classic) while not becoming obsolete. Fashion brands also successfully make use of brand heritage as an extra-legal normative framework to communicate the very same brand heritage to consumers. Second, fashion designs might only benefit from a higher-IP regime in instances where we understand fashion designs not as brand heritage alone, but as part of a wider cultural heritage. Such a higher-IP regime is still, however, very limited in scope. Finally, in the process of my analysis, I identify some overlaps and links between two different but related legal regimes, copyright law and cultural heritage law. These overlaps and links implicate IP's negative space, which Raustiala and Sprigman discuss at the end of their article, thereby further "delimiting and exploring"[25] fashion's place outside the boundaries of intellectual property law.

I. FASHION'S BRAND HERITAGE AND INTELLECTUAL PROPERTY REGIMES

A discussion of heritage within the fashion industry implicates two different definitions of heritage: brand heritage and cultural heritage. First, I will focus on brand heritage. Brand heritage is most often used in business and marketing scholarship, and definitions vary from those considering brand heritage as "strictly connected to [a] brand's past"[26] to considering brand heritage "as a unique institutional trait of an

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[24] In this contribution the author limits herself to the scope of fashion design that Sprigman and Raustiala discuss: apparel and accessory designs. Other instances of fashion design, which may be more tied to tangible objects characterized as designs applied to apparel and products, and which may be less reproducible in other work, are not explored here but in other scholarship. *See* Felicia Caponigri, Fashion Design Objects as Cultural Property in Italy and in the United States (Dec. 17, 2019) (Ph.D. dissertation, IMT School for Advanced Studies Lucca) (on file with IMT E-theses database); Felicia Caponigri, Towards a Cultural Heritage Theory of Copyright Law? (unpublished manuscript) (on file with author).

[25] Raustiala & Sprigman, *supra* note 6, at 1775.

[26] Floriana Iannone & Francesco Izzo, *Salvatore Ferragamo: An Italian Heritage Brand and Its Museum*, 13 PLACE BRANDING & PUB. DIPL. 163, 163 (2017).

organization that embraces the past, present, and future"[27] and "brand identity."[28] What these definitions have in common is a brand's history: brand heritage refers to the history and narrative of a particular brand and may be used as a strong differentiator of a brand's value proposition.[29]

While heritage may be linked to authenticity,[30] authenticity *alone* is not heritage. Indeed, in some cases our common understandings of authenticity may fly in the face of our acceptance of certain brand heritages. The brand heritage of the fashion brand ABS by Allen Schwartz, for example, is uniquely tied to making copies of red carpet gowns.[31] We might argue that the brand was not authentic because it copied designs, or that it is authentic because, notwithstanding its copying, it actually produces and sells these copies under its own brand name. No matter which side we take, Allen Schwartz's copying of designer gowns and sale of these copies at lower prices is a part of the ABS brand heritage. One can be a "fast fashion copier," supposedly unauthentic, and still have a strong brand heritage that embraces an identity as a copier and, moreover, thrives on it.

Other examples of brand heritage as more than simple authenticity exist at the high-fashion level. Take Moschino under Jeremy Scott's leadership: Scott regularly copies and reworks parts of our pop culture—from Barbie Doll dresses to the McDonald's logo—in his fashion designs. When it comes to Scott's work, authenticity does not mean "not copied," nor does authenticity mean "not inspired by," "not linked to," or even "separate from cultural tropes and other brands' logos and symbols." Authenticity in the Moschino sense, rather, is informed by the unique design

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[27] *Id.* Note that some scholars draw differences between "brand heritage," a "heritage brand," and "a brand with a heritage." *Id.* at 166 (defining "brand heritage" as "a dimension of brand identity that managers can leverage as a corporate asset," "heritage brand" as "a brand that bases its value proposition and position on its heritage," and "a brand with heritage" as "a brand that—despite having substantial heritage—deliberately decides not to use it").

[28] *Id.* at 165.

[29] ERICA CORBELLINI & STEFANIA SAVIOLO, MANAGING FASHION AND LUXURY COMPANIES 26–28 (2009).

[30] *See* Susan B. Kaiser, Joseph H. Hancock II & Sara T. Bernstein, *Luxury and Its Opposites: A Critical Fashion Studies Perspective*, *in* THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY: CRITICAL REFLECTIONS 13, 21–22 (Haochen Sun, Barton Beebe & Madhavi Sunder eds., 2015) (discussing heritage and its associated storytelling in terms of an aura of authenticity); *see generally* Andrea Boccardi, Cristiano Ciappei, Lamberto Zollo & Maria Carmen Laudano, *The Role of Heritage and Authenticity in the Value Creation of Fashion Brand*, 9 INT'L BUS. RSCH. 135 (2016) (exploring the benefits and risks of heritage in terms of authenticity for brand marketing strategies).

[31] Lisa Liddane, *A Chat with Designer Allen Schwartz*, ORANGE CNTY. REG. (Dec. 24, 2013), https://www.ocregister.com/2013/12/24/a-chat-with-designer-allen-schwartz/ (last visited Feb. 18, 2021) ("I was watching the red carpet and got into the dress business. I'm a sportswear guy. I start thumbing through photos of these $4,000 to $5,000 dresses that no one could afford to wear. So I started making and selling these affordable dresses. Oprah saw the dresses, 'Entertainment Tonight' featured them. It's what I became known for. But I didn't want to be known only for red carpet dresses."); *see also* Raustiala & Sprigman, *supra* note 6, at 1705 (mentioning ABS as representative of the "steal" in Splurge & Steal spreads in fashion magazines).

identity of Moschino, one known for over-the-top cultural commentary.[32] Moschino's brand identity under Jeremy Scott is uniquely related to Moschino's origins under Franco Moschino and what has been described as Franco Moschino's "irreverent" design style.[33] Scott's designs and Moschino's brand heritage are also intimately related to copying, not only of styles intimately associated with pop culture but also of designs from other houses[34] and designers, and even of artists themselves.[35]

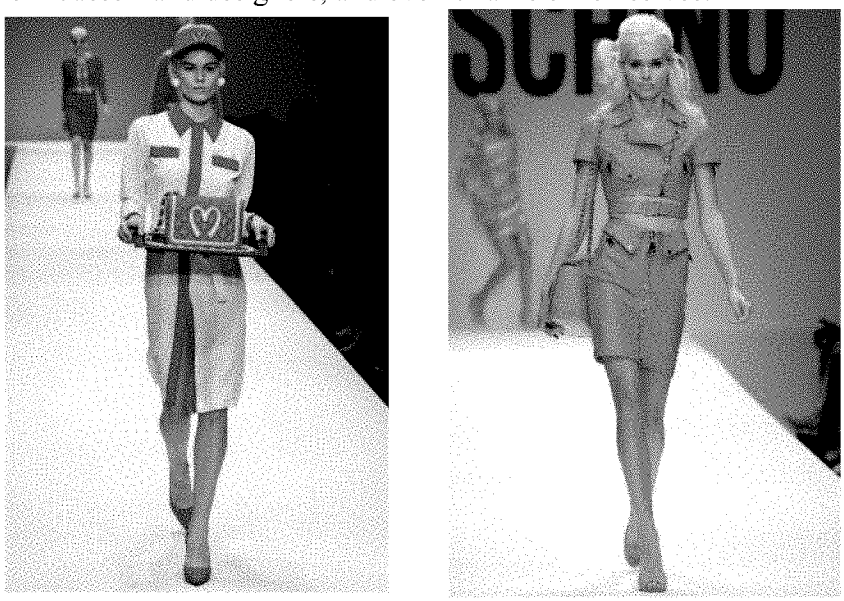

Figure 4. Images from VOGUE's coverage of Moschino's Fall 2014 Ready-to-Wear collection (L) and Spring 2015 Ready-to-Wear collection (R). Indigital Media Group, Vogue, © Condé Nast.

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[32] For a reflection on Moschino's "irreverent" roots in the 1980s and Jeremy Scott's current tenure, see Lizzie Widdicombe, *Barbie Boy: How Jeremy Scott Remade Moschino for the Instagram Era*, NEW YORKER (Mar. 14, 2016), https://www.newyorker.com/magazine/2016/03/21/jeremy-scotts-new-moschino [https://perma.cc/WVF6-M6BN] ("Even those who dismiss Scott's work agree that he is the perfect successor to Franco Moschino, who was sometimes called the court jester of Italian fashion. . . . Inspired by the Surrealists, [Moschino] filled his shows with absurd elements—playing cards, cow prints, rubber pig noses, question marks—and parodies of the latest trends. . . . At Moschino, Scott does many of these things, too. He even uses Franco Moschino's favorite symbols: cow prints, question marks. 'I play with Moschino codes now,' . . . but, . . . a lot of it is just Jeremy Scott, with a bigger budget.")

[33] Marc Karimzadeh, *Jeremy Scott on 20 Years of Fashion & Fun*, COUNCIL OF FASHION DESIGNERS OF AM. (Sept. 7, 2017), https://cfda.com/news/jeremy-scott-on-20-years-of-fashion-fun [https://perma.cc/UR8C-R6W9] (describing his inspiration from Franco Moschino as "[a]musing and so clever, twisting the quotidian with the surreal!"); Widdicombe, *supra* note 32 ("Two years ago, Scott was named the director of the Italian fashion house Moschino, an irreverent brand that flourished in the nineteen-eighties . . . .").

[34] *See, e.g.*, Widdicombe, *supra* note 32 (noting Scott's copying of the style of Chanel suits and bags in the Moschino Fall 2014 Ready-to-Wear collection inspired by McDonald's).

[35] *See, e.g.*, Cait Munro, *Moschino Designer Jeremy Scott Sued by Street Artist over Katy Perry Dress*, ARTNET NEWS (Aug. 5, 2015), https://news.artnet.com/art-world/moschino-designer-jeremy-scott-sued-street-artist-322947 [https://perma.cc/NX9A-85B2] (describing Moschino's copying of a graffiti artist's work).

Because a connection does exist between authenticity and brand heritage, the sustainment of brand heritage is often thought of in terms of trademark law, notwithstanding the fact that trademark law is not meant to strictly police authenticity. It is true that using a mark as a source-identifier for consumers in the market can also by extension convey other symbolic meanings, such as a company's history and place it in a broader cultural narrative.[36] Trademark law refers to this amalgamation of values as "goodwill"[37] and may even consider historic uses of marks—including those found by archivists[38]—as evidence of or related to considerations of the strength of marks in trademark infringement suits. But the brand heritage within fashion designs, like Tod's Gommino, may not be strictly maintained by trademark law and may still thrive in a low-IP regime. Indeed, fashion brands obtain and maintain the brand heritage within fashion designs by making use of IP rights *and* expired IP rights, by utilizing tangible products in innovative ways, and by leveraging intangible traditional craftsmanship and other extra-legal norms in the fashion industry.

What is fundamentally unique about brand heritage within fashion designs, as an amalgamation of a brand's identity, past, authenticity, storytelling, and timelessness, is that brand heritage is hard, if not impossible, to copy. Even if ABS by Allen Schwartz were, in its heyday,[39] to copy Gucci's fashion designs, the ABS by Allen Schwartz dress, notwithstanding its line-by-line copy of the Gucci design, would not embody Gucci's brand heritage. Indeed, we might even argue that, by copying the Gucci design, ABS might be supporting parts of Gucci's brand heritage in the making while supporting ABS's own brand identity and continued brand heritage.

While this argument mirrors Sprigman and Raustiala's argument that copying is fundamentally beneficial to originators and the fashion industry because fashion is a status-conferring good, and apparel design and originators' status therefore only grows and evolves with copying, it is subtly different. To be sure, the fashion brands that use brand heritage to their advantage are also luxury brands whose value proposition is not just founded on timelessness and tradition but also wrapped up in status.[40]

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[36] ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 23 (1998).

[37] 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 2:15–2:21, Westlaw (5th ed., database updated Dec. 2020).

[38] *See, e.g.*, Gucci SpA v. Guess? Inc, Trib., sez. specializzata, 10 gennaio 2013, n. 6095 (It.), *reprinted in* DIRITTO E GIUSTIZIA [L. & Just.], https://www.sugamele.it/allegati/05-07-2013-SP_SOC_13TribMi_aliprandi_s.pdf [https://perma.cc/XXY7-WVXQ] (trademark infringement suit in Italy) (translation by author).

[39] The brand has apparently moved away from copying red carpet dresses. *See* Liddane, *supra* note 31.

[40] CORBELLINI & SAVIOLO, *supra* note 29, at 19.

These fashion and luxury brand examples are the ones discussed most in depth in this Article through the Italian examples of Ferragamo, Gucci, Valentino, and, to a lesser extent, Armani. But brand heritage is not status alone, nor is it confined to high fashion or luxury brands. A fast-fashion copier itself can have a strong brand heritage informed by a history of copying, which grounds consumers' decisions to buy these copied fashion designs. Brand heritage provides benefits to originators and the fashion industry at large by allowing multiple fashion stories and narratives to exist in the marketplace, alongside design copies; this continues to support the status-conferring nature of fashion, but also allows for innovation in the fashion industry and the exercise of consumers' choice.

Because brand heritage links individual fashion designs to a brand's past and history, the reproduction of the heritage embodied in these designs is hard-pressed to be copied, no matter the segment of the fashion industry at issue. Without the ability to copy the design's history, copies are not a threat. A higher-IP regime with rights greater than those already afforded through trademark and patent rights would serve no purpose when we consider brand heritage as the important differentiator of fashion designs. As a result, brand heritage, and fashion designs that embody that brand heritage, paradoxically still thrive in a low-IP regime. Some examples in Italian fashion are illustrative.

A. *Brand Heritage at Ferragamo Without Patent Protection*

Consider the case of Salvatore Ferragamo and its museum exhibitions of corporate ephemera, including expired design patents. Founded in the early twentieth century by Salvatore Ferragamo—a shoemaker from the small town of Bonito outside of Naples, Italy—the Ferragamo brand has been known since its inception for the innovative shoe designs of its founder. Ferragamo first set up shop, literally and figuratively, in Hollywood in the 1920s and made a business out of making shoes for films and film stars.[41] Returning to Italy in 1927 after living and working in the United States, Ferragamo made a point of obtaining patents for his shoe designs. Among the many designs Ferragamo patented were the F heel and multiple aspects of his Invisible Sandal. A shoe made with one continuous strand of nylon thread, the inspiration for the Invisible Sandal arrived when an artisan in Ferragamo's workshop shared that he always used nylon threads when fishing, as the unsuspecting fish were tricked by the invisible connection of the bait to the hook.[42]

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[41] *See* SALVATORE FERRAGAMO, IL CALZOLAIO DEI SOGNI: AUTOBIOGRAFIA DI SALVATORE FERRAGAMO [The Shoemaker of Dreams: The Autobiography of Salvatore Ferragamo] 51–59 (2010) (discussing Ferragamo's time in Hollywood).

[42] *Id.* at 212.

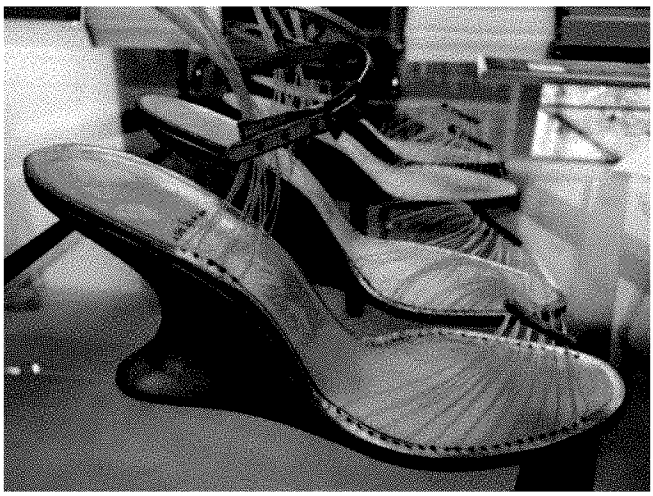

Figure 5. Historic examples of the Invisible Sandal, Museo Ferragamo. © Felicia Caponigri

Inspired by this exchange, Ferragamo registered three aspects of the Invisible Sandal with Italy's patent office.[43] The first filing in November 1946 was for an ornamental model (akin to the U.S. design patent) claiming the look of

> a women's shoe [in the form of] a sandal, with a wedge (orthopedic) heel having various laces made of threads of transparent material, the various threads being made of single filaments; a braid connects the various threads on the back of the foot, to form a strap to tie the shoe; a bundle of threads circles the heel at the back.[44]

The second filing in December 1946 for a utility model[45] claimed an improvement to the process of shoemaking whereby

> one can obtain shoes executed with a transparent and resistant material, as, for example, and in this example, with the product noted in

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[43] *See* It. Patent No. 426001 (filed Jan. 27, 1947) (industrial invention) (on file with Ferragamo Archive and Central State Archive in Rome, Italy) (translated by author); It. Patent No. 26446 (filed Dec. 12, 1946) (utility model) (on file with Ferragamo Archive and Central State Archive in Rome, Italy) (translated by author); Italian Patent No. 26655 (filed Nov. 16, 1946) (ornamental model) (on file with Ferragamo Archive and Central State Archive in Rome, Italy) (translated by author).

[44] '655 Patent, *supra* note 43.

[45] *See* ROSIE BURBIDGE, EUROPEAN FASHION LAW: A PRACTICAL GUIDE FROM START-UP TO GLOBAL SUCCESS 100 (2019) (explaining that utility models are a right unique to specific national jurisdictions outside the United States and are sometimes referred to as "petty patents"); Art. 82, c. della proprietá industriale [Indus. Prop. Code] (It.) (explaining that utility patents, like inventions in this Italian model, require novelty, nonobviousness, and applicability to industry, while a utility model patent is extended to "new models which confer particular efficacy or ease of application or use."); *see generally Brevetti* [Patents], MINISTERO DELLO SVILUPPO ECONOMICO [Ministry of Econ. Dev.], https://uibm.mise.gov.it/index.php/it/brevetti [https://perma.cc/2KYF-KTP3] (describing the differences between industrial inventions, utility models, and ornamental models in Italian patent law).

> commerce with the name "nailon" [sic] (that is exactly esametilen-tretammin and adipic acid) with which we can obtain a special configuration of the shoe upper and eventually the sole.[46]

Ferragamo's last filing in January 1947 was for an industrial invention (akin to our U.S. utility patent), in which he claimed the discovery of "a procedure for the manufacture of shoes, where the shoe upper and the sole are created on the form simultaneously thereby forming the shoe directly."[47] In this industrial invention, Ferragamo described the process of creating the Invisible Sandal in detail. Whereas in previous shoe-making processes the shoe upper and shoe form had to be assembled separately and then glued together on a shoe form, the Invisible Sandal process allowed the entire shoe to be created at the same time by threading one continuous nylon thread through individual holes along the contours of the insole.[48] Passing through the insole's holes in various ways, Ferragamo described two threading processes. In the first, the thread passed completely under the insole between holes on opposite sides of it, while in the second, the thread alternatively passed between holes on the same side of the insole to then pass through the other side of the insole to form the shoe upper.[49] Not limiting himself to the use of nylon thread, Ferragamo also described this same process with a ribbon, braid, or other material.[50]

During the life of its patent[51] the Invisible Sandal was widely publicized[52] and helped win Ferragamo the Neiman Marcus award.[53] Although it was not a runaway best-seller—which Ferragamo surmised was due to its propensity to lay a woman's foot completely bare,[54]—the Invisible Sandal has today become an important component of the Ferragamo brand's identity and current value proposition based on its heritage. Despite the expiration of its associated patent rights, the sandal is still

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46 '446 Patent, *supra* note 43.
47 '001 Patent, *supra* note 43.
48 *Id.*
49 *Id.*
50 *Id.*
51 According to Italian patent laws at the time, the term of an industrial invention was twenty years. *See* R.D. n. 189/1939 (It.). While there is circumstantial evidence that Ferragamo filed patents during his time in the United States, no record of U.S. patents from 1915 to 1927 has been found. *See* STEFANIA RICCI, IDEAS, MODELS, INVENTIONS: THE PATENTS AND COMPANY TRADEMARKS OF SALVATORE FERRAGAMO FROM 1929 TO 1964, at 10 (2004) (also describing the national limitation of the scope of Ferragamo's patents).
52 CRISTINA MOROZZI, FASHION UNFOLDS: SALVATORE FERRAGAMO 39 (2014) (reproducing one advertisement from Saks Fifth Avenue in the United States, describing the style as one example of Ferragamo's "famous" footwork); *Ferragamo: un piede nella sua bellezza* [Ferragamo: A Foot in Its Beauty], IL MATTINO ILLUSTRATO [Illustrated Morning], Apr. 20, 1947, at 37 (noting the model had been widely ordered not only by Saks but also by Fortnum & Mason in London, Nordiska Kompaniet in Stockholm, and other stores in other countries).
53 FERRAGAMO, *supra* note 41, at 212.
54 *Id.*

produced and sold by the Ferragamo brand. Even without a right to prohibit the copying of the look of the shoe or the process of its creation under patent law in Italy, the Invisible Sandal and its design still communicate Ferragamo's genius, the innovative qualities of the design of the Invisible Sandal,[55] and the brand's very identity across a number of

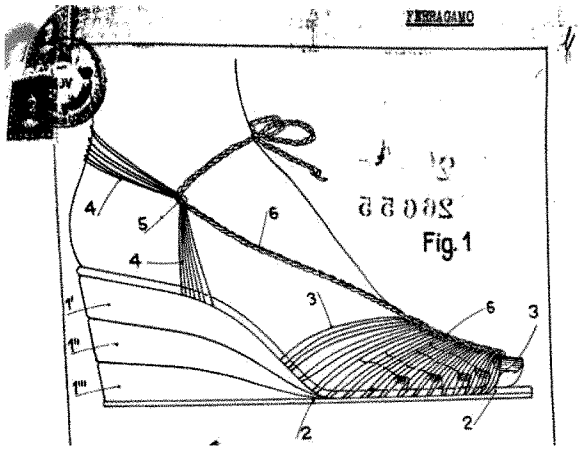

Figure 6(a). Central State Archives, MICA, Italian Patent and Trademark Office, Ornamental Model, N. 26655

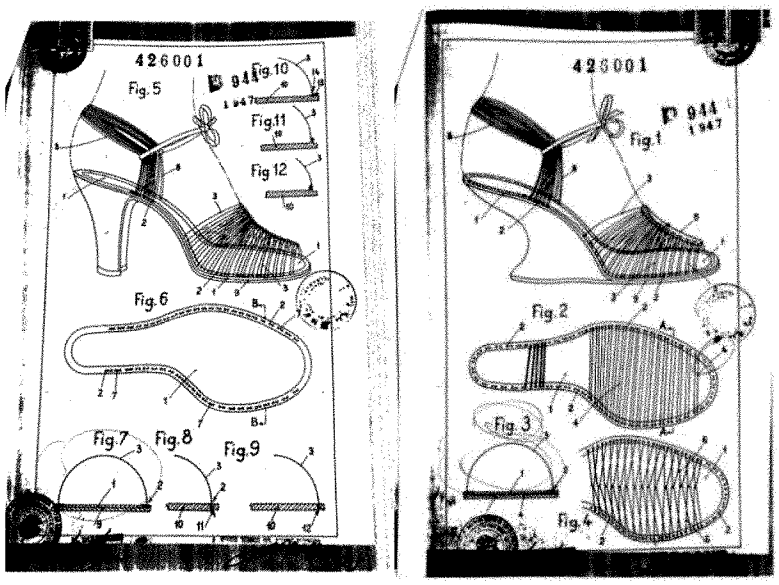

Figure 6(b). Central State Archives, MICA, Italian Patent and Trademark Office, Invention, N. 426001

[55] Lindsay Talbot, *A Revolutionary Shoe Design Updated for a New Century*, N.Y. TIMES MAG., https://www.nytimes.com/2021/03/26/t-magazine/fashion/salvatore-ferragamo-invisible-sandal.html [https://perma.cc/RS89-8J2C] (last updated Mar. 27, 2021).

different products, including scarves. And Ferragamo has built on parts of the design of the Invisible Sandal in its current collection.[56]

Without patent rights, the main way in which the Ferragamo brand still communicates the brand heritage identified with the Invisible Sandal is by including examples of the sandal in museum displays and crafting strategic communications about the design's place in the brand's history. At the same time, it continues to produce the sandal in limited editions. The main vehicle for these activities is the Museo Ferragamo and its relationships with other parts of the Ferragamo corporation. Founded in 1995, the Ferragamo Museum preserves Ferragamo's past corporate ephemera.[57] The museum collection includes material evidence of expired intellectual property rights, newspaper articles, historic Ferragamo logos from artists, and film reels and photographs.[58] It also includes examples of shoe uppers and forms used in Ferragamo's design process, the shoe forms of famous celebrities—including Audrey Hepburn, Sophia Loren, and Marilyn Monroe, among others—and, perhaps most importantly, numerous tangible shoes, the material iterations of Ferragamo's designs.[59] The museum's 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"[60] within a wider imperative of "communicating corporate heritage and celebrating the essence of 'Made in Italy.'"[61] Exhibitions at the museum regularly display parts of the collection alongside works of art and other cultural properties from museums and private collections in Italy and elsewhere around the world. Without benefiting from Ferragamo's right to control copies of the fashion designs displayed in the museum, these exhibitions still communicate the value of the designs Ferragamo originated and the importance of the current Ferragamo products. IP rights beyond those that have expired—for example, trademarks that

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[56] Consider the reproduction of the image of the Invisible Sandal on scarves. @1stDibs, *Iconic Salvatore Ferragamo Scarf with Shoe Designs*, PINTEREST, https://www.pinterest.com/pin/394627986090526891/ [https://perma.cc/3L5F-8TAD]; Victoria and Albert Museum, *Scarf: V&A Explore the Collections*, PINTEREST (Apr. 2021), https://www.pinterest.com/pin/472666923364397093/ [https://perma.cc/2TRC-HQKC]. The Ferragamo Museum has also created magnets of the Invisible Sandal and stationery that are sold in its gift shop. *See Sneak Peak of Salvatore Ferragamo Shoes History*, KITTEN VOYAGE (Jan. 21, 2017), https://kittenvoyage.wordpress.com/2017/01/21/sneak-peak-of-salvatore-ferragamo-shoes-history/ [https://perma.cc/9P6D-A9WP].

[57] *Mission*, MUSEO SALVATORE FERRAGAMO, https://www.ferragamo.com/museo/en/mission [https://perma.cc/NYT4-NDLM] (last visited May 10, 2021).

[58] *Museum History*, MUSEO SALVATORE FERRAGAMO, https://www.ferragamo.com/museo/en/usa/discover/history_museum/# [https://perma.cc/5GTU-RNGT] (last visited Jan. 31, 2021) (photos of exhibitions showing items in collection). The museum also offers a virtual tour of the archive. *Archive Virtual Tour*, MUSEO SALVATORE FERRAGAMO, https://www.ferragamo.com/museo/en/virtual-tour-archivio (last visited May 21, 2021).

[59] *Archive Virtual Tour*, *supra* note 58.

[60] *Museum History*, *supra* note 58.

[61] Iannone & Izzo, *supra* note 26, at 164.

would be in effect and support consumers' association of the Invisible Sandal with Ferragamo,[62]—are not necessarily needed to communicate this design's brand heritage and its place within the fashion industry.

Other activities and norms beyond those of IP law sufficiently support Ferragamo's continued production of the sandal and its relevance in the market. In 2004, for example, the Ferragamo Museum leveraged Ferragamo's expired design patents and marks that were no longer in use through an exhibition *Ideas, Models, and Inventions*.[63] Working with Italy's Ministry of Cultural Heritage and the Ministry for Industry, Commerce, and Artisanship, the Ferragamo Museum presented knowledge of these patents as "something to be treasured because it gives us deeper insight into Ferragamo's creativity and technical experience and . . . offers us fresh points of observation, study and learning which may even lead to new ideas for original and innovative creations in the future."[64] The exhibition's presentation of the Invisible Sandal placed it within a greater narrative of Italian design alongside the work of futurists.[65] Presenting brand heritage in a low-IP regime would seem to support continued innovation in the fashion industry and would seem to be of continued benefit to the Ferragamo brand as the heir of the Invisible Sandal's originator.

Indeed, we might even say that a low-IP regime has allowed the Ferragamo brand to be even more innovative in the shadow of its founder. The presentation of the historic value and innovative qualities of Ferragamo's past products in the Ferragamo Museum informed the brand's choice in 2007 to create a luxury line of reproductions of historic shoes

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62 We could, for example, imagine that trade dress might apply to parts of the Invisible Sandal. Although Italian law and European law also have the doctrine of aesthetic functionality (referred to as "substantial value"), and in light of similar limits to the scope of trade dress in the United States, we could wonder which parts of the Invisible Sandal might still be eligible for trademark protection, and which might be deemed aesthetically functional and thus not protectible. For a recent description of trade dress protection in Italy, *see generally* Marco Martorana & Roberta Savella, *I marchi di forma e la valutazione del carattere distintivo* [Marks of Form and the Evaluation of Distinctiveness], ALTALEX (July 2, 2020), https://www.altalex.com/documents/news/2020/07/02/marchi-di-forma-e-valutazione-carattere-distintivo [https://web.archive.org/web/20210216041144/https://www.altalex.com/documents/news/2020/07/02/marchi-di-forma-e-valutazione-carattere-distintivo] (discussing, in part, the finding by a Turin court that Piaggo's Vespa design was sufficiently distinctive). *See also* Elena Varese & Sofia Barabino, *La tutela della forma delle creazioni di moda: problematiche e prospettive* [The Protection of the Forms of Fashion Creations: Problems and Perspectives], *in* FASHION LAW: LE PROBLEMATICHE GIURIDICHE DELLA FILIERA DELLA MODA [Fashion Law: The Legal Problems of the Fashion Industry] 93, 98–103 (Barbara Pozzo & Valentina Jacometti eds., 2016) (discussing status of Ferragamo brand's buckle as a mark).

63 *See* RICCI, *supra* note 51.

64 *Id.* at 11.

65 Giuseppe di Somma, *Salvatore Ferragamo: The Object of Design*, *in* IDEAS, MODELS, INVENTIONS, *supra* note 51, at 60, 61 ("Even though he liked to take things to extremes, he reduced signs to a minimum in 1947 when he made the transparent shoe. In this shoe, the aerodynamic wedge heel seemed to have drawn on the futurist digressions of Florence's Cesare Augusto Poggi.").

from the archive and museum collection.[66] Today, the brand sells re-editions of specific archival designs made by contemporary artisans through this line, called Ferragamo's Creations.[67] The Invisible Sandal is one such design. While we might characterize it as a high-end museum gift shop reproduction, the contemporary Invisible Sandal is sold in an independent Ferragamo's Creations boutique attached to Ferragamo's flagship store in Florence and in smaller displays throughout Ferragamo's luxury retail locations around the world. Far from a static reproduction, the design of the Invisible Sandal has also been "revisited" in light of the original description in the expired patent. Instead of one continuous thread, artisans now use individual and multiple threads to create the shoe upper, which allows for easier repairs if one of the nylon threads breaks and "renders the shoe more modern and functional."[68] There is no evidence that Ferragamo has attempted to patent this improved process.

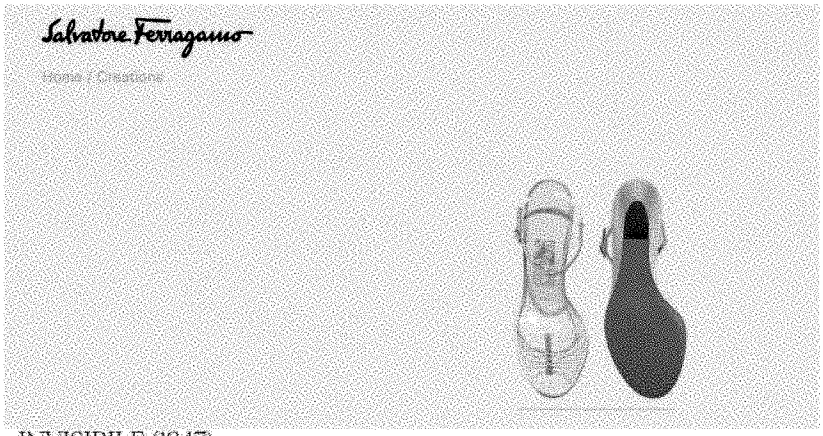

Figure 7. Ferragamo's Creations Invisible Sandal.[69]

Recognized and sold as an important part of Ferragamo's history, the production and place of Ferragamo's Invisible Sandal in the current fashion industry successfully exists in a low-IP regime. Despite the lack of an express right to prohibit copies of the design of the Invisible Sandal, Ferragamo has used other activities beyond IP law to convey the fashionable nature of this design and its place at the pinnacle of Italian luxury products. Central to this success is connecting the Invisible Sandal to

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[66] *Ferragamo's Creations*, SALVATORE FERRAGAMO, https://www.ferragamo.com/shop/us/en/special-collections/creations-us [https://perma.cc/H54V-3ZC2] (last visited Feb. 16, 2021).
[67] *Id.*
[68] Interview with Ferragamo Museum about the Ferragamo's Creations craftsmanship process for Invisible Sandal (Apr. 16, 2019).
[69] *Invisibile (1947)*, SALVATORE FERRAGAMO, https://www.ferragamo.com/shop/us/en/ferragamocreations-us/-536871--1 [https://perma.cc/PNH5-C8TG] (last visited May 23, 2021).

Ferragamo's brand heritage, which does not seem to need increased IP rights, nor a prohibition on copying the Invisible Sandal's design.

B. *Brand Heritage at Gucci Beyond Trademark Rights*

As a second example of the thriving of fashion designs with brand heritage in a low-IP regime, consider Gucci's Flora pattern, which continues to be produced, bought, and celebrated without the benefit of trademark rights in Italy. This success, and continued innovation of the Flora pattern,[70] seems intimately related to the brand heritage embodied in the Flora pattern and to Gucci's continued emphasis of the Flora's connection to Gucci's history in its previous museum, advertising campaigns, and current designs. While Gucci may have lately been in the news under Alessandro Michele's direction for its embrace of a modified fashion show schedule,[71] innovative decisions to show men's and women's

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[70] *See* Luca Solca, *How to Fix the House of Gucci*, BUS. OF FASHION (Oct. 22, 2015), https://www.businessoffashion.com/opinions/finance/gucci-q3-sales-earnings-finance-2015 [https://web.archive.org/web/20210514045432/https://www.businessoffashion.com/opinions/finance/gucci-q3-sales-earnings-finance-2015] (commenting that Gucci has "risked losing its fashion currency," but recognizing former creative director Frida Giannini's success as "a master at reviving former Gucci icons—bringing back the house's floral print as a 2005 bag collection"); Luisa Zargani, *The House of Gucci: A Complete History and Timeline*, WOMEN'S WEAR DAILY (May 6, 2021), https://wwd.com/fashion-news/designer-luxury/house-of-gucci-maurizio-gucci-tom-ford-patrizia-reggiani-history-timeline-1234813497/ [https://perma.cc/KH9L-TVBF] (noting that the Flora pattern "has become iconic for Gucci," revisited by creative directors Giannini and, most recently, in April 2021 by Michele in his Aria collection, which marks the brand's one-hundredth anniversary and revisits "a number of Gucci signature designs, from the Bamboo bag to the Flora motif . . . ."). The Flora pattern continues to be produced in conjunction with other Gucci icons and in new forms of "Flora print," beyond its classic version from the 1960s. *See, e.g.*, *Neon Flora*, GUCCI, https://www.gucci.com/us/en/st/stories/inspirations-and-codes/article/cruise-2019-neon-flora-shoppable [https://perma.cc/JHA8-G6JV]; *New Flora Print Cotton Midi Dress*, GUCCI, https://www.gucci.com/us/en/pr/women/ready-to-wear-for-women/dresses-for-women/mini-dresses-for-women/new-flora-print-cotton-midi-dress-p-619132ZAFGD9172 [https://perma.cc/KPZ5-AMPM] (a "new Flora" dress); *Look 62, Aria: The Looks*, GUCCI, https://www.gucci.com/us/en/st/stories/article/aria-fashion-show-looks-gallery-33-64 [https://perma.cc/6SE2-8KUR] (model wearing the Flora print from head to toe); Vanessa Friedman, *Is Fashion Hacking the Future? Gucci Says Yes*, N.Y. TIMES (Apr. 16, 2021), https://www.nytimes.com/2021/04/16/style/gucci-balenciaga-celine-fall-2021.html [https://perma.cc/8VMG-VQFY] ("Balenciaga signature spandex boots remade in Gucci Flora print."). Creative director Alessandro Michele has regularly added snakes, bees, and other insects to the pattern. *See. e.g.*, Edward Barsamian, *Emma Stone Goes Au Naturel in Gucci*, VOGUE (Nov. 18, 2016), https://www.vogue.com/article/emma-stone-gucci-floral-snake-print-dress-celebrity-red-carpet-style [https://perma.cc/A9WG-6HMH] (fireflies); *Flora Snake Print Neck Bow*, GUCCI, https://www.gucci.com/us/en/pr/women/accessories-for-women/silks-and-scarves-for-women/neck-bows-for-women/flora-snake-print-neck-bow-p-4527433G0019260 [https://perma.cc/7E6L-2A2E] (snakes); *GG Flora Print Shawl*, GUCCI, https://www.gucci.com/us/en/pr/women/accessories-for-women/silks-and-scarves-for-women/shawls-for-women/gg-flora-print-shawl-p-6093183G1659774 [https://perma.cc/4SP4-QTJ3] (butterflies).

[71] Tim Blanks, *Why Gucci's Alessandro Michele Is Shaking Up the Fashion Calendar*, BUS. OF FASHION (May 26, 2020), https://www.businessoffashion.com/opinions/luxury/gucci-alessandro-michele-fashion-calendar-seasonless (last visited Feb. 21, 2021).

fashion together on the runway,[72] and a unisex design aesthetic[73] that may veer into the realm of cultural appropriation,[74] heritage still plays an important role in Gucci's continued relevance in the fashion industry in the face of copying. Gucci's brand heritage allows the brand to continue to benefit, economically and culturally, in the face of copying, whether this copying is by fast-fashion companies[75] or even by Gucci itself.[76]

In 2010, under the direction of Michele's predecessor Frida Giannini, Gucci began the Forever Now[77] advertising campaign.[78] Described as a deliberately oxymoronic phrase that "allow[ed] Gucci to go

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[72] Steff Yotka, *Gucci Will Shake Up the Fashion System with a Single Men's and Women's Runway Show*, VOGUE (Apr. 5, 2016), https://www.vogue.com/article/gucci-unify-mens-womens-runway-show [https://perma.cc/V74V-QE8M].

[73] Rebecca Mead, *Gucci's Renaissance Man*, NEW YORKER (Sept. 12, 2016), https://www.newyorker.com/magazine/2016/09/19/guccis-renaissance-man [https://perma.cc/J6KM-QGKY] (describing Michele's aesthetic at Gucci); Angela Velasquez, *Taking Style Cues From Consumers, Gucci Launches Gender Fluid Line*, SOURCING J.: RIVET (July 28, 2020), https://sourcingjournal.com/denim/denim-brands/gucci-gender-fluid-fashion-mx-project-alessandro-michele-gen-z-223432/ [https://perma.cc/SP92-PDUE] (discussing Gucci's MX Project collection and noting, "Though Alessandro Michele's men's wear designs for Gucci have skewed gender-free, and its shows welcome both male and female models wearing clothing interchangeably, a new collection marks the official debut of the luxury fashion house's genderless fashion."); Selene Oliva, *The Pussy Bow Blouse: How to Wear It*, VOGUE ITALIA (Aug. 9, 2015), https://www.vogue.it/en/trends/trend-of-the-day/2015/09/the-pussy-bow-blouse-how-to-wear-it [https://perma.cc/A39P-NNL4] ("Alessandro Michele for Gucci turned [the pussy bow] into a symbol of genderless apparel, worn by women and men alike and teamed with straight pants and loafers.")

[74] *See* David Marchese, *Dapper Dan on Creating Style, Logomania and Working with Gucci*, N.Y. TIMES MAG. (July 1, 2019), https://www.nytimes.com/interactive/2019/07/01/magazine/dapper-dan-hip-hop-style.html [https://perma.cc/JXM7-4VFP] (describing Gucci's collaboration with Dapper Dan after his creation of designs allegedly infringing Gucci's marks); Amy Held, *Gucci Apologizes and Removes Sweater Following 'Blackface' Backlash*, NPR (Feb. 7, 2019, 1:22 PM), https://www.npr.org/2019/02/07/692314950/gucci-apologizes-and-removes-sweater-following-blackface-backlash [https://perma.cc/26QW-SYTU].

[75] *See The Counterfeit Report: The Big Business of Fakes*, FASHION L. (Oct. 11, 2019), https://www.thefashionlaw.com/the-counterfeit-report-the-impact-on-the-fashion-industry/ [https://perma.cc/BJ9F-UCHL] (listing Gucci among the luxury brands that are "most heavily targeted by counterfeit makers"); Sarah Shannon, *Gucci Escalates Legal Battle with Forever 21*, BUS. OF FASHION (Aug. 8, 2017), https://www.businessoffashion.com/articles/news-analysis/gucci-escalates-legal-battle-with-forever-21 [https://web.archive.org/web/20210410023716/https://www.businessoffashion.com/articles/news-analysis/gucci-escalates-legal-battle-with-forever-21] (depicting the images of copied apparel, including apparel featuring the Flora pattern).

[76] Deliberate designs by Gucci embrace the fact that others copy its designs and logos. *See, e.g.*, *Zaino con stampa 'Fake/Not' misura media*, GUCCI, https://www.gucci.com/it/it/pr/men/bags-for-men/backpacks-for-men/fake/not-print-medium-backpack-p-6366542GCCG8289 [https://perma.cc/P86R-W59T]. Gucci has also been accused of copying others, and Gucci relies on its brand heritage *when it copies*. *See, e.g.*, Tyler McCall, *Don't Call Gucci's Work With Balenciaga a 'Collaboration,'* FASHIONISTA (Apr. 15, 2021), https://fashionista.com/2021/04/gucci-aria-collection-review [https://perma.cc/BR74-EKHC] ("For Michele, 'hacking' means taking iconic Gvasalia-era Balenciaga designs and throwing them in a blender with Gucci signatures. There's bell-shaped suiting rendered in Gucci's brown-and-black color scheme, Gucci's name appearing alongside Balenciaga's in its blocky font; skin-tight sock boots with sharp toes done up in Gucci's floral print; Balenciaga's Hourglass bag covered in Gucci's double-G logo.")

[77] The GUCCI MUSEO FOREVER NOW mark was registered with the USPTO. U.S. Trademark Registration No. 4,515,681. For a list of registered Gucci marks, see *Gucci Trademarks*, GERBEN TRADEMARK LIBR., https://www.gerbenlaw.com/trademarks/apparel/gucci/ [https://perma.cc/3ZLT-VBUL] (last visited Feb. 19, 2021).

[78] Simone Marchetti, *Forever Now*, *in* GUCCI: THE MAKING OF 368 (2011).

backwards and forwards through time as though it were possible to step into a time machine,"[79] the campaign took direct inspiration from Gucci's historical archive and juxtaposed the past with the present within contemporary fashion.[80] One of the central parts of the Forever Now campaign was the Flora pattern.[81] Created in the 1960s by Vittorio Accornero at the request of Rodolfo Gucci for Grace Kelly,[82] the Flora is a complex composition of intertwined flowers of all different species with fruits and insects.[83] Akin to a modern fashion still life, this fabric design was first placed on a scarf, then, on floral mini-dresses in the 1960s, and finally on T-shirts in the 1980s.[84]

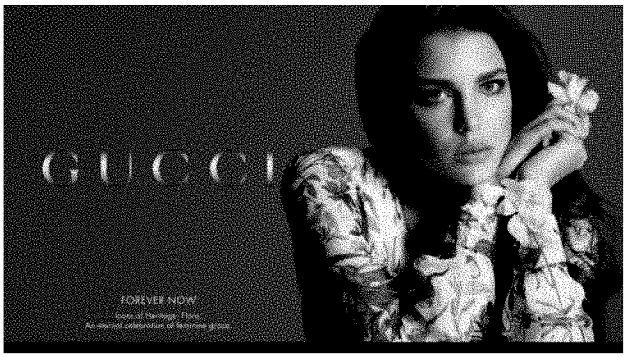

Figure 8. GUCCO Forever Now advertisement of the Flora print.[85]

While we might characterize it as a fabric design,[86] in its corresponding to the shape of the scarf[87] the fabric design also walks the line

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[79] *Id.*
[80] *Id.*
[81] *See, e.g.*, GUCCI, *Gucci Presents: Forever Now, Flora*, YOUTUBE (Feb. 8, 2013), https://www.youtube.com/watch?v=LTPuc9rrzZ8 (Mar. 15, 2021) (promotional video featuring Charlotte Casiraghi, Grace Kelly's granddaughter for whom the Flora was originally designed).
[82] Alessandra Vaccari, *Flora*, *in* GUCCI: THE MAKING OF, *supra* note 78, at 86.
[83] *Id.* ("Flora is a delicate and whimsical composition of flowers, fruits, and insects, drawn with a naturalist's precision in thirty-seven colors on a white background. The nine bouquets, laid out on a quincunx contain lilies, heather, poppies, bluebottles, daffodils, buttercups, anemones, tulips, and irises, while butterflies, dragonflies, wasps, grasshoppers, and beetles play among the leaves and petals.")
[84] *Id.* at 92.
[85] *Third Time's a Charm: Charlotte Casiraghi in Gucci's "Forever Now" Flora Campaign*, CHERIE BOMB (Feb. 5, 2013), https://thecheriebomb.com/2013/02/05/third-times-a-charm-charlotte-casiraghi-in-guccis-forever-now-flora-campaign/ [https://perma.cc/Y9M9-7JNK].
[86] Much of the debate in the United States over the scope of copyright protection for fashion design has centered on whether fashion design is applied art and therefore, like a fabric design or pattern, separable from an underlying useful article and copyrightable subject matter. Fabric designs and patterns have traditionally been copyrightable. For a taste of arguments that certain designs are more or less like applied art and, therefore, more or less separable, see Brief for Intellectual Property Professors as Amicus Curiae Supporting Petitioner at 1–2, 4–6, Star Athletica LLC v. Varsity Brands, Inc., 137 U.S. 1002 (2017) (No. 15-866); Brief for the Respondents at 16–17, 18, *Star Athletica*, 137 U.S. 1002 (No. 15-866) (characterizing chevrons, stripes, and color blocks as applied art, and emphasizing that the design found itself on the cheerleading uniform and not as a part of it).
[87] *Star Athletica*, 137 U.S. at 1012–13.

of an apparel design of the kind Raustiala and Sprigman discuss. In 2005, Giannini used the Flora pattern as the theme of her Cruise collection, repeating a historic fabric intimately associated with Gucci's past creativity

Figure 9. A Gucci Flora scarf. © Felicia Caponigri

Figure 10. A display of the Flora on a variety of scarves and other items in the Gucci Galleria in Florence, Italy, March 9, 2018. © Felicia Caponigri

and its connection to celebrity in a contemporary moment.[88] During his tenure, Michele has also used the Flora print, adding snakes to its

[88] Vaccari, *supra* note 82, at 92 ("Flora enjoyed new success with the cruise accessory collection in Summer 2005, the first Gucci collection that Frida Giannini created in her own name.").

composition, embracing more variations, and even creating it in neon colors.[89] In 2011 Gucci opened the Gucci Museo in Florence, which included an entire room dedicated to the Flora design, including material examples of it on dresses and scarves.[90] Today, the Gucci Galleria, a contemporary design space, continues to display Gucci scarves with the Flora design.[91]

The success of the Flora was supported by trademark rights in Italy for a period of time. That changed, however, with the *Gucci v. Guess* case in Italy. While Guess's alleged infringement of a number of Gucci's trademarks was litigated in numerous jurisdictions around the world,[92] the Italian case included alleged infringement of the Flora mark, unlike the case litigated in the Southern District of New York,[93] in which the Repeating GG Pattern/Diamond Motif Trade Dress, the green-red-green stripe, and the Stylized "G" were mainly at issue.[94] Registered both in Italy as a national mark and at the E.U. level as a community mark, the Flora mark was, according to Gucci's arguments in the Court of First Instance in Milan, infringed by a pair of shoes Guess produced with an imitating floral print.[95] As part of its argument for the distinctiveness of the Flora design and its validity as a mark Gucci emphasized to the Court that "[t]he print was created in 1966 for Princess Grace Kelly of Monaco and was described as a most noted icon of the Florentine house."[96] In response, Guess countered that Gucci's Flora mark was invalid because it either added substantial value to the product (and was thereby aesthetically functional),[97] did not have distinctive character (the ability to identify Gucci as the source of the pattern), or was a generic mark, "given the

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[89] *Neon Flora*, *supra* note 70.

[90] For an image of the Flora room, see Maria Luisa Frisa, *Gucci Museo*, DOMUS (Oct. 20, 2011), https://www.domusweb.it/en/design/2011/10/20/gucci-museo.html [https://perma.cc/F2Y3-GJWX].

[91] Images of Gucci Galleria (on file with author).

[92] *See Almost 10 Years Later, Gucci and Guess Make Peace in Global Legal War*, FASHION L. (Apr. 18, 2018), https://www.thefashionlaw.com/almost-10-years-later-gucci-and-guess-make-peace-in-global-legal-war/ [https://perma.cc/9CP4-FYHK] (describing various decisions as to Guess's trademark infringement of Gucci's marks in different jurisdictions).

[93] Gucci Am., Inc. v. Guess?, Inc., 868 F. Supp. 2d 207 (S.D.N.Y. 2012).

[94] *Id.* at 215. The Script Gucci mark was also at issue in the case litigated in New York. *Id.* at 220.

[95] Gucci SpA v. Guess? Inc, Trib., sez. specializzata, n. 6095, *supra* note 38.

[96] *Id.* at 24. The use of history was, in fact, a central part of Gucci's arguments for continued uses of its marks at issue in the case, as evidenced by the testimony of Mrs. Grazia Maria Venneri, Gucci's historical archivist since 2001, which the Court cites as part of its discussion of the validity and infringement of Gucci's stylized word mark in cursive and the serially repeated G pattern. *Id.* at 34–35, 52.

[97] *Id.* at 59. For a discussion of substantial value in Italian law, see Varese & Barabino, *supra* note 62, at 99–101. A comparative reading of the Louboutin case in the Second Circuit and at the Court of Justice of the European Union further sheds light on the similarities and differences between "significant non-reputation-related disadvantage" and "substantial value." *Compare* Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc., 696 F.3d 206 (2d Cir. 2012), *with* Case C-163/16, Christian Louboutin SAS v. Van Haren Schoenen BV, ECLI:EU:C:2018:423 (June 12, 2018) (discussing whether the concept of shape applies to two-dimensional works and holding that the color as applied to the shoe was not a shape).

consistent number of floral prints used in the field of fashion."[98] Recognizing Gucci's right to use the Flora as a mark, Guess argued, would effectively give Gucci a monopoly on any and all flowers as applied to the accessories at issue.[99] Although Gucci argued the use of the Flora was historic and continuous, dating to the 1960s, Guess argued that the design had in fact not been used by the brand for twenty years until Giannini's use in her collections for the brand.[100] Siding with Guess, the Milan court held the Flora mark invalid as its aesthetic elements predominated over any indication of source.[101] In comparative terms, the court held the Flora design to be aesthetically functional and went on to observe that even if it were not, the Flora design had not acquired secondary meaning, despite Gucci's arguments.[102] While an Italian appeals court ultimately found Guess liable for "parasitic copying," a form of unfair competition, as a separate issue,[103] the appeals court affirmed the invalidity of the Flora mark.[104]

Despite the invalidity of the Flora mark in Italy and what seems to be a similar lack of trademark rights in the Flora pattern in the United States,[105] the Flora design has still thrived as a popular Gucci print within Gucci's historic identity and storytelling efforts. Notwithstanding Gucci's lack of trademark rights in the Flora pattern in Italy, and its uncertain status as a mark in the United States,[106] Gucci continues to use the Flora design as an integral part of its collections. Even in the face of the

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98 Gucci SpA v. Guess? Inc, Trib., sez. specializzata, n. 6095, *supra* note 38, at 24.

99 "Gucci would have the power to help itself to any type of flower represented in the design at issue." *Id.*

100 *Id.* This fact is debatable seeing as during the Tom Ford era, Flora designs on Gucci scarves were still produced in the early 1990s. When Ford first started at the brand (in the early 1990s), he "won quick praise for his fresh ideas—even though they were often based on Gucci's 70-year archive of styles." John Tagliabue, *Gucci Gains Ground with Revival of Style*, N.Y. TIMES (Dec. 14, 1995), https://www.nytimes.com/1995/12/14/business/international-business-gucci-gains-ground-with-revival-style-belt-tightening.html [https://perma.cc/RRH6-ZS8M]; *see Flower Power*, *in* GUCCI: THE MAKING OF, *supra* note 78 (graphic insert depicting scarves in floral motif patterns produced through the early 1990s).

101 Gucci SpA v. Guess? Inc, Trib., sez. specializzata, n. 6095, *supra* note 38, at 62–63 ("In the opinion of the Court, the mark under examination, represented by a fabric with a floral design, particularly desired and aesthetically pleasing, cannot be considered valid as a mark, in as much as it is possible to gather from the same that the aesthetic element is predominant, if not clearly exclusive and in any event determinative of the consumer's choices, not as indicative of a certain provenance but for its ornamental function.") *Id.* The court also took notice of the fact that Gucci had registered the pattern as an ornamental design and had obtained design rights in it. *Id.*

102 *Id.* at 63.

103 BURBIDGE, *supra* note 45, at 346–49 (describing parasitic copying and the *Gucci v. Guess* case).

104 On appeal, Guess overwhelmingly won on trademark infringement but lost on the unfair competition claim. App. Milano, 15 settembre 2014, n. 3308 (It.).

105 A search on TESS through the USPTO reveals that while Gucci has registered the word mark FLORA BY GUCCI for perfume, *see* U.S. Trademark Registration Nos. 3,627,729 and 3,627,732, the Flora pattern does not seem to be registered as a mark.

106 Even if Gucci wishes to argue that the Flora were trade dress in the Unites States, its use of flowers might arguably give rise to a "significant non-reputation-related disadvantage" and be aesthetically functional.

copying of the Flora design in Italy,[107] Gucci still sells scarves and clothing with Accornero's classic Flora design and other—what we might call derivative—iterations. Trademark law, in this instance, is not needed to create a benefit to Gucci, nor is it needed to spur Gucci's innovation and creation of new Flora designs. Rather, it would seem that the brand heritage in the Flora design, on the one hand, supports its continued use in the market and its recognition by consumers and, on the other hand also acts as an extra-legal norm in and of itself when manifested through Gucci's promotional campaigns, museum exhibitions, and other communications. In the current trademark regime, the Flora not only survives but thrives due to the brand heritage it embodies, and brand heritage acts as its own normative regime beyond trademark law. The power of Gucci's brand heritage in the face of full-scale copying of other fashion brands has most recently been on display in Michele's Aria fashion show. The Flora design communicated its own narrative as part of the one-hundredth anniversary of the Gucci brand, essentially overpowering the styles and logos Michele copied from Balenciaga.[108]

Beyond trademark law, the case of brand heritage within the Flora design also indicates that the current scope of copyright protection in the United States may also be of sufficient benefit for fashion design originators and innovation within the fashion industry. Gucci seems to have registered the Flora pattern as a pictorial, graphic, and sculptural work at the U.S. Copyright Office.[109] Notwithstanding a copyright in the Flora, the brand has still seemed to rely on trademark rights for other design items in litigation against fast-fashion brands, even design items that copy the Flora design on the same allegedly infringing items of apparel.[110]

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107 This author bought a dress in Tuscany with a copy of the Flora pattern with Michele's additions of snakes for thirty euro.

108 Michele's "hacking" is a mix of heritage and copying. *See* McCall, *supra* note 76 ("For Michele, 'hacking' means taking iconic Gvasalia-era Balenciaga designs and throwing them in a blender with Gucci signatures. There's bell-shaped suiting rendered in Gucci's brown-and-black color scheme, Gucci's name appearing alongside Balenciaga's in its blocky font; skin-tight sock boots with sharp toes done up in Gucci's floral print; Balenciaga's Hourglass bag covered in Gucci's double-G logo."). For a broader review of the show and collection implying the strong narratives of both brands, see Luisa Zargani, *Exploring the Gucci/Balenciaga Tie-up*, WOMEN'S WEAR DAILY (Apr. 16, 2021), https://wwd.com/fashion-news/designer-luxury/exploring-gucci-balenciaga-project-1234803170/ [https://perma.cc/3KHS-HUBD].

109 *See* U.S. Copyright Registration No. VA 1-433-237. Knowing of the strong copyright and moral rights extended to authors in Italy under *diritto d'autore* [copyright], Vito Accornero may still have rights in the Flora design, although there is no evidence thus far that Accornero or Gucci listed the Flora work with the Italian Ministry of Culture's recordation office, the closest agency office that would keep track of copyrights like the U.S. Copyright Office. For a description of the role that the Italian Society of Authors and Editors plays in keeping public registries for other categories of works, although it also, comparatively, acts more like a collective rights agency, see ANDREA SIROTTI GAUDENZI, IL NUOVO DIRITTO D'AUTORE [The New Copyright (or Right of Authors)] 130–142 (10th ed. 2018).

110 *See, e.g.*, Forever 21, Inc. v. Gucci Am., Inc., No. 2:17-cv-04706, 2018 WL 5860684, at *1 (C.D. Cal. Feb. 9, 2018); *see also* Shannon, *supra* note 75 (depicting an image of the jacket at issue

Even the current copyright in the Flora pattern has not seemed to have led to a campaign to stop copying of the Flora design.[111] Even armed with a copyright in the design, Gucci seems to rely more on promoting brand heritage through extra-legal norms in the fashion industry. And brand heritage within the Flora design seems to be the overarching reason that the design continues to be identified as a fashionable design, is of benefit to its originator, and still promotes design innovation notwithstanding its copying.

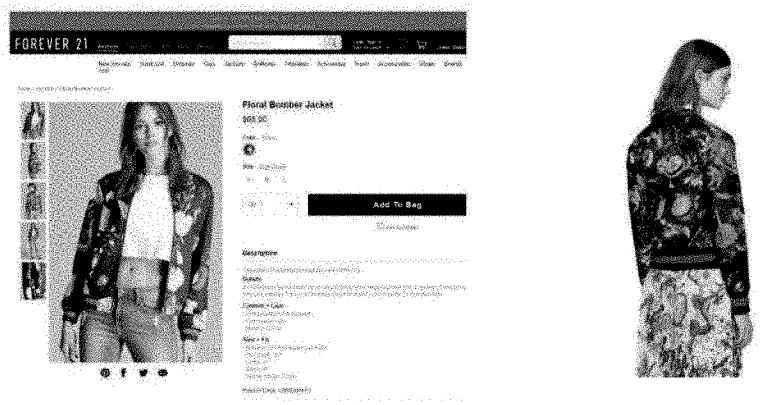

Figure 11. Left: Image of Floral Bomber Jacket sold by Forever 21, copying Gucci's Flora pattern in black.[112] *Right:* Gucci Flora Bomber for sale on the resale market.[113]

C. *Digital Brand Heritage for Valentino and Armani*

Virtual museums and digital archives are the last example of how a low-IP regime for fashion designs can still benefit originators and promote innovation in the industry. Fashion brands today have overwhelmingly mass-migrated to digital platforms to showcase collections and interact with consumers due to the global pandemic and the changes it has wrought on the retail industry. Practitioners and scholars have increasingly begun to consider what new technology-related rights—most often

in the litigation).

111 Although this may also be attributable due to the small scope of the copyright in light of what might be considered substantially similar and infringing under various tests. The impact of infringement tests when extended even to a narrow scope of copyright protection for fashion designs is also discussed by Raustiala and Sprigman in their own response to Hemphill and Suk's argument for an extension of copyright to close copies and a new "substantial difference" test. *See* Christopher Sprigman & Kal Raustiala, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1206 (2009); *see also* discussion *infra* note 158.

112 Complaint at 7, Forever 21, Inc. v. Gucci Am., Inc., No. 2:17-cv-04706, 2017 WL 2781597 (C.D. Cal. June 16, 2017).

113 *Gucci Black Flora Snake Bomber Jacket*, CLOTHBASE, https://clothbase.com/items/268039a0_gucci-black-flora-snake-bomber-jacket_gucci [https://perma.cc/PD8H-HHHE] (last visited May 23, 2021).

privacy and data protection—apply to fashion brands as they continue to operate online.[114]

However, digital platforms that feature fashion designs also raise questions about new ways of controlling the dissemination of fashion designs in the face of widespread copying in a low-IP regime.[115] Similarly, the interaction between legal rights in a digital platform and the relatively higher IP legal regimes for fashion designs in countries such as France and Italy[116] particularly raise questions about the role digital platforms play in the cycle of copying, which Raustiala and Sprigman identify as beneficial to originators and promoting innovation.

The rights in virtual fashion museums and digital archives seem to be most used as alternative ways to communicate brand heritage and not as a mutant form of intellectual property protection for fashion designs themselves. Digital museums and archives[117] primarily serve as vehicles to communicate the innovation and story of a fashion brand's founder. In the process of founding them, brands have used current intellectual property regimes in various jurisdictions to their advantage, but without prohibiting the copying of fashion design themselves.

Take the example of Valentino Garavani's Virtual Museum.[118] Launched in 2011, Valentino's designs and his legacy as an individual designer who created a historic and valuable fashion brand is presented

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114 Consider the addition to a fashion law casebook of a whole chapter dedicated to privacy. *See* Miriam Farhi & Meredith Halama, *Privacy*, *in* THE BUSINESS AND LAW OF FASHION AND RETAIL 945–94 (Barbara Kolsun & Douglas Hand eds., 2020). A recent article in Italy's SOLE24ORE named privacy and data protection as increasingly important in the face of virtual fashion shows and online events. *See* Valeria Uva, *Moda, cibo e videogame le sfide per 2021 per i "tecno" avvocati* [Fashion, Food, and Videogames: The Challenges for 2021 for "Techno" Attorneys], SOLE24ORE (Jan. 31, 2021), https://www.ilsole24ore.com/art/moda-cibo-e-videogame-sfide-2021-i-tecno-avvocati-ADlSzuEB [https://perma.cc/FKM7-EBFM].

115 Blockchain, for example, is one way to not just control the supply chain but track the provenance of a copy. Maghan McDowell, *6 Ways Blockchain Is Changing Luxury*, VOGUE BUS. (May 14, 2019), https://www.voguebusiness.com/technology/6-ways-blockchain-changing-luxury [https://perma.cc/2V2S-UGDL].

116 As Raustiala & Sprigman describe in *The Piracy Paradox* by mentioning design rights in the European Union, but which is also the case in copyright regimes in France and Italy, which recognize certain fashion designs as part of copyrightable subject matter. *See* Code de la propriété intellectuelle [Intell. Prop. Code] art. L112-2 (Fr.); Art. 2(10) c. della proprietá industriale [Indus. Prop. Code], L. n. 633/1941 (It.).

117 Increasingly of interest in Italy, not only now during the pandemic and lockdown but previously as a tool for tourism. *See* Paola Labadessa & Simone Gabriele Paratore, *Virtual Museums as Opportunity and Perspective for Tourism Development: Some Italian Cases*, *in* CONTEMPORARY ECONOMIES IN THE FACE OF NEW CHALLENGES: ECONOMIC, SOCIAL AND LEGAL ASPECTS 633 (Ryszard Borowiecki et al. eds., 2013).

118 The relationship between the museum, Valentino as a founder and designer, and Valentino as a brand is complex. Founded upon Valentino's retirement from the brand, the virtual museum and the fashion design it displays is still fundamentally connected to the brand and its history and yet, it was founded after Valentino and Giancarlo Giammetti had sold their financial stake in the fashion company. *See Inside Valentino Garavani's Virtual Museum*, BUS. OF FASHION (Dec. 7, 2011), https://www.businessoffashion.com/articles/technology/digital-scorecard-valentino-garavani-virtual-museum [https://perma.cc/2V9Y-G2L6] (noting the virtual museum's "sole aim of securing the designer's legacy").

in this digital space. Once downloaded, a virtual museum-goer can wander through digital environments that contain images of Valentino's celebrated fashion designs, strategically placed in a space resembling the forty-fifth-anniversary exhibition Valentino held in Rome's *Ara Pacis* in 2007.[119] Described by computer scientists as "impostors,"[120] the virtual fashions in the museum are photographs propped up onto digital models in a UNITY 3D software and geometric model.[121]

The presentation of fashion designs as photographs indicates that copyright law in its current state, inasmuch as it protects pictorial works in the United States[122] and photographs elsewhere,[123] does have a role to play in the communication and acceptance of designs' brand heritage. Using intellectual property protection for software,[124] images,[125] and audiovisual or multimedia projects[126] has played a role in the dissemination of brand heritage and in the recognition that certain fashion designs are fashionable while, at the same time, being continued classics. At the same time, claiming intellectual property and technology rights in this virtual museum has not given Valentino a right to control the copying of the underlying fashion design,[127] nor has the founding of the museum seemed to lead to extensive arguments to prevent the copying of fashion designs displayed in it. Rather, the virtual museum strategically used intellectual property rights as part of complex negotiations to communicate the connection of Valentino's fashion designs to the brand's and the founder's history.[128]

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119 Suzy Menkes, *Valentino in Ara Pacis*, N.Y. TIMES (July 10, 2007), https://www.nytimes.com/2007/07/10/style/10iht-10suzy.6585213.html [https://perma.cc/P7PS-W4C9]; VALENTINO: THE LAST EMPEROR (Acolyte Films 2008).

120 E-mail from Marco Callieri, Senior Researcher, Visual Computing Lab of the Inst. of Sci. & Tech. of Info., to author (Feb. 14, 2017, 4:02 AM) (on file with author).

121 *Id.*

122 17 U.S.C. § 102 (2018).

123 *See* GAUDENZI, *supra* note 109, at 205–09 (describing the recognition of photographs as copyrightable subject matter under Italian law and the distinction between simple photographs and photographic works).

124 Software is considered to be a literary work under U.S. copyright law. *See* 17 U.S.C. § 102; *see also* GAUDENZI, *supra* note 109, at 263–70 (describing the protection of software under copyright law in Italy).

125 *See* discussion *supra* notes 122–123 discussing copyrightability of photographs under U.S. and Italian law.

126 17 U.S.C. § 102 (recognizing motion pictures and other audiovisual works); *see* GAUDENZI, *supra* note 109, at 313–27 (describing the extension of copyrightable subject matter under Italian law to individually named categories of databases and collective works).

127 *See* Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 U.S. 1002, 1008–09 (2017) (emphasizing this bedrock principle of U.S. copyright law, although the majority and dissent debated whether the chevrons, stripes, and zig-zags actually brought along the underlying useful article as part of its nature as copyrightable subject matter). For example, images of shoes do not give the owner of those images a right to control the production of those shoes in their materiality.

128 *Terms of Use*, VALENTINO GARAVANI MUSEUM, https://www.valentinogaravanimuseum.com/general-terms [https://perma.cc/9GVF-3GBE] (last visited Feb. 16, 2021) (noting that "photographs, designs, testimonials, images, texts, video and audio clips, logos, trademarks and software programs used for the management and development of the Site" are protected under French

Other examples of archival databases support the argument that use of current intellectual property and technology-related rights serve to support the brand heritage narrative and do not necessarily exist as mutant forms of copyright protection for designs that disrupt the act of copying and compromise the benefits of copying for originators and the industry. Giorgio Armani, in his museum-like space Armani/Silos in Milan has only made a digital database of his fashion designs and other corporate ephemera, including cinematic images and clips available to visitors of his physical museum.[129] Visitors to Armani/Silos are welcomed into the historic narrative of Armani's brand and can peruse images of designs, related film clips, and photographs in the database on site.[130] This database helps to communicate the heritage of specific fashion designs without needing to act as a deterrent to their copying.

These examples highlight how brand heritage supports a low-IP regime for fashion designs. They suggest, first, that copying is paradoxically good for fashion brands with heritage because designs with heritage cannot be compromised by copies. In some sense, just as it is impossible to rebuild history, so it is impossible to copy the heritage of a brand design by copying the design alone. Fashion designs like the Tod's Gommino can be fashionable and yet not obsolete because they exhibit a brand's heritage. The copying of these heritage designs still benefits originators and promotes innovation in the fashion industry because their history cannot be copied. Copies are not a threat to heritage designs. Second, the examples also show how brand heritage may act as its own normative framework within the fashion industry, outside of intellectual property law.

D. *Brand Heritage: A History and Story Beyond Source Identification*

A counterargument to the observation that fashion design's brand heritage supports a low-IP regime and the piracy paradox may be that counterfeits, or exact copies, do nevertheless compromise aspects of brand heritage. For example, a counterfeit of a Gucci handbag of inferior quality may undermine consumer knowledge of a brand's history of using luxury materials, the best artisans, and producing accessories of the highest quality. But these effects of counterfeits are still not sufficient reasons

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intellectual property law). Note that a discussion of any moral rights under French law for Valentino's fashion designs that are displayed in the virtual museum is beyond the scope of this Article.

[129] ARMANI/SILOS, https://www.armanisilos.com [https://perma.cc/B79R-U36R] (last visited May 23, 2021) (inviting visitors to "book their access" to the Digital Archive Project, "containing sketches, fashion show videos and iconic advertising photos from past Giorgio Armani ready-to-wear and Privé couture collections" and featuring "an interactive catalogue, workstations as well as a screening area intended to stimulate research and inspire young generations by looking back at some of the house's most iconic moments").

[130] *Id.*

to craft a higher-IP regime for fashion designs that would allow originators to prevent design copying. Trademark law already gives fashion brands the right to police quality as an extension of the policing of their marks, allowing brands to stop the sale of goods that would seek to market low-quality products as goods from their fashion brand.[131]

Still, the counterargument might proceed, would not a higher-IP regime still benefit design originators by allowing them to monopolize fashion designs at the outset of their creation and build that design into their brand identity, presenting it as part of their brand's story and history? How can a brand build a heritage associated with an apparel design and a brand story if it cannot control the copying of this apparel design? This counterargument has a problematic facet: it takes source-identification as the main component of brand heritage and imports source-identification into an argument for the regulation of copies. Where a design indicates a brand as a source and has secondary meaning, trade dress protection already allows fashion brands to use that design in its non-functional aspects to indicate its brand.[132] And where a nascent brand has a compelling story and, over time builds its history, the fact that its fashion designs are built on copies or are copied may not matter.

Brand heritage is more than just brand identity in a source-identifying sense. Brand heritage is not simply *knowing* a fashion design is made by a specific fashion brand. Rather, brand heritage is an amalgamation of facts about a fashion design, which may indeed include its copying and prior references, as we have seen with the Tod's Gommino. Knowing that copies of the fashion design exist and seeing them does not necessarily compromise a consumer's knowledge of brand heritage or their desire to participate in a brand's story. Indeed, to participate in a brand's heritage consumers buy the fashion design *from the originating fashion brand itself. A copy will not do.*

Indeed, a copy does not even compromise the purchase of the original fashion design because the copy is produced outside of the brand's heritage and outside of a fashion brand's own story. If a consumer wishes to participate in a fashion brand's own story and narrative, it must buy from the brand. A fashion brand can already, by extension of a trademark right, ensure that its fashion design is known and associated with their brand, and even that the fashion design is on products of high quality without needing a right to control every copy that is produced. Buying design copies that are not from a brand precludes a consumer from participating in a fashion brand's heritage and excludes them from the

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131 *See, e.g.*, Zino Davidoff SA v. CVS Corp., 571 F.3d 238 (2d Cir. 2009) (holding that a trademark owner can police sale of gray-market goods that do not conform to the owner's quality standards).
132 *See* Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205 (2000).

brand's narrative and story. Design copies alone do not compromise the brand heritage within a fashion design.

It seems doubtful, therefore, that brand heritage has a role to play in arguments for increased copyright protection and for increased IP protection for fashion designs. Brand heritage, rather, operates well in a low-IP regime and allows copies to persist without compromising innovation or harming originators. To return to Sprigman and Raustiala's terms, a fashion design that is not obsolete and still recognized as a trend (or more, aptly, a classic) over a long period of time still thrives in a low-IP regime and fits within the piracy paradox theory. Brand heritage provides an alternate argument for why the fashion industry and originators of fashion designs still benefit from a low-IP regime. The creation and knowledge of a fashion design's importance in the narrative of a brand can still, paradoxically, thrive in the absence of the regulation of copies of the fashion design itself.

The counterargument might continue as a last resort, why should we not extend a right to prevent copies of apparel designs when European IP regimes seem to have done so? Do these increased protections for designs, in jurisdictions with brands who have long histories and distinct heritages, not indicate that brand heritage should be a reason for increased IP rights in fashion designs? As will be discussed in Part II, regimes that have extended rights to control copies of fashion designs have *not* done so based on *brand heritage alone*. Rather, recognizing the right to control the reproduction of a fashion design has been based in a wider cultural recognition of a design's importance *beyond the brand's own story*. In this sense, brand heritage only seems relevant to an argument for a higher-IP regime for fashion designs when brand heritage converges with a public cultural heritage, when a design has a history and cultural relevance beyond the brand's consumers alone.

II. FASHION'S BRAND HERITAGE AS CULTURAL HERITAGE WITHIN COPYRIGHT LAW: A LIMITED COPYRIGHT FOR CERTAIN DESIGNS

The examples of the Ferragamo Museum, Gucci's Forever Now campaign, Valentino's Virtual Museum, and even Armani's digital archive indicate that brand heritage may thrive in a low-IP regime and even in a negative space of IP law. First, brand heritage, as a historical narrative of the brand, is hard-pressed to be copied. As a result, even if consumers buy copies of a fashion design, the desire to participate in a brand's history and storytelling still spurs them to buy the original design. Second, the communication of brand heritage itself still thrives in a low-IP regime. Current trademark law provides the best avenue for the dissemination and recognition of brand heritage and, even when a mark has been declared invalid, consumers can still recognize the brand heritage of

a fashion design due to extra-legal norms, uses of the tangible object, and communication of the intangible craftsmanship used to produce the design in museum exhibitions and advertisements.

Brand heritage is, however, uniquely tied to the story of one fashion brand, one company, or one designer.[133] Over time brand heritage can become the heritage of more people than just consumers of the fashion brand and the founders of the fashion brand itself. In essence, brand heritage can become cultural heritage. What role does IP play when a fashion design is recognized as having value for more communities and people than just the consumers of a brand? Does a low-IP regime still benefit originators and support innovation when a fashion design is considered part of cultural heritage? At least one copyright case in Italy indicates that the recognition of a design's cultural impact beyond consumers of the brand has had a role to play in extending copyright to certain fashion designs and creating a higher-IP regime for the fashion industry.

In 2013 the Italian company Gruppo Tecnica sued another company Anniel and the Italian retail chain Coin alleging copyright infringement of the design of its Moon Boots.[134] Designed in 1969 by Giancarlo Zanatta, it was inspired by the moon landing and "the shape and technology of the boots worn by the Apollo 11 astronauts."[135] To determine copyright infringement, the Italian court first had to determine whether Zanatta's design was copyrightable subject matter under Italy's copyright law.[136] Under Italian law, works of industrial designs must be of creative character and artistic value[137] to be copyrightable: creative character, similar

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133 Brand heritage can change and evolve depending on how closely a designer is related to a brand and whether that designer remains with the brand. *See* discussion *supra* note 118 regarding Valentino as a designer and Valentino as a brand.

134 Tecnica v. Anniel, Trib. sez, speciale impresa, 12 luglio 2016, n. 8628 (It.), *reprinted in* DEJURE (additionally claiming design patent infringement and unfair competition); *see also* Palandri, *supra* note 19 (describing this case in a comparative light considering the links between fashion and art).

135 PAOLA ANTONELLI & MICHELLE MILLAR FISHER, ITEMS: IS FASHION MODERN? 181 (2017).

136 Art. 2(10) L. n. 633/1941 (It.).

137 It should be noted that the continued validity of a requirement of artistic value in Italy may be uncertain in light of the recent *Cofemel* judgment, in which a Portuguese court referred the question to the Court of Justice of the European Union (CJEU) as to whether member states could in fact condition copyright protection on criteria that were higher than originality under the 2001 Directive Harmonizing Certain Aspects of Copyright. Case C-683/17, Cofemel v. G-Star Raw, ECLI:EU:C:2019:721 (Sept. 12, 2019). The court held that no other requirement but originality is required under this 2001 Directive. *Id.* Commentators have hypothesized that this *might* require a different approach in Italy in the future, although the exact impact of the test is not clear. Eleonora Rosati, *The* Cofemel *Decision Well Beyond the 'Simple' Issue of Designs and Copyright*, THE IPKAT (Sept. 17, 2019), https://ipkitten.blogspot.com/2019/09/the-cofemel-decision-well-beyond-simple.html [https://perma.cc/SGP9-GZG7] (commenting on the case in light of Italian law). *But see* Marianne Levin, *The* Cofemel *Revolution—Originality, Equality and Neutrality*, *in* THE ROUTLEDGE HANDBOOK OF EU COPYRIGHT LAW 82 (Eleonora Rosati ed., 2021) (further discussing the broader meaning of the *Cofemel* decision and seeming to note that the *Cofemel* court's emphasis on originality should apply to scope more than eligibility). More designs than the Moon Boots might be eligible for copyright protection under a less stringent test. In this sense, connections to cultural heritage might be explored further through the requirement of originality in the

to originality in U.S. copyright law, refers to a work's quality as the "personal expression of an author," while artistic value refers to qualities which give rise to an appreciation of the design's aesthetic over its functional aspects and over the particularly pleasant, refined, and elegant lines and forms that a designer creates.[138] The evaluation of this artistic value was *not*, the court emphasized, an evaluation of the design's artistic merit.[139] Nor was this supposed to be a recognition that a design had acquired artistic value after the fact of its creation.[140] Rather, the court explained, the judges were called to evaluate the design's artistic value through "an appreciation of the design . . . within [the context of] the historic and cultural moment in which it was created."[141] This historic contextualization was linked, the judges noted, to an iconic value that required a critical and cultural consensus.[142]

To keep this evaluation objective and to avoid subjective judgments on the artistic merits, the court explained that it was necessary to take note of perceptions of the design that were consolidated in the minds of the collective, in particular in cultural spheres.[143] Of particular relevance would be a recognition within cultural spheres that the design was an "expression of trends and influences from artistic movements," beyond the specific intentions and even knowledge of the designer.[144] The court emphatically abandoned the consumers of the design object as the relevant group whose opinions it should take into account when evaluating this artistic value. The artistic value required under the law, the court reasoned, would be identified within the design when the design's representative and communicative capacities were recognized by a wider audience.[145]

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future, especially if we consider that originality may be linked to an author's unique expression, which communicates to the public and, therefore, is by extension linked to how the public decides what should count as cultural heritage. The legal evolution of works of industrial design of creative character and artistic value under Italian copyright law began in 2001 following Italy's implementation of the Directive on the legal protections of designs. Council Directive 98/71/EC, 1998 O.J. (L 289) 28 (EC). Italy, in fact, abandoned its own separability test in favor of this creative character and artistic value test. For a history of the abandonment of the separability test and problematic applications of the creative character and artistic value test prior to the Moon Boots case, see Francesca Morri, *Le Opere dell' Industrial Design tra Diritto d'Autore e Tutela come Modelli Industriali: Deve Cambiare Tutto Perché (quasi) nulla cambi?* [Works of Industrial Design Between Copyright and Protection as Industrial Models: Must Everything Change So Nothing Does?], 1 RIVISTA DI DIRITTO INDUSTRIALE [Rev. Indus. L.] 177 (2013).

138 Tecnica v. Anniel, Trib. sez. speciale impresa, n. 8628, *supra* note 134, at 7–8 (translation by author).

139 *Id.* at 7.

140 *Id.* at 8 ("Naturalmente non si tratta di acquisizione del 'valore artistico' ex post.").

141 *Id.*

142 In the opinion, the judges use the word "sedimentazione," or "settling." *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

Applying these criteria to the Moon Boots, the court recognized the design of the shoe—an "ambidextrous sole" with hidden seams and a shoe upper with a thick, high band over the toe and side of the foot and strategically placed shoelace holes[146]—as having the necessary creative character and artistic value. The court pointed to the fact that the Moon Boots design's particular aesthetic impact had, when it appeared on the market, "profoundly changed" the aesthetic concept of the after-ski boot, becoming a real "icon of Italian design," and to the fact that it had irreversibly evolved the tastes of an entire historic time period as they related to this everyday object.[147] The court also put stock in the fact that the design had received national and international prizes, was included in design monographs, and had even been chosen by the Louvre as one of the one hundred most significant design symbols of the twentieth century.[148] Indeed, as if to confirm the court's evaluation, in 2018, the Moon Boots design was included in the exhibition *Items: Is Fashion Modern?* at the Museum of Modern Art in New York.[149]

Figure 12. Tecnica's Moon Boots on display at the Museum of Modern Art. © Felicia Caponigri

146 The court described the contours of the design's uniqueness as part of its evaluation of infringement. *Id.* at 10.

147 *Id.* at 9.

148 *Id.*

149 ANTONELLI & FISHER, *supra* note 135, at 180–82 ("[A] rubber outsole and foam-rubber midsole provide traction in snow while simultaneously suggesting the effect of a low-gravity moon bounce. Just like the outer boots worn by astronauts, Moon Boots lack differentiation between the right and left foot."). Offered in a variety of bright colors and featuring a bubbly logo (in the typeface Amelia) across the shaft, Moon Boots reflect fashion's fascination with space travel in the 1960s and early 1970s, and they quickly became a popular ski accessory. *Id.* at 182. After a lull in the 1980s and 1990s, the Moon Boot experienced a resurgence among fashion-conscious American women in 2004. *Id.* ("Described in the *New York Times* as 'a true rarity, a fashion fad that seems to have surfaced spontaneously' the Moon Boot revival was taken up by designers worldwide, from Marc Jacobs to Christian Dior.").

Following this identification of creative character and artistic judgment, the court found that Anouk, the design company which had made copies of the Moon Boot with minimal changes, was liable for copyright infringement.[150] In addition to similarities between the two designs, the Anouk design's trading on the cultural impact of the Moon Boots model was an important factor in the finding of infringement. Bloggers' comments which could not but refer to the Moon Boots design as an iconic prototype of the Anouk were evidence of this.[151]

The court's reasoning in the *Moon Boots* case indicates that a higher IP regime may, at least for a designated term limit,[152] have a role to play in the cycle of copying of certain fashion designs. But what is that role, exactly? The Italian court's opinion seems to suggest that copyright law should recognize select fashion designs as copyrightable subject matter when that design has an iconic value; that the regulation of copies of that iconic fashion design should be infringing when they reproduce the essence of the design's iconic, cultural impact.[153] In essence, the Italian court imports language from cultural heritage scholarship and law to look beyond a fashion brand's own heritage and storytelling to extend copyright protection.[154] The court takes cultural consensus from dialogue around a fashion design as an indicator of copyrightability.

In this case, Italian copyright law seems to have a role in regulating copies of fashion design, but only when they are of cultural significance. Fashion designs that have a broader cultural significance to society and copies that seek to trade on this broader cultural significance are worthy of a higher level of copyright protection under the law. If we consider the Italian court's reasoning in light of Raustiala and Sprigman's "piracy paradox," it seems that some copying of fashion designs, at least in the Italian context, is deemed *not* beneficial for innovation nor beneficial for

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150 The court noted that the Anouk model's band, which connected the shoe upper with the sole, was not as high and that it had two pairs of shoelace holes instead of the Moon Boots' three. Tecnica v. Anniel, Trib. sez. speciale impresa, n. 8628, *supra* note 134, at 10.

151 *Id.* The blogs included phrases such as "l'evoluzione dei Moon Boots: adesso si portano bassi" ["the evolution of the Moon Boots: now we wear them short"], "gli Anouk Boots di Anniel assomigliano a dei Moon Boots, in modo più fine e portano i motivi ed i colori di Anniel" ["the Anouk Boots of Anniel look like Moon Boots, in a more refined way and they have Anniel's motifs and colors"], and "Anniel è tornata indietro agli iconici Moon Boots" ["Anniel has turned back to the iconic Moon Boots"]). *Id.*

152 As in the United States, the term of economic rights in Italian copyright is life of the author plus seventy years. Art. 25 L. n. 633/1941 (It.).

153 The court notes that the designs that are copyrightable subject matter under Art. 2(10) are only in the "hundreds" and are different than the "thousands and thousands of other designs which are just creative and populate the panorama of industrial production." Tecnica v. Anniel, Trib. sez. speciale impresa, n. 8628, *supra* note 134, at 9.

154 As the Italian scholar Michele Cantucci described, we converge our objective judgment on an object and deem it of cultural interest to us as a collective to actuate cultural property protection. *See* MICHELE CANTUCCI, LA TUTELA GIURIDICA DELLE COSE D'INTERESSE ARTISTICO O STORICO [The Legal Protection of Things of Artistic or Historic Interest] 100–03 (1953).

originators. Copying of iconic fashion designs that have had a cultural impact undermines the economic and authorial protections at the heart of copyright law.[155] Why might this be so? How does the regulation of copies of culturally significant designs benefit the fashion industry? And what effect does this extension of copyright have on the piracy paradox theory?

From an American perspective, an extension of copyright protection to iconic fashion designs is difficult to grasp. As Raustiala and Sprigman detailed years ago, U.S. copyright law has consistently relegated apparel designs to a negative space of copyright law and a low-IP regime.[156] Even in the recent *Star Athletica* case, holding the chevrons, stripes, and zigzags of cheerleading uniforms to be copyrightable subject matter, the U.S. Supreme Court made a point of relegating apparel designs as styles and cuts "replicating" underlying useful articles to a negative space of copyright law, thereby allowing the styles, cuts, and designs of the very dimensions of fashion items to be freely copied.[157]

Indeed, if we consider the effects on cultural communication that U.S. copyright law has,[158] in addition to its classic economic and

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155 Justifications for U.S. copyright law are primarily utilitarian, as Raustiala and Sprigman note. *See* Raustiala & Sprigman, *supra* note 6, at 1688. However, other authors described alternate justifications for copyright law at the nexus of cultural progress and cultural dialogue. *See* Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 327–28 (2018) (compiling examples of scholarship that attacks or questions the assumptions of the utilitarian model); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009) (arguing that copyright's incentive model overlooks that creativity is grounded in an artist's own experiences that are often unrelated to economic incentives); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (discussing non-monetary incentives that affect creativity). Barton Beebe's work regularly engages with the aesthetic's effect on U.S. copyright law. *See* Barton Beebe, Bleistein, *The Problem of Aesthetic Progress and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 346 (2017) (re-reading *Bleistein* and exploring how a shift to pragmatist aesthetics might rebalance current copyright law); Barton Beebe, Star Athletica *and the Problem of Panaestheticism*, 9 U.C. IRVINE L. REV. 275, 286 (2019) (exploring the *Star Athletica* case as confronting the problem that anything can be art).

Justifications for Italian copyright law are often characterized as predominantly authorial in nature, but histories also show the complexity of Italian copyright law's evolution and its awareness of economic facets. See GAUDENZI, *supra* note 109, at 39–50. Additionally, re-readings and historical accounts of early English cases such as *Donaldson v. Beckett* and *Millar v. Taylor* spur new concepts of what the work actually is in copyright law. *See* BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE 1760–1911, at 9–42 (1999); ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? (2015).

156 *See* discussion *supra* note 7, summarizing the facets of IP which Sprigman and Raustiala discuss as part of their definition of a low-IP regime. Note that some of these facets have evolved: for instance, the separability test in *Star Athletica*. Sarah Burstein has also explored these critiques of design patents. *See* Sarah Burstein, *Moving Beyond the Standard Criticisms of Design Patents*, 17 STAN. TECH. L. REV. 305 (2013).

157 Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1008, 1012 (2017).

158 In this sense, the author's approach is similar to Hemphill and Suk's response to Sprigman and Raustiala. In Hemphill and Suk's argument, copyright in *some* fashion designs which would prohibit close copies of them does not inhibit the innovation that is at the heart of intellectual property protection because fashion design is part of multiple expressions within a collectivity, and close copies frustrate this expression of individuality within a wider collectivity. *See* C. Scott Hemphill & Jeannie Suk Gersen, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147

utilitarian incentives, U.S. copyright law seems to take a stance which is at first opposite to Italian copyright law. The nature of apparel designs and their ability to be used by a multitude of people relegates them to the public domain, a space where they may be freely copied and not monopolized.[159] Imagine the problematic effects monopolizing the cut of a cheerleading uniform would have on the fashion industry: basic building blocks of the fashion industry might require licenses for use.[160] Such a monopoly would fly in the face of the fair use doctrine and other exceptions that limit copyright's scope, leading to problematic evaluations of the difference between the style of a garment and the idea of a garment, or when the expression of a style merges with the idea of a style.[161]

But the Italian court in the Moon Boots case was *not* discussing the cut and style of the Moon Boots; it was discussing the entirety of apparel design, which Raustiala and Sprigman primarily take as their case study. By identifying iconic fashion design, the Italian court extended copyright protection to the *cultural significance* within these fashion designs, not to ubiquitous fashion designs themselves.[162] There is some overlap in the Moon Boots case between Raustiala and Sprigman's apparel design and the design the Italian court identifies, but the subject matter is slightly different.

Let us return to Raustiala and Sprigman's Gommino example. Italian copyright law does not seek to extend copyright to the Tod's Driving Shoe inasmuch as it is a simple design, one which is ubiquitous on the market. To speak in anchoring terms, copyrightable subject matter is not *any theme* upon which the fashion masses converge.[163] Rather, Italian copyright law seeks to extend copyright protection to a certain type of convergence, which, in Raustiala and Sprigman's words, exists even beyond the fashion sphere.[164] This certain type of anchoring is of interest to

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(2009).

159 As Justice Breyer asked Varsity's counsel at oral argument, "[W]hy don't you disabuse me of my notion that we are into monopoly big-time?" Transcript of Oral Argument at 34, Star Athletica LLC v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017) (No. 15-866).

160 It may even lead to requiring mechanical licenses, as the music industry does. Although the rule that copyright law does not protect ideas and the *scènes à faire* doctrine might play a role in limiting the scope of copyright in such a design. *See* Raustiala & Sprigman, *supra* note 6, at 1762 (discussing mechanical licenses in the music industry in the context of fashion).

161 *See* 17 U.S.C. §§ 102(b), 113(b) (2018). The case often cited for the merger doctrine is *Baker v. Selden*, 101 U.S. 99 (1880), although other scholarship has used *Baker v. Selden* to further delimit the scope of copyrightable subject matter by exploring the difference between a work and its material form. *See* DRASSINOWER, *supra* note 155, at 88–103.

162 Recall the court making a difference between the hundreds of eligible designs and the thousands of ineligible designs. *See* discussion *supra* note 153 and accompanying text.

163 Raustiala & Sprigman, *supra* note 6, at 1729.

164 *Id.* ("The process by which the industry converges on a particular theme(s) is worthy of its own study, but is beyond the scope of this Article. We can see the process at work, however, in the illustrations of driving shoes in Figure G. That particular style had an efflorescence in Spring and Summer 2005. At the same time, the *New York Times* reported on a project by a former fashion

Italian copyright law because it recognizes it as in need of regulation by an author, the designer. To again use the language from Raustiala and Sprigman's framework, Italian copyright law claims a role for itself within the anchoring of a particular theme:[165] the recognition that a design is of cultural significance. This copyright law then, as a result, also sees itself as having a role to play in regulating the induced obsolescence of a design by extending to the designer, for the specific period of time of copyright's term limit of life plus seventy years, the right to participate in the convergence and to re-frame the cycle of induced obsolescence. But Italian copyright law may only extend this right to designs which have a *cultural impact*, which are iconic, and which are, in essence, part of our shared cultural heritage.

The benefits of allowing certain designers to participate in anchoring and induced obsolescence are best understood when we consider that there is a relationship between cultural heritage law and copyright law. As the Italian scholar Massimo Severo Giannini, who studied cultural heritage and copyright, observed, copyright law is meant to address issues of "private preservation or preservation between private persons."[166] This is in contrast to cultural property law, which is meant to address issues of public preservation for tangible items.[167] Each legal regime makes choices, based on a common need to preserve our intangible cultural interests in certain types of properties at different times.[168] These choices of preservation certainly take economic considerations into account,[169]

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critic for the *New Yorker* magazine honoring the twenty-fifth anniversary of the original Della Valle (Tod's) driving shoe.").

165 *Id.*

166 Giannini wrote:

> Positive legal frameworks occupy themselves only with some material supports, with those that pose practical reasons for public protection . . . for other types of properties there may not be any issues [or challenges] for preservation (it's not necessary, for example, to protect the Iliad or the [musical] suites of Bach [as cultural property]) or there may be issues of private preservation or preservation between private persons (and in this we find the reason for regulations for scientific, artistic, and literary property).

Massimo Severo Giannini, *I Beni Culturali* [Cultural Properties], 3 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 3, 34 [Trimester Rev. Pub. L.] 34 (1975–1976) (translation by author).

167 *Id.*

168 Giannini in his work explains that cultural property has two facets: publicness and intangibility. A public intangible cultural interest is what is common across different cultural properties and what defines the legal notion of cultural property under cultural property law. *Id. See also* Lorenzo Casini, *"Italian Hours": The Globalization of Cultural Property Law*, 9 INT'L J. CONST. L. 369, 378 (2011).

169 As evidenced by recent changes to time thresholds under Italian cultural property law in the face of verbal protests by antiquarians that the specter of export licenses compromised their business. L. n. 124/2017 (updating D.L. n. 42/2004) (It.) (describing the raising of the time threshold for movable works of cultural property to seventy years from fifty). *See also Legislatura 17a—Dossier n. 494/2*, SENATO DELLA REPUBBLICA (July 2017), https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/0/1029805/index.html?part=dossier_dossier1-sezione_sezione13-h2_h266 [https://perma.cc/63AD-FGTK] (explaining in detail these changes within the legislature); SENATO DELLA REPUBBLICA, *Legge annuale per il mercato e la concorrenza* [Annual law for the market and

but they also consider the importance of identity and cultural communication. To understand why a limited higher-IP regime with increased rights to prevent copying can benefit innovation and originators within the fashion industry without overly compromising the piracy paradox theory we must examine the relationship between cultural heritage law and copyright law.

III. FASHION DESIGNS, CULTURAL HERITAGE LAW, AND COPYRIGHT LAW

Cultural heritage, defined most broadly as "manifestations of human life which represent a particular view of life and witness the history and validity of that view,"[170] is made up of two categories: intangible cultural heritage and tangible cultural heritage. Intangible cultural heritage, following the definition in the 2003 UNESCO Convention, consists of "practices, representations, expressions, knowledge, [and] skills . . . that communities, groups and . . . individuals, recognize" as such.[171] Tangible cultural heritage, or cultural property, includes buildings, paintings, manuscripts, and other properties (tangible things) that are of historic, artistic, or other cultural interest to us.[172] Tangible heritage can also include landscape and other built environments.[173]

Much of the scholarship exploring copyright law's relationship to cultural heritage has taken place in discussions of how copyright law can be used as a tool for source communities who have contributed much to our common knowledge and yet gained little in terms of economic benefit and attribution. Copyright law's requirements of fixation, sole or joint authorship,[174] and fixed term limits often frustrate its use by source

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competition], *Schede di lettura* [Reading materials], A.S. n. 2085-B, at 237–48 (July 2017), https://www.senato.it/service/PDF/PDFServer/BGT/01029805.pdf [https://perma.cc/4YCF-Q2KK].

170 Lyndel V. Prott & Patrick J. O'Keefe, *'Cultural Heritage' or 'Cultural Property'?*, 1 INT'L J. CULTURAL PROP. 307, 307 (1992).

171 Convention for the Safeguarding of the Intangible Cultural Heritage art. 2, ¶ 1, Oct. 17, 2003, 2368 U.N.T.S. 3.

172 This definition elides the complexity of the definition of cultural property, which is often informed by the purpose of the legal instrument in which it is included. For example, cultural property in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, is defined in terms of its relevance to all mankind. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215. The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property allows individual nations to define cultural property. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231. Article 10 of the Italian Code of Cultural Heritage and Landscape is even more complex, with time thresholds depending on who owns the property and what kind of property the category is in the first place. D.Lgs. n. 42/2004 (It.).

173 In international law, see Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151. In Italian national law, see D.Lgs. n. 42/2004 (It.).

174 Although the extension of copyright protection to subject matter which is, by nature, the result of multiple authors, like an opera, might nuance the notion of author and the division of rights. *See, e.g.*, Art. 33, L. n. 633/1941 (It.) (providing elaborate provisions for contributors to operas and other similar works under Italian copyright law).

communities.[175] In part for this reason, international organizations and their legal instruments have attempted to bridge the gap between copyright law in modern, industrial societies and its use for and by source communities, including those in developing nations. The World Intellectual Property Organization (WIPO), for example, uses the term "traditional cultural expressions" (TCEs) to refer to much of the same subject matter that may enter into the scope of intellectual property law, including music, art, and architectural forms.[176] While acknowledging that TCEs may already be protected under some current national IP regimes, WIPO has draft model provisions that propose the extension of IP-like rights to TCEs. Among these rights is the authorization for the intentional use of folklore, defined in part as "productions consisting of characteristic elements of the traditional artistic heritage"[177] when that use is outside of its "traditional or customary context."[178] The Tunis Model Law on Copyright Law, another example, would extend exclusive rights to reproduce or authorize the reproduction of its definition of folklore to public entities.[179] These definitions indicate how the productions of source communities are often dually viewed as both a part of heritage and as current works of authorship in need of economic protections.

Many individual nations that count source communities and indigenous peoples among their constituencies already bridge the gap between these two, at first separate, legal categories by including various definitions of intangible cultural heritage within their national copyright or other intellectual property laws.[180] In these instances, the lines between cultural heritage laws and copyright laws become blurred, and the lines between source nations and market nations stark, especially when instances of heritage also protected under copyright in one nation come into contact with a legal regime that does not recognize such links.

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[175] For such critiques, see, in part, Michael F. Brown, *Can Culture Be Copyrighted?* 39 CURRENT ANTHROPOLOGY 193 (1998); Michael F. Brown, *Heritage as Property*, *in* PROPERTY IN QUESTION: VALUE TRANSFORMATION IN THE GLOBAL ECONOMY 49 (Katherine Verdery & Caroline Humphrey eds., 2004).

[176] *See Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG., https://www.wipo.int/tk/en/folklore/ [https://perma.cc/MM9H-5262] (last visited Feb. 17, 2021).

[177] World Intell. Prop. Org. [WIPO] & U.N. Educ., Sci., and Cultural Org. [UNESCO], *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* § 2 (1985), https://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf [https://https://perma.cc/YY7F-VCVA].

[178] *Id.* § 3.

[179] World Intell. Prop. Org. [WIPO] & U.N. Educ., Sci., and Cultural Org. [UNESCO], *Tunis Model Law on Copyright for Developing Countries* § 18(iv) (1976), https://www.keionline.org/wp-content/uploads/tunis_OCR%20model_law_en-web.pdf [https://perma.cc/YVN8-8U33] (defining "folklore" as "[a]ll literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage").

[180] *See, e.g.*, *Model Provisions for National Law*, *supra* note 177, § 5 (listing "Attempts to Protect Expressions of Folklore Under Copyright Law" and describing Chile in particular).

The copying of fashion patterns offers an example of this. Consider the brand Carolina Herrera's use of "embroidery techniques and patterns specific to certain Mexican indigenous communities" in the brand's 2020 resort collection.[181] The collection's "Latin Holiday" theme was inspired by Carolina Herrera's creative director's trip to Mexico.[182] Mexico's Minister of Culture called out the use of animal and floral prints originating from the indigenous communities in Tenango de Doria in Hidalgo, bright flowers used by artisans in the Isthmus of Tehuantepec, and a pattern in the same vein as a *sarape* from Saltillo.[183] Mexico's concern in 2019 that the communities from which these prints and patterns originated would not receive credit preceded a 2020 amendment to Mexico's copyright law extending copyright protection to "traditional cultural expressions."[184] Under this law, third parties who wish to use artistic and artisanal works that are expressions of traditional cultures in Mexico must be authorized in writing by the relevant community or, if this community cannot be located, by Mexico's Secretary of Culture.[185] To an audience in the market nation of the United States such rights to control copies often seem antithetical to the very definition of copyright. To paraphrase Christopher Sprigman, economic incentives are not required to spur the creation of these patterns, communities already create them.[186]

Making matters more complex is the addition of protections for tangible cultural property in source nations' codes, which also overlap with the restrictions market nations traditionally associate with copyright law. National cultural property laws may seek to regulate certain reproductions of certain cultural properties.[187] These laws may also delineate

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181 Vanessa Friedman, *Homage or Theft? Carolina Herrera Called Out by Mexican Minister*, N.Y. TIMES (June 13, 2019), https://www.nytimes.com/2019/06/13/fashion/carolina-herrera-mexico-appropriation.html [https://perma.cc/W68D-HWUQ].

182 *Id.*

183 *Mexican Government Accuses Carolina Herrera of Cultural Appropriation*, BBC (June 13, 2019), https://www.bbc.com/news/world-latin-america-48618265 [https://perma.cc/5ZC5-YPGH] (describing the specific patterns and designs at issue).

184 Decreto por el que se reforman diversas disposiciones de la Ley Federal del Derecho de Autor, Diario Oficial de la Federación [DOF] 24-1-2020 (Mex.) Before the amendment, Mexico's copyright law had only extended copyright protection to "works derived from popular cultures." *See id.* (translation by author).

185 *Id.* art. 157–158.

186 Christopher Sprigman (@CJSprigman), TWITTER (June 14, 2019), https://www.twitter.com/CJSprigman ("There is an effort by some to protect so-called 'traditional knowledge': a broad category that would include the designs and stitching motifs Herrera used. But that effort is deeply controversial, not least [because] the usual justifications for IP protection don't apply very well. For example, IP is often understood as a set of rules aimed at encouraging creators to make new creative works. But traditional knowledge (TK) is already created—it doesn't need (and doesn't even respond to) incentives.").

187 *See, e.g.*, art. 107–108 D.Lgs. 42/2004, c. dei beni culturali e del paesaggio [Code of Cultural and Landscape Heritage] (It.). For a historical discussion of the regulation of copies and reproductions of cultural properties, see Lorenzo Casini, *Riprodurre il patrimonio culturale? I "pieni" e i "vuoti" normativi* [Reproducing Cultural Heritage?], ARTE E DIRITTO ON LINE [Art & L. Online] (2018), http://www.aedon.mulino.it/archivio/2018/3/casini.htm [https://perma.cc/XH56-PV8A].

boundaries between their rules and those of specific intellectual property regimes themselves, like copyright.[188] Consider, for example, that the reproduction of historic fashion objects in public museum collections in Italy may be authorized by the museum entities that hold the collection under Article 107 and Article 108 of the Italian Code of Cultural and Landscape Heritage when the use is for commercial purposes.[189] Although copies for personal and other non-commercial uses, uses related to the freedom of expression, or uses which promote cultural property may now be free,[190] the Code continues to extend a narrow right to control copies for commercial purposes, as a first matter, to state museum entities. For example, the reproduction in an exhibition catalog of a fashion design by Rosa Genoni, as exemplified in a dress from 1906 in the Uffizi's collection, may be authorized by the Uffizi gallery in commercial instances.

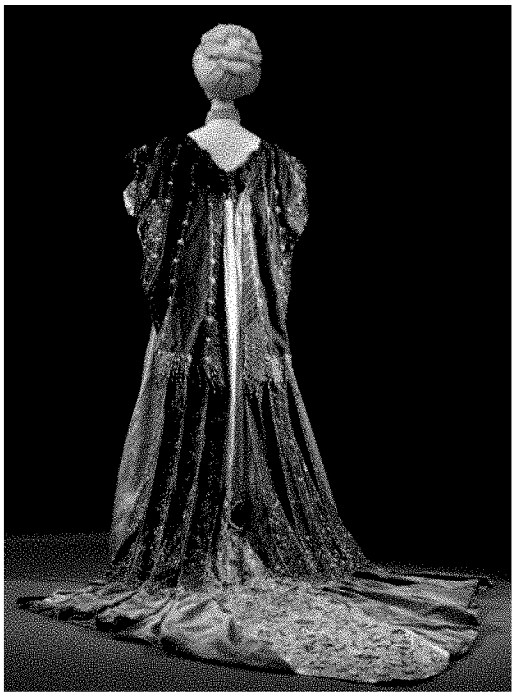

Figure 13. Pisanello Women's Cape by Rosa Genoni, 1906. In the collection of the Museum of Fashion and Costume, Palazzo Pitti. Image reproduced with permission of the Italian Ministry of Culture.

188 D.Lgs. n. 42/2004 (It.).
189 *Id.* art. 107–108.
190 *Id.* art. 108(3-bis). These additions were made as part of the ArtBonus reform. *See* Casini, *supra* note 187.

Although the effect of these cultural property law clauses is similar to copyright law, the function of cultural property law is different, as evidenced by its origins. Indeed, Article 107 expressly delimits its application as different from copyright law, not wanting to interfere with copyright law's scope.[191] The impetus for control of copies of cultural property is based in the desire to control their integrity,[192] their appropriate use, or what may be referred to in other parts of Italian cultural property law as their *decoro*.[193]

Of course, this control and the idea of the "integrity" of a work, like an extension of copyright law to traditional cultural expressions, can be antithetical to the notion of the right to copy in market nations like the United States. The example of the reproduction of Michelangelo's *David* by an Illinois rifle company in 2014 brings these differences into sharp relief. When Armalite reproduced an image of Michelangelo's *David* with a rifle and the phrase "AR-50A1: A Work of Art" superimposed on it, the Italian Minister of Culture was furious and decried the use, which caused a general uproar in Italy.[194] The Italian government's argument was that the "cultural dignity" of the *David* had been violated through this unauthorized copy, which was in violation of Article 107.[195]

This control of the reproduction of cultural properties, traditionally associated with the public domain, seems to a U.S. audience contrary to the promise of works of authorship to the public. To paraphrase Christopher Sprigman again, the idea of "owning" culture can be "toxic": control of culture in this way can frustrate cultural interchange and might also lead to discrimination and exclusion. The differences between copyright law in Italy and in the United States as applied to fashion seem to indicate two different models. In one, the cultural value of fashion design is treated as cultural content and effectively frozen for a time through the control of copies. In the other, the cultural value of fashion design is treated as part of a dialogue and allowed to be freely copied as part of a conversation. It is at this crossroad of cultural exchange that America exists, and it is why, perhaps, we have such contested views of what our

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191 Art. 107(1), D.Lgs. n. 42/2004 (It.) ("The Minister, the regions, and the other public entities of the territories may permit the reproduction and also the instrumental and provisional use of the cultural properties in their possession, subject to the regulations in clause 2 and those on the subject within copyright law.") (translation by author).

192 Casini, *supra* note 187.

193 *Id.*

194 *Italy Furious at Gun-Toting 'David' Statue in U.S. Rifle Ad*, TIME (Mar. 9, 2014), https://time.com/17313/italy-furious-at-gun-toting-david-statue-in-u-s-rifle-ad/ [https://perma.cc/T5MU-WGHY] (depicting an image of the advertisement).

195 *Id.*; *see also* Arturo Leone, *La riproduzione dei beni culturali nella pubblicità* [The Reproduction of Cultural Properties in Advertisements], BIRD & BIRD (Jan. 2018), https://www.twobirds.com/it/news/articles/2018/italy/beni-culturali [https://perma.cc/68V5-C73D] (describing other contested commercial uses of cultural properties).

own cultural property is, refusing in many instances to even call it that and embracing the term "historic property" instead.[196] While the problematic use of the *David* by Armalite may be an example where some control might be welcome to maintain the cultural dignity of the *David*, consider other examples of the *David* dressed as a cowboy, wearing the fashions of another culture.[197] Deciding which cultural content to "freeze" can soon become problematic.

Consider Sprigman and Raustiala's classic example, in their book, of non-Italian-Americans making, drinking, and enjoying espresso.[198] This is an important contribution of *The Piracy Paradox*: it challenges us to think about how even narrowly controlling copies of fashion designs considered to be parts of our cultural heritage might compromise the very essence of how we decide what fashion design is part of cultural heritage in the first place. Indeed, what are the boundary lines between liberty of cultural exchange and respect for cultural traditions, and how do we, as members of a global community, decide what role the law should play?

Fashion exists in an overlapping space between all three legal categories of intangible cultural heritage, tangible cultural property, and copyrightable subject matter, and the broader legal frameworks of these categories. As such, fashion brings to the fore the nuances and differences between these at first firmly drawn distinctions between legal categories. Dresses or accessories identified as part of fashion can be tangible objects of historical or other cultural interest (*cultural property*), examples of artisanship and craftsmanship (*intangible cultural heritage*), and also display pictorial, graphic and sculptural facets which may be appreciated apart from the tangible objects in which they are fixed (*copyright*). In this overlapping space, fashion design is also more than an intangible communication which can freely travel between peoples and communities. Fashion design, when considered at the nexus of cultural heritage and copyright, is more than intangible communication,[199] more than "a social phenomenon affecting the way members of a culture or society behave" characterized by the acceptance by a large number of people for a short period of time.[200] Fashion is certainly an intangible communication which

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196 *See* John Henry Merryman, *"Protection" of Cultural "Heritage"?*, 38 AM. J. COMP. L. 513 (1990) (exploring whether the United States has its own cultural heritage legal regime); MITCH LANDRIEU, IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY (2018) (considering cultural complexities within the United States in the context of the removal of one confederate monument).

197 A search on Google Images for "Michelangelo David magnets, dress up" yields a number of magnet sets that dress the *David* in various fashions.

198 KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION 169–70 (2012); *see also* SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 99–100 (2005).

199 MALCOLM BARNARD, FASHION AS COMMUNICATION (2d ed. 2002).

200 Phyllis G. Tortora, *History and Development of Fashion*, *in* BERG ENCYCLOPEDIA OF WORLD

needs to be visible to many and shared in order to exist. Fashion, and fashion design, is part of an intangible cultural exchange. But fashion is also so much more. Fashion is also, as Valerie Steele has noted, "the cultural construction of the embodied identity."[201] What we collectively agree on as fashion on one body, on one person, in one context, may not be deemed fashion on another body, on another person, in another context.[202] And this collective agreement about what fashion is changes and differs between communities.

The piracy paradox, through its argument that copying is paradoxically good for the fashion industry and for originators because copying allows for anchoring and induced obsolescence, implicates fashion design's proverbial traveling. Fashion design needs to be, in essence, limited to an intangible communication within the piracy paradox theory. But when fashion is understood as more than simply intangible communication, cracks may appear in theories about fashion's need to travel for its own innovation. As intangible communication *informed by identity*, the traveling at the heart of the piracy paradox may arguably *not* aid the progress of the arts and sciences. Making matters more complex, this intangible communication *informed by identity* does *not* happen solely in an intangible space but is deeply connected to *tangible objects* and people. Certain fashions may not be so intangible and able to travel after all. We cannot divorce discussions of the legal regulation of fashion design copies from fashion design's tangible iterations and the people who live their lives in these fashion designs.

The purpose then of extending to originators a limited right to control the copying of certain fashion designs that are of importance to communities may be to support the communication of culture and of identities. At the same time, there is a limit to this extension; the extension itself is narrow in scope. Everyday fashion designs that are of functional interest to us, or simply pleasing, that have not impacted our design history, should not, if we follow the reasoning of the Moon Boots court, be constrained by their originators' right to control their copying. We might, then, understand innovation in the fashion industry as not only informed

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DRESS AND FASHION: GLOBAL PERSPECTIVES 159–70 (Joanne B. Eichner & Phyllis G. Tortora eds., 2010) (ebook) (describing these two elements as common across different definitions of fashion); *see also* CORBELLINI & SAVIOLO, *supra* note 29, at 19 (noting, from a business management perspective, how fashion is characterized by change while luxury has comparatively more permanence). Time is, of course, as evidenced by the Gommino example, problematic here.

201 VALERIE STEELE, THE BERG COMPANION TO FASHION, at xvii (2010).

202 *See* Gianina Thompson, *Cultural Appropriation Was Always Inexcusable*, INSTYLE (Jul. 15, 2020), https://www.instyle.com/lifestyle/do-you-understand-appropriation-yet [https://perma.cc/6FUW-TZYL]; Layla Ilchi, *Gucci Accused of Cultural Appropriation over 'Indy Turban,'* WOMEN'S WEAR DAILY (May 16, 2019), https://wwd.com/fashion-news/fashion-scoops/gucci-indy-turban-cultural-appropriation-backlash-1203132880/ [https://perma.cc/W3WU-S7NV].

by the production of more designs, but also by a design's response to a cultural moment,[203] its relationship to a community, and its history. Paradoxically, existing within a cultural moment, relating to a community, and existing within a historical narrative cannot be accomplished without copying, but depending on the type of heritage at issue, that copying may need to be regulated.

We often think of fashion brands as their own universes, catering to specific types of consumers within the fashion industry. Fashion brands are this, and when they communicate that universe through their own individual histories—through their brand heritage—consumers can distinguish between different designs. Originators thrive because consumers still buy their designs in the face of copies to participate in a brand's story. Innovation in the fashion industry benefits from derivative works referencing designs with this heritage. But fashion brands, their designs, and their products, are increasingly becoming a recognized part of our common cultural story. Fashion brands contribute to our culture, just as much as individual communities have done throughout our history.

In the United States, where we are at times hard-pressed to admit the contributions of individual communities and more apt to embrace the role that corporations and pop culture have in our cultural narrative, fashion design as cultural heritage might be, paradoxically, easier to embrace. Beyond fashion, consider the impact that Apple,[204] the Coca-Cola Company,[205] Radioflyer,[206] and still other brands have had on our American culture. The designs of these companies, when they change the course of history, might be worth a narrow scope of a right to copy for a limited term if we understand that right to copy not in terms of an absolute control of the design itself but as a way to promote preservation of the design's nature as an icon and to understand the design's cultural impact between private parties. Trading on that iconic nature as part of our common

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203 Described as the cultural zeitgeist in Hemphill & Suk, *supra* note 158, at 1157–59 ("The themes of the trend reflect the spirit of the times in which we are living."). Also described, to a lesser extent, in the discussion of anchoring in Raustiala & Sprigman, *supra* note 6, at 1728 ("Designers and critics note these trends all the time, and they often talk of the convergence of designs as a reflection of the zeitgeist.").

204 Apple products did give rise to the founding of a private "Apple Museum" in Prague, although the state of the museum is currently unknown. *See* APPLE MUSEUM, https://applemuseum.com/en/ [https://perma.cc/U6NH-3BQT] (last visited Feb. 22, 2021). Interestingly, the original garage in which Steve Jobs started Apple has been designated a historic site by the Los Altos Historical Commission, pointing to an overlap between historic preservation law and the production of current products, which we perhaps see more often in Italy. *See* Adario Strange, *Garage Where Steve Jobs Started Apple Designated as Historic Site*, MASHABLE (Oct. 29, 2013), https://mashable.com/2013/10/29/steve-jobs-apple-garage-landmark/ [https://perma.cc/F35X-ZU9Y].

205 Which also has a museum founded by the Coca-Cola Company. *See World of Coca-Cola: Our Story*, COCA-COLA, https://www.worldofcoca-cola.com/our-story/ [https://perma.cc/693D-ZEUA] (last visited Feb. 18, 2021).

206 Which emphasizes its history on its company website. See *Radio Flyer,* RADIO FLYER, https://www.radioflyer.com/heritage [https://perma.cc/3376-GL24] (last visited Feb. 18, 2021).

cultural heritage is what might be copyright infringement in the market[207] until the expiration of the right and the design's falling into the public domain for use by all.

In practice, thinking of fashion designs as a part of cultural heritage, and extending a copyright based on a design's iconic nature and recognition in a community, is challenging. Theoretically, such an extension may have some traction but, in application, it may be impossible. Indeed, even in Italy there does not seem to be a rush to judicial declarations of the copyrightability of certain fashion designs nor to copyright infringement suits based on such a right. In the United States, there has not been an express link to the iconic nature or cultural impact of designs within copyright law. We might see such references in past decisions of separability which took museum collections into account.[208] We might give greater weight to the Court in *Star Athletica*'s comparison of the chevrons, stripes, and zig zags of cheerleading uniforms to the composition of a fresco and other comparisons to fine art compositions in various briefs.[209] In this sense, the application of IP's negative space seems to apply differently to fashion designs depending on the jurisdiction. While the apparel designs discussed by Raustiala and Sprigman may be in a negative space of U.S. copyright, those same apparel designs may be identified as iconic and therefore copyrightable in Italy.

Such an anomaly raises further questions about why we may feel so strongly in the United States that apparel design, even if it is of cultural importance, should be outside copyright law. Does copying, for example, from the U.S. perspective benefit fashion designs because fashion designs are indeed so iconic? Unlike Italy, the United States does not have a comprehensive legal framework for American intangible cultural heritage or

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[207] In a sense, a variation of Drassinower's argument that a work in copyright law is meant to allow one to "speak in one's own words." *See* DRASSINOWER, *supra* note 155, at 11, 73. Note that the proposal that traditional garment design, and not modern fashion brands' designs, might gain increased copyright protection in part by allowing historic preservation or cultural property terms to inform copyright terms after *Star Athletica* has been made in Saharah F. Farnezah, Note, *Cultural Appropriation of Traditional Garment Designs in the Post-*Star Athletica *Era*, 37 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 the Native American Graves and Protection Act, a law regulating movable objects of cultural interest to Native American communities in the United States).

[208] Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 990–91 (2d Cir. 1980) (holding designs of decorative belt buckles to be copyrightable subject matter, characterizing the buckles as "sculptured designs cast in precious metals-decorative in nature and used as jewelry," and recognizing the designer and a manufacturer as a designer of recognition in part because the buckles were "accepted by the Metropolitan Museum of Art for its permanent collection").

[209] Brief for Fashion Law Institute as Amici Curiae Supporting Respondents at 26–28, Star Athletica L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017) (No. 15-866) (comparing cheerleading design to Mondrian painting used by Yves Saint Laurent); Brief for the United States as Amicus Curiae Supporting Respondents at 17–23, *Star Athletica*, 137 S. Ct. 1002 (No. 15-866) (using works by Van Gogh and Klimt applied to dolls' dresses to illustrate 17 U.S.C. § 113(a)).

movable tangible cultural property.[210] Do we, as Americans, perhaps see the public domain as our cultural heritage space for fashion design objects?[211] Given our multi-cultural, melting pot society, do we deliberately take an opposite road to our source nation counterparts because cultural exchange without restrictions is so fundamental to the American way?[212] Should the law change the prominence of the public domain and play a greater role in the anchoring that takes place in our American culture?[213]

Fashion design's contribution to our cultural heritage will only increase as brands continue to emphasize their brand heritage as a market differentiator, allowing these stories and the designs that represent them to become part of cultural heritage, a part of our common cultural narratives. In part as a result of the pandemic, our cultural heritage is becoming increasingly digital, and international organizations are considering the role that copyright law has to play in the preservation of digital heritage.[214] Given this, it therefore seems an opportune moment to consider how fashion design as cultural heritage might affect our own conceptions of the appropriateness of copyright protection for fashion designs. *The Piracy Paradox*, published fifteen years ago, still provides a rich stage on which to explore the role that copying plays in the fashion industry and the appropriateness of a low-IP regime for fashion. While a low-IP regime might still be the most beneficial for innovation and originators in the fashion industry, in light of fashion's inclusion as part of our cultural heritage, a slightly higher IP regime that contains a limited right to control copies of designs with cultural impact may have a positive effect on the anchoring process and explain why some fashion designs, like the Gommino, do not become obsolete in the "piracy paradox" model.

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210 Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 565–66 (1995). *But see* Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 432 (1994) [hereinafter Gerstenblith, *Architect as Artist*] (exploring the links between moral rights, copyright law, and historic preservation law in other scholarship on architecture and architects).

211 As implied by some authors' insistence that, despite similarities, copyright law and moral rights should not be seen as substitutes for cultural heritage law. *See* W.W. Kowalski, *A Comparative Law Analysis of the Retained Rights of Artists*, 38 VAND. J. TRANSNAT'L L. 1141, 1168–69 (2005) (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 210, at 463 ("[W]hile 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.").

212 Although we have extended to some source communities trademark-like protection for their designs through truth in advertising laws. *See* Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662.

213 As implied by K.J. Greene's work on copyright, Black cultural production, and the music industry. K.J. Greene, Copyright Formalities, Copyright Terminations and the Looming Threat to the Old-School Hip-Hop Music Catalog (unpublished manuscript) (on file with author).

214 *See* U.N. Educ., Sci. & Cultural Org. [UNESCO], Charter on the Preservation of the Digital Heritage art. 6.

CONCLUSION

Raustiala and Sprigman's *The Piracy Paradox* is a rich article that offers a compelling thesis: fashion thrives in a low-IP regime because copying is paradoxically good for the fashion industry, for fashion's innovation, and for its originators. Since the publication of the article, heritage has become increasingly important to fashion brands. Brands have founded their own museums and archives, especially in Italy, and they have used heritage as part of digital campaigns and design principles. Capitalizing on one's history allows for the building of unique, one-of-a-kind narratives that are hard-pressed to be copied. Designs embodying this history are, therefore, uniquely tied to something that cannot be copied. Brand heritage indicates that designs still thrive in a low-IP regime because copies of designs with heritage do not reproduce the heritage itself for the consumer. Just as we cannot rebuild history, so, too, can we not copy brand heritage.

By contrast, cultural heritage, which encompasses intangible designs that are of cultural interest to a collective and not just to a brand's consumers, seems to support a slightly higher IP regime for fashion designs. This is evidenced by the extension of a narrow copyright to iconic fashion designs, as exemplified in Italian copyright law as presented in the Moon Boots case. Fashion design's iconic nature and cultural impact has been most visible in jurisdictions that embrace fashion as a part of their cultural heritage and, therefore, assign a role for copyright law in their dissemination. Italy has provided the most apt examples. If we understand copyright law in relation to cultural heritage law, we may understand why a narrow copyright is, paradoxically, beneficial for the fashion industry. When we understand copyright as about supporting a private preservation, a preservation between private persons, we can see how extending a right to designers to participate in what Raustiala and Sprigman term anchoring can be beneficial for the industry.

Extending a narrow copyright to certain fashion designs of cultural impact may still, however, be hard to translate to our U.S. jurisdiction. Paradoxically, this may be a result of how fundamental unrestricted cultural exchange is to our society. We might consider whether the law should play a greater role in the anchoring that takes place in our American culture, including in fashion design. And this is perhaps the most inspiring legacy of *The Piracy Paradox*: that, while speaking of intellectual property law's negative space, the authors also implicitly raise questions for how, as Americans, we should think of our cultural dialogue and cultural heritage.